



FEDERAL REGISTER

Vol. 89

Monday,

No. 231

December 2, 2024

Pages 95077–95716

OFFICE OF THE FEDERAL REGISTER



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

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The President

National Family Week, 2024

By the President of the United States of America

A Proclamation

My Dad taught me that family is the beginning, the middle, and the end. It is everything. During National Family Week, we celebrate the love shared by millions of American families, and we recommit to uplifting them, so that more families can build their American Dream together.

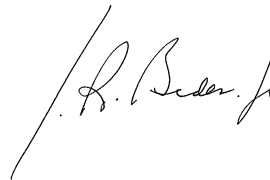
Since I came into office, I have been determined to give hardworking families a little more breathing room and a fair shot at achieving their dreams. That work began with building an economy that would strengthen our middle class. My American Rescue Plan kept millions of families afloat during the pandemic, ensuring they could stay in their homes and put food on their tables. It also delivered the largest-ever Child Tax Credit, which helped tens of millions of working families with the costs of raising children and cut child poverty nearly in half. My Bipartisan Infrastructure Law created jobs rebuilding our Nation's infrastructure—from strengthening our roads, bridges, and ports to removing lead pipes from our homes and expanding access to high-speed internet. My CHIPS and Science Act is revitalizing American manufacturing, and, throughout my Administration, we have created over 1.6 million manufacturing and construction jobs. And my Inflation Reduction Act made healthcare more affordable for families, saving millions of them an average of \$800 per year on their health insurance premiums. It will also cap the cost of out-of-pocket prescription drug costs at \$2,000 per year for seniors on Medicare, easing their cost of care. And through my PACT Act, we are helping veterans exposed to toxic materials get the benefits they and their families deserve. And today, incomes are up almost \$4,000, after adjusting for inflation, ensuring families have the breathing room they deserve.

My Administration has also been working to ensure families have the support they need to thrive while keeping them safe. I signed the Respect for Marriage Act, protecting the right to marriage for same-sex and interracial couples. I signed an Executive Order that directed the most comprehensive actions of any administration in history to make high-quality child care and long-term care more accessible and support caregivers. I took a slate of historic actions to prevent children from being placed into foster care and separated from their families without adequate justification. And I signed the most comprehensive gun reform bill in nearly three decades to end the scourge of gun violence ripping apart our families and deliver historic funding to address the youth mental health crisis.

During National Family Week, may we hold our loved ones close, both the family that have been there since the beginning and the family we have made along the way. And may we continue to fight for families—the heart and soul of our Nation.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 24 through November 30, 2024, as National Family Week. I invite States, communities, and individuals to join together in observing this week with appropriate ceremonies and activities to honor our Nation's families.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of November, in the year of our Lord two thousand twenty-four, and of the Independence of the United States of America the two hundred and forty-ninth.

A handwritten signature in black ink, appearing to read "Joe Biden", is written over a horizontal line.

[FR Doc. 2024-28331

Filed 11-29-24; 8:45 am]

Billing code 3395-F4-P

Rules and Regulations

Federal Register

Vol. 89, No. 231

Monday, December 2, 2024

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DEPARTMENT OF AGRICULTURE

Rural Housing Service

7 CFR Part 3550

[Docket No. RHS–24–SFH–0028]

Section 504 Direct Single Family Housing Home Repair Loans and Grants; Materials Pilot Program

AGENCY: Rural Housing Service, USDA.

ACTION: Notification of waiver.

SUMMARY: The Rural Housing Service (RHS or the Agency), a Rural Development agency of the United States Department of Agriculture (USDA), is issuing this document to implement a demonstration program, the Section 504 Direct Single Family Housing Loans and Grants pilot program. The Agency's intention is to evaluate the existing regulations and remove regulatory barriers to assist eligible applicants with improved ease of use for very low-income homeowners seeking to repair or rehabilitate their homes. This document briefly discusses the new waiver and provides contact information for additional details about the pilot program.

DATES: The effective date of the regulatory waiver is December 2, 2024. The duration of the pilot program is anticipated to continue until December 2, 2026, at which time the RHS may extend the pilot program (with or without modifications) or terminate it depending on the workload and resources needed to administer the program, feedback from the public, and the effectiveness of the program. If the pilot program is extended or terminated early, the RHS will notify the public via Notice publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Anthony Williams, Management and Program Analyst, Special Programs and Initiatives Branch, Single Family Housing Direct Loan Division, Rural

Development, U.S. Department of Agriculture, Email: anthonyl.williams@usda.gov; Phone: (202) 720–9649.

SUPPLEMENTARY INFORMATION:

Authority

Title V, Section 504 of the Housing Act of 1949, as amended; 42 U.S.C. 1474.

Background

The RHS offers a variety of programs to build or improve housing and essential community facilities in rural areas. The Agency offer loans, grants, and loan guarantees for single- and multifamily housing, child-care centers, fire and police stations, hospitals, libraries, nursing homes, schools, first responder vehicles and equipment, housing for farm laborers and much more. RHS also provides technical assistance loans and grants in partnership with non-profit organizations, Indian tribes, state and federal government agencies, and local communities.

The RHS Single Family Housing Direct Loans and Grants Program (SFHDLGP) Division implements the Section 504 loan/grant program under 7 CFR part 3550 with the objective to assist very low-income owner occupants of single-family homes in rural areas repair or rehabilitate their homes. Loan funds are available for repairs to improve or modernize a home, make it safer or more sanitary, or remove health and safety hazards. The eligibility requirements, as described in 7 CFR 3550.103, include that a homeowner (1) be unable to secure financial assistance at reasonable terms and conditions from a non-Agency source; (2) lack the personal resources to meet their needs; and (3) can demonstrate the ability to repay the Section 504 loan. For homeowners 62 years old and over at the time of application, grant funds are available to correct health or safety hazards, or remodel dwellings to make them accessible to a household member with a disability.

RHS may authorize limited demonstration (pilot) programs to test new approaches to offering housing under the statutory authority granted to the Secretary, as set forth in section 506(b) of the Housing Act of 1949 (42 U.S.C. 1476(b)). Additional demonstration program authority for regulations contained in 7 CFR part

3550 is provided at 7 CFR 3550.7. Any program requirements that are statutory will remain in effect.

Discussion of the New Section 504 Waiver

To align with current market payment requirements and further utilize program loan funding, RHS has determined to test and evaluate the regulatory requirements under the new pilot program for the Single-Family Housing Section 504 Home Repair Loan and Grant program under the pilot program authority provided at section 506(b) of the Housing Act of 1949 (42 U.S.C. 1476(b)).

The pilot program allows participants to use Section 504 loan or grant funds for the payment of construction materials prior to site delivery and without the need for the contractor to provide a surety bond. This component of the demonstration program will permit SFHDLGP to evaluate 7 CFR 1924.6(a)(12)(v)(C) which requires delivery of materials prior to payment and a surety bond. Under the demonstration program, payment in full may be made directly to the material supplier so the order can be placed or to the contractor upon receipt of paid invoice. Contractors expect up to fifty percent down prior to ordering materials or beginning work, and applicants struggle to find contractors that will work within the Agency's payment terms. This waiver is a step closer to meeting contractor expectations while still protecting applicants from fraudulent contractors that might take downpayment funds and never complete the job.

Eligibility Requirements

(1) Eligible participants—Eligible participants in the Section 504 Home Repair Loan and Grant program must abide by the regulatory requirements outlined in 7 CFR 3550. (2) Eligible States and Territories—The following twenty-five (25) States and U.S. Territories are selected based on program usage, involvement in the Rural Partners Network, and to provide wide geographic and historic production variation for the pilot program: Alabama, Alaska, American Samoa, Arizona, California, Florida, Georgia, Kansas, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Nebraska, New Mexico, New York, Puerto Rico, South

Dakota, Tennessee, Texas, Washington, West Virginia, and Wisconsin.

Paperwork Reduction Act

The regulatory waivers for this pilot program contain no new reporting or recordkeeping burdens under OMB control number 0575–0172 that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Non-Discrimination Statement

In accordance with Federal civil rights laws and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Mission Areas, agencies, staff offices, 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.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (e.g., Braille, large print, audiotope, American Sign Language) should contact the responsible Mission Area, agency, or staff office; or the 711 Relay Service.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, *USDA Program Discrimination Complaint Form*, which can be obtained online at <https://www.usda.gov/sites/default/files/documents/ad-3027.pdf> from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

(1) *Mail*: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; or

(2) *Fax*: (833) 256–1665 or (202) 690–7442; or

(3) *Email*: program.intake@usda.gov
USDA is an equal opportunity provider, employer, and lender.

Joaquin Altoro

Administrator, Rural Housing Service.

[FR Doc. 2024–28189 Filed 11–29–24; 8:45 am]

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CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1026

Truth in Lending (Regulation Z) Annual Threshold Adjustments (Credit Cards, HOEPA, and Qualified Mortgages)

AGENCY: Consumer Financial Protection Bureau.

ACTION: Final rule; official interpretation.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) is issuing this final rule amending the regulation text and official interpretations for Regulation Z, which implements the Truth in Lending Act (TILA). The CFPB calculates the dollar amounts for provisions in Regulation Z annually; this final rule revises the amounts for provisions implementing TILA and its amendments, including the Home Ownership and Equity Protection Act of 1994 (HOEPA), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The CFPB adjusts these amounts based on the annual percentage change of the Consumer Price Index (CPI) effective June 1, 2024.

DATES: This final rule is effective January 1, 2025.

FOR FURTHER INFORMATION CONTACT:

George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202–435–7700 or at: <https://reginquiries.consumerfinance.gov/>. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION: The CFPB is amending the regulation text and official interpretations for Regulation Z, which implements TILA, to update the dollar amounts of various thresholds that it must adjust annually to reflect the annual percentage change in the CPI as published by the Bureau of Labor Statistics (BLS). Specifically, for open-end consumer credit plans under TILA, the threshold that triggers requirements to disclose minimum interest charges will remain unchanged at \$1.00 in 2025.

For HOEPA loans, the adjusted total loan amount threshold for high-cost mortgages in 2025 will be \$26,968. The adjusted points-and-fees dollar trigger for high-cost mortgages in 2025 will be \$1,348. For qualified mortgages (QMs) under the General QM loan definition in § 1026.43(e)(2), the thresholds for the spread between the annual percentage rate (APR) and the average prime offer rate (APOR)¹ in 2025 will be: 2.25 or more percentage points for a first-lien covered transaction with a loan amount greater than or equal to \$134,841; 3.5 or more percentage points for a first-lien covered transaction with a loan amount greater than or equal to \$80,905 but less than \$134,841; 6.5 or more percentage points for a first-lien covered transaction with a loan amount less than \$80,905; 6.5 or more percentage points for a first-lien covered transaction secured by a manufactured home with a loan amount less than \$134,841; 3.5 or more percentage points for a subordinate-lien covered transaction with a loan amount greater than or equal to \$80,905; or 6.5 or more percentage points for a subordinate-lien covered transaction with a loan amount less than \$80,905. For all categories of QMs, the thresholds for total points and fees in 2025 will be 3 percent of the total loan amount for a loan greater than or equal to \$134,841; \$4,045 for a loan amount greater than or equal to \$80,905 but less than \$134,841; 5 percent of the total loan amount for a loan greater than or equal to \$26,968 but less than \$80,905; \$1,348 for a loan amount greater than or equal to \$16,855 but less than \$26,968; and 8 percent of the total loan amount for a loan amount less than \$16,855.²

¹ On April 20, 2023, the CFPB published a document announcing the availability of a revised version of its “Methodology for Determining Average Prime Offer Rates,” which describes the data and methodology used to calculate the average prime offer rate for purposes of Regulation C and Regulation Z. See 88 FR 24393. The methodology statement was revised to address the imminent unavailability of certain data the CFPB previously relied on to calculate average prime offer rates, as a result of a decision by Freddie Mac to make changes to its Primary Mortgage Market Survey® (PMMS). After evaluating potential sources, the CFPB determined that data from Intercontinental Exchange Mortgage Technology (ICE Mortgage Technology) is currently the most suitable option to replace PMMS. Beginning on April 24, 2023, the CFPB started using data provided by ICE Mortgage Technology and the revised methodology to calculate average prime offer rates.

² The QM categories in Regulation Z appear at 12 CFR 1026.43(e)(2), (e)(4), (e)(5), (e)(6), and (e)(7). Note that 12 CFR 1026.43(e)(6) applies only to covered transactions for which the application was received before April 1, 2016.

I. Background

A. Credit Card Annual Adjustments

Minimum Interest Charge Disclosure Thresholds

Sections 1026.6(b)(2)(iii) and 1026.60(b)(3) of Regulation Z implement sections 127(a)(3) and 127(c)(1)(A)(ii)(II) of TILA. Sections 1026.6(b)(2)(iii) and 1026.60(b)(3) require creditors to disclose any minimum interest charge exceeding \$1.00 that could be imposed during a billing cycle. These provisions also state that, for open-end consumer credit plans, the CFPB shall calculate the minimum interest charge thresholds annually using the CPI that was in effect on the preceding June 1; the CFPB uses the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for this adjustment.³ If the cumulative change in the adjusted minimum value derived from applying the annual CPI-W level to the current amounts in §§ 1026.6(b)(2)(iii) and 1026.60(b)(3) has risen by a whole dollar, the CFPB will increase the minimum interest charge amounts set forth in the regulation by \$1.00. The CFPB bases its 2025 adjustment analysis on the CPI-W index in effect on June 1, 2024, as reported by BLS on May 15, 2024.⁴ As a result, the adjustment reflects the percentage change in the CPI-W from April 2023 to April 2024. The adjustment analysis accounts for a 3.4 percent increase in the CPI-W from April 2023 to April 2024. This increase in the CPI-W when applied to the current amounts in §§ 1026.6(b)(2)(iii) and 1026.60(b)(3) does not trigger an increase in the minimum interest charge threshold of at least \$1.00, and the CFPB, therefore, is not amending §§ 1026.6(b)(2)(iii) and 1026.60(b)(3).

B. HOEPA Annual Threshold Adjustments

Section 1026.32(a)(1)(ii) of Regulation Z implements section 1431 of the Dodd-Frank Act,⁵ which amended the HOEPA points-and-fees coverage test. Under § 1026.32(a)(1)(ii)(A) and (B), in assessing whether a transaction is a high-cost mortgage due to points and fees the creditor is charging, the applicable points-and-fees coverage test depends on whether the total loan

amount is for \$20,000 or more, or for less than \$20,000. Section 1026.32(a)(1)(ii) provides that the CFPB recalculate this threshold amount annually using the CPI index in effect on the preceding June 1; the CFPB uses the CPI-U for this adjustment.⁶ The CFPB bases the 2025 adjustment on the CPI-U index in effect on June 1, 2024, as reported by BLS on May 15, 2024. As a result, the adjustment reflects the percentage change in the CPI-U from April 2023 to April 2024, which is an increase of 3.4 percent. The adjustment to \$26,968 here reflects the 3.4 percent increase in the CPI-U index from April 2023 to April 2024 rounded to the nearest whole dollar amount for ease of compliance.⁷

Under § 1026.32(a)(1)(ii)(B), the HOEPA points-and-fees threshold is the lesser of 8 percent of the total loan amount or \$1,000. Section 1026.32(a)(1)(ii)(B) provides that the CFPB will recalculate the dollar amount threshold annually using the CPI index in effect on the preceding June 1; the CFPB uses the CPI-U for this adjustment. The CFPB bases the 2025 adjustment on the CPI-U index in effect on June 1, 2024, as reported by BLS on May 15, 2024. As a result, the adjustment reflects the percentage change in CPI-U from April 2023 to April 2024, which is an increase of 3.4 percent. The adjustment to \$1,348 here reflects the 3.4 percent increase in the CPI-U index from April 2022 to April 2023 rounded to the nearest whole dollar amount for ease of compliance.

C. QM Annual Threshold Adjustments

The CFPB's Regulation Z implements sections 1411 and 1412 of the Dodd-Frank Act, which generally require creditors to make a reasonable, good-faith determination of a consumer's ability to repay any consumer credit transaction secured by a dwelling and establishes certain protections from liability under this requirement for QMs.

On December 10, 2020, the CFPB issued a final rule amending the General QM loan definition in § 1026.43(e)(2).⁸

⁶ The CPI-U is based on all urban consumers and represents approximately 93 percent of the U.S. population.

⁷ Adjusted dollar amounts throughout this final rule are calculated by applying the relevant consumer price index to the previous year's unrounded dollar amount before rounding to the nearest whole dollar. Accordingly, applying the rounded consumer price index figures to the previous year's rounded dollar amounts may not add up to the total dollar amount shown.

⁸ 85 FR 86308 (Dec. 29, 2020). This final rule was initially effective on March 1, 2021, with a mandatory compliance date of July 1, 2021. On April 27, 2021, the CFPB issued a final rule

The final rule established pricing thresholds in § 1026.43(e)(2)(vi)(A) through (F) based on the spread of a loan's APR compared to the APOR for a comparable transaction as of the date the interest rate is set. To satisfy the General QM loan definition, a loan's APR must be below the applicable pricing threshold and must satisfy other requirements in § 1026.43(e)(2). Specifically, under § 1026.43(e)(2)(vi), a covered transaction is a QM if the APR does not exceed the APOR for a comparable transaction as of the date the interest rate is set by: 2.25 or more percentage points for a first-lien covered transaction with a loan amount greater than or equal to \$110,260 (indexed for inflation); 3.5 or more percentage points for a first-lien covered transaction with a loan amount greater than or equal to \$66,156 (indexed for inflation) but less than \$110,260 (indexed for inflation); 6.5 or more percentage points for a first-lien covered transaction with a loan amount less than \$66,156 (indexed for inflation); 6.5 or more percentage points for a first-lien covered transaction secured by a manufactured home with a loan amount less than \$110,260 (indexed for inflation); 3.5 or more percentage points for a subordinate-lien covered transaction with a loan amount greater than or equal to \$66,156 (indexed for inflation); or 6.5 or more percentage points for a subordinate-lien covered transaction with a loan amount less than \$66,156 (indexed for inflation).⁹ The rule states that the CFPB will adjust the loan amounts in § 1026.43(e)(2)(vi) annually on January 1 by the annual percentage change in the CPI-U that was in effect on the preceding June 1.¹⁰

Regulation Z also contains points and fees limits applicable to all categories of QMs. Under § 1026.43(e)(3)(i), a covered transaction is not a QM if the transaction's total points and fees exceed: 3 percent of the total loan amount for a loan amount greater than or equal to \$100,000 (indexed for inflation); \$3,000 (indexed for inflation) for a loan amount greater than or equal to \$60,000 (indexed for inflation) but less than \$100,000 (indexed for inflation); 5 percent of the total loan amount for loans greater than or equal to \$20,000 (indexed for inflation) but less than \$60,000 (indexed for inflation); \$1,000 (indexed for inflation) for a loan amount greater than or equal to \$12,500

effective June 30, 2021, which extended the mandatory compliance date of the final rule published on December 29, 2020, at 85 FR 86308, until October 1, 2022. 86 FR 22844 (Apr. 30, 2021).

⁹ The loan amounts in the regulatory text reflect the CPI-U in effect on June 1, 2020.

¹⁰ See comment 43(e)(2)(vi)-3.

³ The CPI-W is a subset of the Consumer Price Index for All Urban Consumers (CPI-U) index and represents approximately 30 percent of the U.S. population.

⁴ BLS publishes Consumer Price Indices monthly, usually in the middle of each calendar month. Thus, the CPI-W reported on May 15, 2024, was the most current as of June 1, 2024.

⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

(indexed for inflation) but less than \$20,000 (indexed for inflation); or 8 percent of the total loan amount for loans less than \$12,500 (indexed for inflation). Section 1026.43(e)(3)(ii) provides that the CFPB will recalculate the limits and loan amounts in § 1026.43(e)(3)(i) annually for inflation using the CPI-U index in effect on the preceding June 1.

The CFPB bases the 2025 adjustment to the loan amounts applicable to the pricing thresholds for the General QM loan definition and the points and fees limits for all categories of QM on the CPI-U index in effect on June 1, 2024, as reported by BLS on May 15, 2024. As a result, the adjustment reflects the percentage change in CPI-U from April 2023 to April 2024, which is an increase of 3.4 percent. The 2025 adjustment¹¹ adopted here reflects a 3.4 percent increase in the CPI-U index for this period rounded to whole dollars for ease of compliance.

II. Adjustment and Commentary Revision

A. Credit Card Annual Adjustments Minimum Interest Charge Disclosure Thresholds—§§ 1026.6(b)(2)(iii) and 1026.60(b)(3)

The minimum interest charge amounts for §§ 1026.6(b)(2)(iii) and 1026.60(b)(3) will remain unchanged at \$1.00 for the year 2025. Accordingly, the CFPB is not amending these sections of Regulation Z.

B. HOEPA Annual Threshold Adjustment—Comments 32(a)(1)(ii)–1 and –3

Effective January 1, 2025, for purposes of determining under § 1026.32(a)(1)(ii)

¹¹ For 2025, a covered transaction is a qualified mortgage if the APR does not exceed the APOR for a comparable transaction as of the date the interest rate is set by: 2.25 or more percentage points for a first-lien covered transaction with a loan amount greater than or equal to \$134,841; 3.5 or more percentage points for a first-lien covered transaction with a loan amount greater than or equal to \$80,905 but less than \$134,841; 6.5 or more percentage points for a first-lien covered transaction with a loan amount less than \$80,905; 6.5 or more percentage points for a first-lien covered transaction secured by a manufactured home with a loan amount less than \$134,841; 3.5 or more percentage points for a subordinate-lien covered transaction with a loan amount greater than or equal to \$134,841; \$4,045 for a loan amount greater than or equal to \$80,905 but less than \$134,841; 5 percent of the total loan amount for loans greater than or equal to \$26,968 but less than \$80,905; \$1,348 for a loan amount greater than or equal to \$16,855 but less than \$26,968; or 8 percent of the total loan amount for loans less than \$16,855.

the points-and-fees coverage test under HOEPA to which a transaction is subject, the total loan amount threshold figure is \$26,968, and the adjusted points-and-fees dollar trigger under § 1026.32(a)(1)(ii)(B) is \$1,348. If the total loan amount for a transaction is \$26,968 or more, and the points-and-fees amount exceeds 5 percent of the total loan amount, the transaction is a high-cost mortgage. If the total loan amount for a transaction is less than \$26,968, and the points-and-fees amount exceeds the lesser of the adjusted points-and-fees dollar trigger of \$1,348 or 8 percent of the total loan amount, the transaction is a high-cost mortgage. The CFPB is amending comments 32(a)(1)(ii)–1 and –3, which list the adjustments for each year, to reflect for 2025 the new points-and-fees dollar trigger and the new loan amount dollar threshold, respectively.

C. Qualified Mortgages Annual Threshold Adjustments

Effective January 1, 2025, to satisfy § 1026.43(e)(2)(vi) under the General QM loan definition, the annual percentage rate may not exceed the average prime offer rate for a comparable transaction as of the date the interest rate is set by the following amounts: 2.25 or more percentage points for a first-lien covered transaction with a loan amount greater than or equal to \$134,841; 3.5 or more percentage points for a first-lien covered transaction with a loan amount greater than or equal to \$80,905 but less than \$134,841; 6.5 or more percentage points for a first-lien covered transaction with a loan amount less than \$80,905; 6.5 or more percentage points for a first-lien covered transaction secured by a manufactured home with a loan amount less than \$134,841; 3.5 or more percentage points for a subordinate-lien covered transaction with a loan amount greater than or equal to \$80,905; or 6.5 or more percentage points for a subordinate-lien covered transaction with a loan amount less than \$80,905. Accordingly, the CFPB is amending comment 43(e)(2)(vi)–3, which lists the adjustments for each year, to reflect the new dollar threshold amounts for § 1026.43(e)(2)(vi)(A) through (F).

Effective January 1, 2025, a covered transaction is not a qualified mortgage if, pursuant to § 1026.43(e)(3), the transaction's total points and fees exceed 3 percent of the total loan amount for a loan amount greater than or equal to \$134,841; \$4,045 for a loan amount greater than or equal to \$80,905 but less than \$134,841; 5 percent of the total loan amount for loans greater than or equal to \$26,968 but less than

\$80,905; \$1,348 for a loan amount greater than or equal to \$16,855 but less than \$26,968; or 8 percent of the total loan amount for loans less than \$16,855. The CFPB is amending comment 43(e)(3)(ii)–1, which lists the adjustments for each year, to reflect the new dollar threshold amounts for 2025.

III. Procedural Requirements

A. Administrative Procedure Act

The Administrative Procedure Act does not require notice and opportunity for public comment if an agency finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest.¹² Pursuant to this final rule, the CFPB adds comments 32(a)(1)(ii)–1.ix, 32(a)(1)(ii)–3.ix, 43(e)(2)(vi)–3.ii, and 43(e)(3)(ii)–1.ix to update the exemption thresholds. The amendments in this final rule are technical and non-discretionary, as they merely apply the method previously established in Regulation Z for determining adjustments to the thresholds. For these reasons, the CFPB has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary. The amendments, therefore, are adopted in final form.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking where a general notice of proposed rulemaking is not required.¹³ As noted previously, the CFPB has determined that it is unnecessary to publish a general notice of proposed rulemaking for this final rule. Accordingly, the RFA's requirement relating to an initial and final regulatory flexibility analysis do not apply.

C. Paperwork Reduction Act

The information collections contained in Regulation Z which implements TILA are approved by OMB under Control number 3170–0015. The current approval for this control number expires on May 31st, 2026. In accordance with the Paperwork Reduction Act of 1995,¹⁴ the CFPB reviewed this final rule. The CFPB has determined that this rule does not create any new information collections or substantially revise any existing collections.

D. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the CFPB will submit a report containing this rule and other required information to the United

¹² 5 U.S.C. 553(b)(B).

¹³ 5 U.S.C. 603(a), 604(a).

¹⁴ 44 U.S.C. 3506; 5 CFR part 1320.

States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule taking effect. The Office of Information and Regulatory Affairs (OIRA) has designated this rule as not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 12 CFR Part 1026

Advertising, Banks, Banking, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth-in-lending.

Authority and Issuance

For the reasons set forth in the preamble, the CFPB amends Regulation Z, 12 CFR part 1026, as set forth below:

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601, 2603–2605, 2607, 2609, 2617, 3353, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

■ 2. In Supplement I to Part 1026:

■ a. Under Section 1026.32—

Requirements for High-Cost Mortgages, revise *paragraph 32(a)(1)(ii)*; and

■ b. Under Section 1026.43—Minimum Standards for Transactions Secured by a Dwelling, revise *paragraphs 43(e)(2)(vi)* and *43(e)(3)(ii)*.

The revisions read as follows:

Supplement I to Part 1026—Official Interpretations

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Section 1026.32—Requirements for High-Cost Mortgages

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Paragraph 32(a)(1)(ii).

1. *Annual adjustment of \$1,000 amount.* The \$1,000 figure in § 1026.32(a)(1)(ii)(B) is adjusted annually on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1. The Bureau will publish adjustments after the June figures become available each year.

i. For 2015, \$1,020, reflecting a 2 percent increase in the CPI-U from June 2013 to June 2014, rounded to the nearest whole dollar.

ii. For 2016, \$1,017, reflecting a 0.2 percent decrease in the CPI-U from June 2014 to June 2015, rounded to the nearest whole dollar.

iii. For 2017, \$1,029, reflecting a 1.1 percent increase in the CPI-U from June 2015 to June 2016, rounded to the nearest whole dollar.

iv. For 2018, \$1,052, reflecting a 2.2 percent increase in the CPI-U from June 2016 to June 2017, rounded to the nearest whole dollar.

v. For 2019, \$1,077, reflecting a 2.5 percent increase in the CPI-U from June 2017 to June 2018, rounded to the nearest whole dollar.

vi. For 2020, \$1,099, reflecting a 2 percent increase in the CPI-U from June 2018 to June 2019, rounded to the nearest whole dollar.

vii. For 2021, \$1,103, reflecting a 0.3 percent increase in the CPI-U from June 2019 to June 2020, rounded to the nearest whole dollar.

viii. For 2022, \$1,148, reflecting a 4.2 percent increase in the CPI-U from June 2020 to June 2021, rounded to the nearest whole dollar.

ix. For 2023, \$1,243, reflecting an 8.3 percent increase in the CPI-U from June 2021 to June 2022, rounded to the nearest whole dollar.

x. For 2024, \$1,305, reflecting a 4.9 percent increase in the CPI-U from June 2022 to June 2023, rounded to the nearest whole dollar.

xi. For 2025, \$1,348, reflecting a 3.4 percent increase in the CPI-U from June 2023 to June 2024, rounded to the nearest whole dollar.

2. *Historical adjustment of \$400 amount.*

Prior to January 10, 2014, a mortgage loan was covered by § 1026.32 if the total points and fees payable by the consumer at or before loan consummation exceeded the greater of \$400 or 8 percent of the total loan amount. The \$400 figure was adjusted annually on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1, as follows:

i. For 1996, \$412, reflecting a 3 percent increase in the CPI-U from June 1994 to June 1995, rounded to the nearest whole dollar.

ii. For 1997, \$424, reflecting a 2.9 percent increase in the CPI-U from June 1995 to June 1996, rounded to the nearest whole dollar.

iii. For 1998, \$435, reflecting a 2.5 percent increase in the CPI-U from June 1996 to June 1997, rounded to the nearest whole dollar.

iv. For 1999, \$441, reflecting a 1.4 percent increase in the CPI-U from June 1997 to June 1998, rounded to the nearest whole dollar.

v. For 2000, \$451, reflecting a 2.3 percent increase in the CPI-U from June 1998 to June 1999, rounded to the nearest whole dollar.

vi. For 2001, \$465, reflecting a 3.1 percent increase in the CPI-U from June 1999 to June 2000, rounded to the nearest whole dollar.

vii. For 2002, \$480, reflecting a 3.27 percent increase in the CPI-U from June 2000 to June 2001, rounded to the nearest whole dollar.

viii. For 2003, \$488, reflecting a 1.64 percent increase in the CPI-U from June 2001 to June 2002, rounded to the nearest whole dollar.

ix. For 2004, \$499, reflecting a 2.22 percent increase in the CPI-U from June 2002 to June 2003, rounded to the nearest whole dollar.

x. For 2005, \$510, reflecting a 2.29 percent increase in the CPI-U from June 2003 to June 2004, rounded to the nearest whole dollar.

xi. For 2006, \$528, reflecting a 3.51 percent increase in the CPI-U from June 2004 to June 2005, rounded to the nearest whole dollar.

xii. For 2007, \$547, reflecting a 3.55 percent increase in the CPI-U from June 2005 to June 2006, rounded to the nearest whole dollar.

xiii. For 2008, \$561, reflecting a 2.56 percent increase in the CPI-U from June 2006

to June 2007, rounded to the nearest whole dollar.

xiv. For 2009, \$583, reflecting a 3.94 percent increase in the CPI-U from June 2007 to June 2008, rounded to the nearest whole dollar.

xv. For 2010, \$579, reflecting a 0.74 percent decrease in the CPI-U from June 2008 to June 2009, rounded to the nearest whole dollar.

xvi. For 2011, \$592, reflecting a 2.2 percent increase in the CPI-U from June 2009 to June 2010, rounded to the nearest whole dollar.

xvii. For 2012, \$611, reflecting a 3.2 percent increase in the CPI-U from June 2010 to June 2011, rounded to the nearest whole dollar.

xviii. For 2013, \$625, reflecting a 2.3 percent increase in the CPI-U from June 2011 to June 2012, rounded to the nearest whole dollar.

xix. For 2014, \$632, reflecting a 1.1 percent increase in the CPI-U from June 2012 to June 2013, rounded to the nearest whole dollar.

3. *Applicable threshold.* For purposes of § 1026.32(a)(1)(ii), a creditor must determine the applicable points and fees threshold based on the face amount of the note (or, in the case of an open-end credit plan, the credit limit for the plan when the account is opened). However, the creditor must apply the allowable points and fees percentage to the “total loan amount,” as defined in § 1026.32(b)(4). For closed-end credit transactions, the total loan amount may be different than the face amount of the note. The \$20,000 amount in § 1026.32(a)(1)(ii)(A) and (B) is adjusted annually on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1.

i. For 2015, \$20,391, reflecting a 2 percent increase in the CPI-U from June 2013 to June 2014, rounded to the nearest whole dollar.

ii. For 2016, \$20,350, reflecting a 0.2 percent decrease in the CPI-U from June 2014 to June 2015, rounded to the nearest whole dollar.

iii. For 2017, \$20,579, reflecting a 1.1 percent increase in the CPI-U from June 2015 to June 2016, rounded to the nearest whole dollar.

iv. For 2018, \$21,032, reflecting a 2.2 percent increase in the CPI-U from June 2016 to June 2017, rounded to the nearest whole dollar.

v. For 2019, \$21,549, reflecting a 2.5 percent increase in the CPI-U from June 2017 to June 2018, rounded to the nearest whole dollar.

vi. For 2020, \$21,980, reflecting a 2 percent increase in the CPI-U from June 2018 to June 2019, rounded to the nearest whole dollar.

vii. For 2021, \$22,052 reflecting a 0.3 percent increase in the CPI-U from June 2019 to June 2020, rounded to the nearest whole dollar.

viii. For 2022, \$22,969 reflecting a 4.2 percent increase in the CPI-U from June 2020 to June 2021, rounded to the nearest whole dollar.

ix. For 2023, \$24,866 reflecting an 8.3 percent increase in the CPI-U from June 2021 to June 2022, rounded to the nearest whole dollar.

x. For 2024, \$26,092, reflecting a 4.9 percent increase in the CPI-U from June 2022

to June 2023, rounded to the nearest whole dollar.

xi. For 2025, \$26,968, reflecting a 3.4 percent increase in the CPI-U from June 2023 to June 2024, rounded to the nearest whole dollar.

* * * *

Section 1026.43—Minimum Standards for Transactions Secured by a Dwelling

* * * *

Paragraph 43(e)(2)(vi).

1. *Determining the average prime offer rate for a comparable transaction as of the date the interest rate is set.* For guidance on determining the average prime offer rate for a comparable transaction as of the date the interest rate is set, see comments 43(b)(4)–1 through –3.

2. *Determination of applicable threshold.* A creditor must determine the applicable threshold by determining which category the loan falls into based on the face amount of the note (the “loan amount” as defined in § 1026.43(b)(5)). For example, for a first-lien covered transaction with a loan amount of \$75,000, the loan would fall into the tier for loans greater than or equal to \$66,156 (indexed for inflation) but less than \$110,260 (indexed for inflation), for which the applicable threshold is 3.5 or more percentage points.

3. *Annual adjustment for inflation.* The dollar amounts in § 1026.43(e)(2)(vi) will be adjusted annually on January 1 by the annual percentage change in the CPI-U that was in effect on the preceding June 1. The Bureau will publish adjustments after the June figures become available each year.

i. For 2022, reflecting a 4.2 percent increase in the CPI-U that was reported on the preceding June 1, to satisfy § 1026.43(e)(2)(vi), the annual percentage rate may not exceed the average prime offer rate for a comparable transaction as of the date the interest rate is set by the following amounts:

A. For a first-lien covered transaction with a loan amount greater than or equal to \$114,847, 2.25 or more percentage points;

B. For a first-lien covered transaction with a loan amount greater than or equal to \$68,908 but less than \$114,847, 3.5 or more percentage points;

C. For a first-lien covered transaction with a loan amount less than \$68,908, 6.5 or more percentage points;

D. For a first-lien covered transaction secured by a manufactured home with a loan amount less than \$114,847, 6.5 or more percentage points;

E. For a subordinate-lien covered transaction with a loan amount greater than or equal to \$68,908, 3.5 or more percentage points;

F. For a subordinate-lien covered transaction with a loan amount less than \$68,908, 6.5 or more percentage points.

ii. For 2023, reflecting an 8.3 percent increase in the CPI-U that was reported on the preceding June 1, to satisfy § 1026.43(e)(2)(vi), the annual percentage rate may not exceed the average prime offer rate for a comparable transaction as of the date the interest rate is set by the following amounts:

A. For a first-lien covered transaction with a loan amount greater than or equal to \$124,331, 2.25 or more percentage points;

B. For a first-lien covered transaction with a loan amount greater than or equal to \$74,599 but less than \$124,331, 3.5 or more percentage points;

C. For a first-lien covered transaction with a loan amount less than \$74,599, 6.5 or more percentage points;

D. For a first-lien covered transaction secured by a manufactured home with a loan amount less than \$124,331, 6.5 or more percentage points;

E. For a subordinate-lien covered transaction with a loan amount greater than or equal to \$74,599, 3.5 or more percentage points;

F. For a subordinate-lien covered transaction with a loan amount less than \$74,599, 6.5 or more percentage points.

iii. For 2024, reflecting a 4.9 percent increase in the CPI-U that was reported on the preceding June 1, to satisfy § 1026.43(e)(2)(vi), the annual percentage rate may not exceed the average prime offer rate for a comparable transaction as of the date the interest rate is set by the following amounts:

A. For a first-lien covered transaction with a loan amount greater than or equal to \$130,461, 2.25 or more percentage points;

B. For a first-lien covered transaction with a loan amount greater than or equal to \$78,277 but less than \$130,461, 3.5 or more percentage points;

C. For a first-lien covered transaction with a loan amount less than \$78,277, 6.5 or more percentage points;

D. For a first-lien covered transaction secured by a manufactured home with a loan amount less than \$130,461, 6.5 or more percentage points;

E. For a subordinate-lien covered transaction with a loan amount greater than or equal to \$78,277, 3.5 or more percentage points;

F. For a subordinate-lien covered transaction with a loan amount less than \$78,277, 6.5 or more percentage points.

iv. For 2025, reflecting a 3.4 percent increase in the CPI-U that was reported on the preceding June 1, to satisfy § 1026.43(e)(2)(vi), the annual percentage rate may not exceed the average prime offer rate for a comparable transaction as of the date the interest rate is set by the following amounts:

A. For a first-lien covered transaction with a loan amount greater than or equal to \$134,841, 2.25 or more percentage points;

B. For a first-lien covered transaction with a loan amount greater than or equal to \$80,905 but less than \$134,841, 3.5 or more percentage points;

C. For a first-lien covered transaction with a loan amount less than \$80,905, 6.5 or more percentage points;

D. For a first-lien covered transaction secured by a manufactured home with a loan amount less than \$134,841, 6.5 or more percentage points;

E. For a subordinate-lien covered transaction with a loan amount greater than or equal to \$80,905, 3.5 or more percentage points;

F. For a subordinate-lien covered transaction with a loan amount less than \$80,905, 6.5 or more percentage points.

4. *Determining the annual percentage rate for certain loans for which the interest rate may or will change.*

i. *In general.* The commentary to § 1026.17(c)(1) and other provisions in subpart C address how to determine the annual percentage rate disclosures for closed-end credit transactions. Provisions in § 1026.32(a)(3) address how to determine the annual percentage rate to determine coverage under § 1026.32(a)(1)(i). Section 1026.43(e)(2)(vi) requires, for the purposes of § 1026.43(e)(2)(vi), a different determination of the annual percentage rate for a qualified mortgage under § 1026.43(e)(2) for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due. An identical special rule for determining the annual percentage rate for such a loan also applies for purposes of § 1026.43(b)(4).

ii. *Loans for which the interest rate may or will change.* Section 1026.43(e)(2)(vi) includes a special rule for determining the annual percentage rate for a loan for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due. This rule applies to adjustable-rate mortgages that have a fixed-rate period of five years or less and to step-rate mortgages for which the interest rate changes within that five-year period.

iii. *Maximum interest rate during the first five years.* For a loan for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due, a creditor must treat the maximum interest rate that could apply at any time during that five-year period as the interest rate for the full term of the loan to determine the annual percentage rate for purposes of § 1026.43(e)(2)(vi), regardless of whether the maximum interest rate is reached at the first or subsequent adjustment during the five-year period. For additional instruction on how to determine the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due, see comments 43(e)(iv)–3 and –4.

iv. *Treatment of the maximum interest rate in determining the annual percentage rate.* For a loan for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due, the creditor must determine the annual percentage rate for purposes of § 1026.43(e)(2)(vi) by treating the maximum interest rate that may apply within the first five years as the interest rate for the full term of the loan. For example, assume an adjustable-rate mortgage with a loan term of 30 years and an initial discounted rate of 5.0 percent that is fixed for the first three years. Assume that the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due is 7.0 percent. Pursuant to § 1026.43(e)(2)(vi), the creditor must determine the annual percentage rate based on an interest rate of 7.0 percent applied for the full 30-year loan term.

5. *Meaning of a manufactured home.* For purposes of § 1026.43(e)(2)(vi)(D), manufactured home means any residential structure as defined under regulations of the U.S. Department of Housing and Urban Development (HUD) establishing manufactured home construction and safety standards (24 CFR 3280.2). Modular or other factory-built homes that do not meet the HUD code standards are not manufactured homes for purposes of § 1026.43(e)(2)(vi)(D).

6. *Scope of threshold for transactions secured by a manufactured home.* The threshold in § 1026.43(e)(2)(vi)(D) applies to first-lien covered transactions less than \$110,260 (indexed for inflation) that are secured by a manufactured home and land, or by a manufactured home only.

* * * * *

Paragraph 43(e)(3)(ii).

1. *Annual adjustment for inflation.* The dollar amounts, including the loan amounts, in § 1026.43(e)(3)(i) will be adjusted annually on January 1 by the annual percentage change in the CPI-U that was in effect on the preceding June 1. The Bureau will publish adjustments after the June figures become available each year.

i. For 2015, reflecting a 2 percent increase in the CPI-U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transactions total points and fees do not exceed;

A. For a loan amount greater than or equal to \$101,953: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to \$61,172 but less than \$101,953: \$3,059;

C. For a loan amount greater than or equal to \$20,391 but less than \$61,172: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to \$12,744 but less than \$20,391: \$1,020;

E. For a loan amount less than \$12,744: 8 percent of the total loan amount.

ii. For 2016, reflecting a 0.2 percent decrease in the CPI-U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transactions total points and fees do not exceed;

A. For a loan amount greater than or equal to \$101,749: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to \$61,050 but less than \$101,749: \$3,052;

C. For a loan amount greater than or equal to \$20,350 but less than \$61,050: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to \$12,719 but less than \$20,350: \$1,017;

E. For a loan amount less than \$12,719: 8 percent of the total loan amount.

iii. For 2017, reflecting a 1.1 percent increase in the CPI-U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transactions total points and fees do not exceed;

A. For a loan amount greater than or equal to \$102,894: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to \$61,737 but less than \$102,894: \$3,087;

C. For a loan amount greater than or equal to \$20,579 but less than \$61,737: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to \$12,862 but less than \$20,579: \$1,029;

E. For a loan amount less than \$12,862: 8 percent of the total loan amount.

iv. For 2018, reflecting a 2.2 percent increase in the CPI-U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed;

A. For a loan amount greater than or equal to \$105,158: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to \$63,095 but less than \$105,158: \$3,155;

C. For a loan amount greater than or equal to \$21,032 but less than \$63,095: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to \$13,145 but less than \$21,032: \$1,052;

E. For a loan amount less than \$13,145: 8 percent of the total loan amount.

v. For 2019, reflecting a 2.5 percent increase in the CPI-U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed;

A. For a loan amount greater than or equal to \$107,747: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to \$64,648 but less than \$107,747: \$3,232;

C. For a loan amount greater than or equal to \$21,549 but less than \$64,648: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to \$13,468 but less than \$21,549: \$1,077;

E. For a loan amount less than \$13,468: 8 percent of the total loan amount.

vi. For 2020, reflecting a 2 percent increase in the CPI-U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed;

A. For a loan amount greater than or equal to \$109,898: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to \$65,939 but less than \$109,898: \$3,297;

C. For a loan amount greater than or equal to \$21,980 but less than \$65,939: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to \$13,737 but less than \$21,980: \$1,099;

E. For a loan amount less than \$13,737: 8 percent of the total loan amount.

vii. For 2021, reflecting a 0.3 percent increase in the CPI-U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed;

A. For a loan amount greater than or equal to \$110,260: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to \$66,156 but less than \$110,260: \$3,308;

C. For a loan amount greater than or equal to \$22,052 but less than \$66,156: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to \$13,783 but less than \$22,052: \$1,103;

E. For a loan amount less than \$13,783: 8 percent of the total loan amount.

viii. For 2022, reflecting a 4.2 percent increase in the CPI-U that was reported on

the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to \$114,847: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to \$68,908 but less than \$114,847: \$3,445;

C. For a loan amount greater than or equal to \$22,969 but less than \$68,908: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to \$14,356 but less than \$22,969: \$1,148;

E. For a loan amount less than \$14,356: 8 percent of the total loan amount.

ix. For 2023, reflecting an 8.3 percent increase in the CPI-U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to \$124,331: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to \$74,599 but less than \$124,331: \$3,730;

C. For a loan amount greater than or equal to \$24,866 but less than \$74,599: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to \$15,541 but less than \$24,866: \$1,243;

E. For a loan amount less than \$15,541: 8 percent of the total loan amount.

x. For 2024, reflecting a 4.9 percent increase in the CPI-U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to \$130,461: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to \$78,277 but less than \$130,461: \$3,914;

C. For a loan amount greater than or equal to \$26,092 but less than \$78,277: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to \$16,308 but less than \$26,092: \$1,305;

E. For a loan amount less than \$16,308: 8 percent of the total loan amount.

xi. For 2025, reflecting a 3.4 percent increase in the CPI-U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to \$134,841: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to \$80,905 but less than \$134,841: \$4,045;

C. For a loan amount greater than or equal to \$26,968 but less than \$80,905: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to \$16,855 but less than \$26,968: \$1,348;

E. For a loan amount less than \$16,855: 8 percent of the total loan amount.

* * * * *

Brian Shearer,

Assistant Director, Office of Policy Planning and Strategy, Consumer Financial Protection Bureau.

[FR Doc. 2024–27553 Filed 11–29–24; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–1897; Project Identifier AD–2023–00774–T; Amendment 39–22882; AD 2024–23–03]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain The Boeing Company Model 737–300 and –400 series airplanes. This AD was prompted by a report that flight control rigging tolerances could result in spoiler deflection not reaching the minimal level required to engage the cruise thrust split monitor (MONFD) used by the autothrottle (A/T) system. This AD requires changing certain wire bundles, installing a new housing assembly, removing the mechanical aileron force limiter (MAFL), doing an inspection or records check to determine if certain flight control computers (FCCs) are installed, and performing applicable on-condition actions. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 6, 2025.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 6, 2025.

ADDRESSES:

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2024–1897; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket

Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For Boeing material identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website myboeingfleet.com.

- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2024–1897.

FOR FURTHER INFORMATION CONTACT: Eric Igama, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; telephone 562–627–5388; email roderick.igama@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain The Boeing Company Model 737–300 and –400 series airplanes. The NPRM published in the *Federal Register* on July 29, 2024 (89 FR 60836). The NPRM was prompted by a report indicating that flight control rigging tolerances could result in spoiler deflection not reaching the minimal level required to engage the MONFD used by the A/T system. In the NPRM, the FAA proposed to require changing certain wire bundles, installing a new housing assembly, removing the mechanical aileron force limiter (MAFL), doing an inspection or records check to determine if certain flight control computers (FCCs) are installed, and performing applicable on-condition actions. The FAA is issuing this AD to address failure of the spoiler deflection to engage the MONFD, which could lead to significant throttle split, leading to asymmetric thrust and the subsequent lack of autothrottle disengagement, uncommanded roll, and consequent loss of control of the airplane and reduced ability of the flightcrew to maintain the safe flight and landing of the airplane.

Discussion of Final Airworthiness Directive

Comments

The FAA received a comment from Aviation Partners Boeing. The following

presents the comment received on the NPRM and the FAA’s response.

Effect of Winglets on Accomplishment of the Proposed Actions

Aviation Partners Boeing stated that the installation of winglets per Supplemental Type Certificate (STC) ST01219SE does not affect compliance with the proposed actions.

The FAA agrees with the commenter that STC ST01219SE does not affect the accomplishment of the manufacturer’s service instructions. Therefore, the installation of STC ST01219SE does not affect the ability to accomplish the actions required by this AD. The FAA has not changed this AD in this regard.

Conclusion

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

Material Incorporated by Reference Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 737–22A1399 RB, dated April 13, 2023. This material specifies procedures for changing certain wire bundles, installing a new housing assembly, removing the MAFL, doing an inspection or records check to determine if certain FCCs are installed (FCCs that have an electronic aileron limiter (EAL) revision), and performing applicable on-condition actions. On-condition actions include installing new FCCs or re-installing kept FCCs (the installation includes doing specified tests and applicable corrective actions until the tests are passed).

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

Costs of Compliance

The FAA estimates that this AD affects 110 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Wire bundle change, MAFL removal, housing assembly installation, and inspection/records review.	Up to 10 work-hours × \$85 per hour = up to \$850.	\$0	Up to \$850	Up to \$93,500.

The FAA estimates the following costs to do any on-condition actions that would be required based on the results

of the inspection/records review. The agency has no way of determining the

number of aircraft that might need these on-condition actions:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Installation of FCCs	2 work-hours × \$85 per hour = \$170	\$7,250	\$7,420

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2024–23–03 The Boeing Company:
Amendment 39–22882; Docket No. FAA–2024–1897; Project Identifier AD–2023–00774–T.

(a) Effective Date

This airworthiness directive (AD) is effective January 6, 2025.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 737–300 and –400 series airplanes, certificated in any category, as identified in Boeing Alert Requirements Bulletin 737–22A1399 RB, dated April 13, 2023.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight controls.

(e) Unsafe Condition

This AD was prompted by a report that flight control rigging tolerances could result in spoiler deflection not reaching the minimal level required to engage the cruise thrust split monitor (MONFD) used by the

autothrottle (A/T) system. The FAA is issuing this AD to address failure of the spoiler deflection to engage the MONFD. The unsafe condition, if not addressed, could lead to significant throttle split, leading to asymmetric thrust and the subsequent lack of autothrottle disengagement, which could result in an uncommanded roll and consequent loss of control of the airplane, and reduced ability of the flightcrew to maintain the safe flight and landing of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the "Compliance" paragraph of Boeing Alert Requirements Bulletin 737–22A1399 RB, dated April 13, 2023, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 737–22A1399 RB, dated April 13, 2023.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 737–22A1399, dated April 13, 2023, which is referred to in Boeing Alert Requirements Bulletin 737–22A1399 RB, dated April 13, 2023.

(h) Exceptions to Requirements Bulletin Specifications

Where the Compliance Time columns of the table in the "Compliance" paragraph of Boeing Alert Requirements Bulletin 737–22A1399 RB, dated April 13, 2023, use the phrase "the original issue date of Requirements Bulletin 737–22A1399 RB," this AD requires using the effective date of this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520, Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19,

send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j)(1) of this AD. Information may be emailed to: AMOC@faa.gov.

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, AIR-520, Continued Operational Safety Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

(1) For more information about this AD, contact Eric Igama, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: 562-627-5388; email: roderick.igama@faa.gov.

(2) Material identified in this AD that is not incorporated by reference is available at the address specified in paragraph (k)(3) of this AD.

(k) Material Incorporated by Reference

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

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

(i) Boeing Alert Requirements Bulletin 737-22A1399 RB, dated April 13, 2023.

(ii) [Reserved]

(3) For the material identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110-SK57, Seal Beach, CA 90740-5600; telephone 562-797-1717; website myboeingfleet.com.

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

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov.

Issued on November 7, 2024.

Peter A. White,

Deputy Director, Integrated Certificate Management Division, Aircraft Certification Service.

[FR Doc. 2024-28134 Filed 11-29-24; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2024-2014; Project Identifier MCAI-2024-00162-E; Amendment 39-22883; AD 2024-23-04]

RIN 2120-AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2023-21-08 for certain Rolls-Royce Deutschland Ltd & Co KG (RRD) Model Trent 1000 engines. AD 2023-21-08 required revisions to the airworthiness limitation section (ALS) of the operator's existing approved aircraft maintenance program (AMP). This AD was prompted by the manufacturer's revision of the time limits manual (TLM) to introduce new or more restrictive tasks, limitations, and associated thresholds and intervals for life-limited parts. This AD requires revisions to the ALS of the operator's existing approved AMP, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 6, 2025.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 6, 2025.

ADDRESSES:

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA-2024-2014; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

• For EASA material identified in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADS@easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu.

• You may view this material 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. It is also available at regulations.gov under Docket No. FAA-2024-2014.

FOR FURTHER INFORMATION CONTACT:

Barbara Caufield, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238-7146; email: barbara.caufield@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2023-21-08, Amendment 39-22580 (88 FR 77889, November 14, 2023) (AD 2023-21-08). AD 2023-21-08 applied to certain RRD Model Trent 1000-A, Trent 1000-AE, Trent 1000-C, Trent 1000-CE, Trent 1000-D, Trent 1000-E, Trent 1000-G, and Trent 1000-H engines. AD 2023-21-08 required revisions to the ALS of the operator's existing approved AMP as specified in EASA AD 2022-0259, dated December 20, 2022. The FAA issued AD 2023-21-08 to prevent the failure of critical rotating parts.

The NPRM published in the **Federal Register** on August 9, 2024 (89 FR 65270). The NPRM was prompted by EASA AD 2024-0062, dated March 6, 2024 (EASA AD 2024-0062) (also referred to as the MCAI), issued by EASA, which is the Technical Agent for the Member States of the European Union. The MCAI states that the manufacturer published a revised TLM introducing new or more restrictive tasks and limitations. These new or more restrictive tasks and limitations include updating Direct Accumulation Counting data files.

In the NPRM, the FAA proposed to retain none of the requirements of AD 2023-21-08. The NPRM proposed to require revising the ALS of the operator's existing approved AMP, as specified in EASA AD 2024-0062. The FAA is issuing this AD to prevent the failure of rotating parts.

You may examine the MCAI in the AD docket at regulations.gov under Docket No. FAA-2024-2014.

Discussion of Final Airworthiness Directive

Comments

The FAA received a comment from The Boeing Company, who supported the NPRM without change.

Conclusion

These products have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data, considered the comment received, and determined that air safety requires adopting the AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, this AD is adopted as proposed in the NPRM.

Material Incorporated by Reference Under 1 CFR Part 51

The FAA reviewed EASA AD 2024–0062, which specifies instructions for accomplishing the actions specified in the applicable TLM, including performing maintenance tasks, replacing life-limited parts, and revising the existing approved maintenance or inspection program, as applicable, by incorporating the limitations, tasks, and associated thresholds and intervals described in the TLM.

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

Differences Between This AD and the MCAI

Where EASA AD 2024–0062 specifies revising the approved AMP within 12 months after the effective date of EASA AD 2024–0062, this AD requires revising the ALS of the existing approved aircraft maintenance or inspection program, as applicable, within 30 days after the effective date of this AD.

Costs of Compliance

The FAA estimates that this AD affects 28 engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise the ALS	1 work-hours × \$85 per hour = \$85	\$0	\$85	\$2,380

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

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

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by:
 - a. Removing Airworthiness Directive 2023–21–08, Amendment 39–22580 (88 FR 77889, November 14, 2023); and
 - b. Adding the following new airworthiness directive:

2024–23–04 Rolls-Royce Deutschland Ltd & Co KG: Amendment 39–22883; Docket No. FAA–2024–2014; Project Identifier MCAI–2024–00162–E.

(a) Effective Date

This airworthiness directive (AD) is effective January 6, 2025.

(b) Affected ADs

This AD replaces AD 2023–21–08, Amendment 39–22580 (88 FR 77889, November 14, 2023).

(c) Applicability

This AD applies to Rolls-Royce Deutschland Ltd & Co KG Model Trent 1000–A, Trent 1000–AE, Trent 1000–C, Trent 1000–CE, Trent 1000–D, Trent 1000–E, Trent 1000–G, and Trent 1000–H engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7200, Engine (Turbine/Turboprop).

(e) Unsafe Condition

This AD was prompted by the manufacturer revising the engine Time Limits Manual life limits of certain critical rotating parts. The FAA is issuing this AD to prevent the failure of critical rotating parts. The unsafe condition, if not addressed, could result in failure of critical rotating parts, which could result in failure of one or more engines, loss of thrust control, and loss of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraph (h) of this AD: Perform all required actions within the compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2024–0062, dated March 6, 2024 (EASA AD 2024–0062).

(h) Exceptions to EASA AD 2024–0062

(1) Where EASA AD 2024–0062 refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not require compliance with paragraphs (1), (2), (4), and (5) of EASA AD 2024–0062.

(3) Where paragraph (3) of EASA AD 2024–0062 specifies “Within 12 months after the effective date of this AD, revise the approved AMP,” for this AD, replace that text with “Within 30 days after the effective date of this AD, revise the airworthiness limitation section (ALS) of the existing approved engine maintenance or inspection program, as applicable.”

(4) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2024–0062 is on or before the applicable “limitations” and “associated thresholds” as incorporated by the requirements of paragraph (3) of EASA AD 2024–0062 or within 30 days after the effective date of this AD, whichever occurs later.

(5) This AD does not adopt the “Remarks” paragraph of EASA AD 2024–0062.

(i) Provisions for Alternative Actions and Intervals

No alternative actions and associated thresholds and intervals, including life limits, are allowed for compliance with paragraph (g) of this AD unless they are approved as specified in the provisions of the “Ref. Publications” section of EASA AD 2024–0062.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520 Continued Operational Safety 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, AIR–520 Continued Operational Safety Branch, send it to the attention of the person identified in paragraph (k) of this AD and email to: AMOC@faa.gov.

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

(k) Additional Information

For more information about this AD, contact Barbara Caufield, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7146; email: barbara.caufield@faa.gov.

(l) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2024–0062, dated March 6, 2024.

(ii) [Reserved]

(3) For EASA material identified in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADS@easa.europa.eu; website: easa.europa.eu. You may find this

EASA AD on the EASA website at ad.easa.europa.eu.

(4) You may view this material 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.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov.

Issued on November 12, 2024.

Peter A. White,

Deputy Director, Integrated Certificate Management Division, Aircraft Certification Service.

[FR Doc. 2024–28094 Filed 11–29–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–1899; Project Identifier MCAI–2023–01169–E; Amendment 39–22870; AD 2024–21–03]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2023–24–06, which applies to certain Rolls-Royce Deutschland Ltd & Co KG (RRD) Model Trent 1000 engines. AD 2023–24–06 required revising the airworthiness limitation section (ALS) of the operator’s existing approved engine maintenance or inspection program, as applicable, to incorporate new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts. This AD was prompted by the manufacturer revising the time limits manual (TLM) to introduce new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts. This AD requires revisions to the ALS of the operator’s existing approved engine maintenance or inspection program, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products. **DATES:** This AD is effective January 6, 2025.

The Director of the Federal Register approved the incorporation by reference

of a certain publication listed in this AD as of January 6, 2025.

ADDRESSES:

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA–2024–1899; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For EASA material identified in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADS@easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu.

- You may view this material 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. It is also available at regulations.gov under Docket No. FAA–2024–1899.

FOR FURTHER INFORMATION CONTACT:

Barbara Caufield, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7146; email: barbara.caufield@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2023–24–06, Amendment 39–22623 (88 FR 89290, December 27, 2023) (AD 2023–24–06) for certain RRD Model Trent 1000–AE3, Trent 1000–CE3, Trent 1000–D3, Trent 1000–G3, Trent 1000–H3, Trent 1000–J3, Trent 1000–K3, Trent 1000–L3, Trent 1000–M3, Trent 1000–N3, Trent 1000–P3, Trent 1000–Q3, and Trent 1000–R3 engines. AD 2023–24–06 required revising the ALS of the operator’s existing approved engine maintenance or inspection program, as applicable, to incorporate new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts. The FAA issued AD 2023–24–06 to prevent the failure of critical rotating parts.

The NPRM published in the **Federal Register** on July 29, 2024 (89 FR 60841). The NPRM was prompted by EASA AD

2023–0195, dated November 9, 2023 (EASA AD 2023–0195) (also referred to as the MCAI), issued by EASA, which is the Technical Agent for the Member States of the European Union. The MCAI states that the manufacturer published a revised engine TLM introducing new or more restrictive tasks and limitations. These new or more restrictive tasks and limitations include updating declared lives of certain critical parts.

In the NPRM, the FAA proposed to retain none of the requirements of AD 2023–24–06. The NPRM proposed to require revising the ALS of the operator’s existing approved engine maintenance or inspection program, as specified in EASA AD 2023–0195. The FAA is issuing this AD to prevent the failure of rotating parts, which, if not addressed, could result in failure of one or more engines, loss of thrust control, and loss of the airplane.

You may examine the MCAI in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2024–1899.

Discussion of Final Airworthiness Directive

Comments

The FAA received a comment from The Boeing Company who supported the NPRM without change.

Conclusion

These products have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA’s bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data, considered the comment received, and determined that air safety requires adopting the AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, this AD is adopted as proposed in the NPRM.

Material Incorporated by Reference Under 1 CFR Part 51

The FAA reviewed EASA AD 2023–0195, which specifies instructions for accomplishing the actions specified in the applicable TLM, including

performing maintenance tasks, replacing life-limited parts, and revising the existing approved maintenance or inspection program, as applicable, by incorporating the limitations, tasks, and associated thresholds and intervals described in the TLM.

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

Differences Between This AD and the MCAI

Where EASA AD 2023–0195 specifies revising the approved aircraft maintenance programme (AMP) within 12 months after the effective date of EASA AD 2023–0195, this AD requires revising the ALS of the existing approved aircraft maintenance or inspection program, as applicable, within 30 days after the effective date of this AD.

Costs of Compliance

The FAA estimates that this AD affects 2 engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise the ALS	1 work-hours × \$85 per hour = \$85	\$0	\$85	\$170

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

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

- 1. The authority citation for part 39 continues to read as follows:
Authority: 49 U.S.C. 106(g), 40113, 44701.
- **\$ 39.13 [Amended]**
- 2. The FAA amends § 39.13 by:
 - a. Removing Airworthiness Directive 2023–24–06, Amendment 39–22623 (88 FR 89290, December 27, 2023); and
 - b. Adding the following new airworthiness directive:
2024–21–03 Rolls-Royce Deutschland Ltd & Co KG: Amendment 39–22870; Docket No. FAA–2024–1899; Project Identifier MCAI–2023–01169–E.

(a) Effective Date

This airworthiness directive (AD) is effective January 6, 2025.

(b) Affected ADs

This AD replaces AD 2023–24–06, Amendment 39–22623 (88 FR 89290, December 27, 2023).

(c) Applicability

This AD applies to Rolls-Royce Deutschland Ltd & Co KG Model Trent 1000–AE3, Trent 1000–CE3, Trent 1000–D3, Trent 1000–G3, Trent 1000–H3, Trent 1000–J3, Trent 1000–K3, Trent 1000–L3, Trent 1000–M3, Trent 1000–N3, Trent 1000–P3, Trent 1000–Q3, and Trent 1000–R3 engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7200, Engine (Turbine/Turboprop).

(e) Unsafe Condition

This AD was prompted by the manufacturer revising the engine time limits manual (TLM) required maintenance and inspections. The FAA is issuing this AD to prevent the failure of rotating parts. The unsafe condition, if not addressed, could result in failure of one or more engines, loss of thrust control, and loss of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraph (h) of this AD: Perform all required actions within the compliance times specified in, and in accordance with, European Union Aviation Safety Agency AD 2023–0195, dated November 9, 2023 (EASA AD 2023–0195).

(h) Exceptions to EASA AD 2023–0195

(1) Where EASA AD 2023–0195 refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not require compliance with paragraph (1), (2), (4), and (5) of EASA AD 2023–0195.

(3) Where paragraph (3) of EASA AD 2023–0195 specifies “Within 12 months after the effective date of this AD, revise the approved AMP,” replace that text with “Within 30 days after the effective date of this AD, revise the airworthiness limitation section (ALS) of the existing approved engine maintenance or inspection program, as applicable.”

(4) This AD does not adopt the “Remarks” paragraph of EASA AD 2023–0195.

(i) Provisions for Alternative Actions and Intervals

No alternative actions and associated thresholds and intervals, including life limits, are allowed for compliance with paragraph (g) of this AD unless they are approved as specified in the provisions of the “Ref. Publications” section of EASA AD 2023–0195.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520 Continued Operational Safety 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, AIR–520 Continued Operational Safety Branch, send it to the attention of the person identified in paragraph (k) of this AD and email to: AMOC@faa.gov.

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

(k) Additional Information

For more information about this AD, contact Barbara Caufield, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7146; email: barbara.caufield@faa.gov.

(l) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023–0195, dated November 9, 2023.

(ii) [Reserved]

(3) For EASA material identified in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADs@easa.europa.eu; website: easa.europa.eu. You may find this EASA AD on the EASA website at ad.easa.europa.eu.

(4) You may view this material at 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.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov.

Issued on October 15, 2024.

Peter A. White,

Deputy Director, Integrated Certificate Management Division, Aircraft Certification Service.

[FR Doc. 2024–28088 Filed 11–29–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA–2024–0463; Project Identifier AD–2023–00792–T; Amendment 39–22890; AD 2024–23–11]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain The Boeing Company Model 737–8, 737–9, and 737–8200 (737 MAX) airplanes. This AD was prompted by a report of a non-conforming installation of spoiler wire bundles that led to unintended spoiler motion, including one instance of a flight spoiler hardover. Further investigation identified the potential for a hardover of more than one flight spoiler on the same wing, which can exceed full lateral control capability leading to loss of control of the airplane. This AD requires a one-time inspection of the clearance between the spoiler control wire bundles and the adjacent structure, and applicable on-condition actions. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 6, 2025.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 6, 2025.

ADDRESSES:

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA–2024–0463; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For Boeing material identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website myboeingfleet.com.

- You may view this material at the FAA, Airworthiness Products Section,

Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* under Docket No. FAA–2024–0463.

FOR FURTHER INFORMATION CONTACT:

Michael Closson, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3973; email: *Michael.P.Closson@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain The Boeing Company Model 737–8, 737–9, and 737–8200 airplanes. The NPRM published in the **Federal Register** on March 11, 2024 (89 FR 17346). The NPRM was prompted by a report of a non-conforming installation of flight spoiler control wire bundles that led to unintended spoiler motion, including one instance of flight spoiler hardover. Further investigation identified the potential for simultaneous time-limited hardovers of more than one flight spoiler on the same wing, which can exceed full lateral control capability leading to loss of control of the airplane. In the NPRM, the FAA proposed to require a one-time inspection of the clearance between the spoiler control wire bundles and the adjacent structure, and applicable on-condition actions. The FAA is issuing this AD to address the potential for improper clearance between the spoiler control wire bundles and the adjacent structure. Improper clearance can lead to damage to the wire bundle, causing unintentional spoiler motion and consequent loss of control of the airplane. A hardover of more than one flight spoiler on the same wing can exceed full lateral control capability leading to loss of control of the airplane.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from seven commenters: The Boeing Company, United Airlines, Air Line Pilots Association, International, and four individuals, who supported the NPRM without change.

The FAA received additional comments from three commenters: SunExpress Airlines, The Foundation for Aviation Safety, and an individual. The following summarizes the comments received on the NPRM and provides the FAA's responses.

Request for Immediately Adopted Rule (IAR)

The Foundation for Aviation Safety (the Foundation) requested ¹ that the FAA issue the AD as an immediately adopted rule (IAR) ² with a compliance time of 30 days instead of the proposed 36-month compliance time. The Foundation's rationale referenced the service history of this model, the FAA's use of what the Foundation described as an unvalidated assumption about wear rates, the presence of a potentially catastrophic single failure condition, and the required inspection is estimated to take nine hours ³ per airplane.

In addition, an individual requested the FAA require "immediate repair of the defects on the identified aircraft" due to recent Boeing failures.

The FAA does not agree with the request to issue the AD as an IAR, or to shorten the compliance time. After conducting a risk analysis, the FAA did not find it necessary to issue an IAR with a shorter compliance time, but determined that an NPRM, which allowed the opportunity for public comment, was appropriate.

As part of their argument for an IAR and shortened compliance time, the Foundation stated that the potential failure condition is the result of a single point of failure (the chafed wire to a spoiler actuator), which is incorrect. The NPRM was issued to address the potential catastrophic event of simultaneous time-limited ⁴ hardovers of more than one flight spoiler on the same wing, which would require two separate specific wires to short to ground almost simultaneously.

To support their argument for the IAR, the Foundation also questioned the FAA's assumptions regarding the use of unvalidated wire "wear rates" to support the compliance times in the NPRM. The FAA concurs that "wear rate" is highly dependent upon the specific installation and operational environment of the wire bundle in

question. However, the FAA did not use Boeing's "wear rate" in developing the risk analysis as suggested by the commenter. Instead, the FAA's analysis incorporated feedback from 737 MAX operators that had performed the inspections called out in Boeing Service Letter 737–SL–293–A, dated May 17, 2022, which indicated no findings of wire chafing in over 650 Model 737 MAX airplanes. This, combined with the FAA risk analysis, showed that an NPRM was appropriate.

Request for Credit for Prior Inspections

SunExpress Airlines requested that Boeing Service Letter 737–SL–27–293–B, dated May 23, 2022, serve as alternative method of compliance to paragraphs (g) and (h) of the proposed AD. The commenter asserted that the Work Instructions of Boeing Service Letter 737–SL–27–293–B fulfills the requirements stated in Boeing Alert Requirements Bulletin 737–27A1325 RB, dated July 14, 2023 (Alert RB 737–27A1325 RB).

The FAA agrees that accomplishing Boeing Service Letter 737–SL–27–293–B, dated May 23, 2022, provides some of the inspection and corrective action instructions called out in Alert RB 737–27A1325 RB. However, the FAA disagrees with giving credit for paragraphs (g) and (h) of this AD because the scope of the inspections in Boeing Service Letter 737–SL–27–293–B, dated May 23, 2022, does not include inspections for the outboard clamp locations and does not have certain of the defined clearance requirements of the Requirements Bulletin. Paragraph (i) of this AD allows the commenter to request an alternative method of compliance (AMOC) for the actions in the Service Letter that are duplicated in the Requirements Bulletin.

Request for Additional Guidance To Identify Affected Airplanes

An individual requested that the FAA issue additional guidance to assist in identifying other airplane models that may be subject to the same unsafe condition.

Such additional guidance is unnecessary. The FAA has worked with Boeing to identify the affected airplanes and those airplanes have been listed in Alert RB 737–27A1325 RB. The agency has also verified with Boeing that the actions and practices identified in Alert RB 737–27A1325 RB have been incorporated in Boeing's production processes at a specific airplane line number, ensuring this unsafe condition does not exist on airplanes delivered from that line number forward.

¹ The Foundation's comment on this AD was submitted directly to the FAA Administrator, but has been placed into the rulemaking docket.

² An "Immediately Adopted Rule" or "IAR" is an FAA term for a rule that is issued without first obtaining public comment, a.k.a a "Final Rule with request for Comments," based upon good cause.

³ Although the work-hours listed in the NPRM for the one-time inspection and on-condition actions amount to nine hours of work per airplane, no airplane would require all of the on-condition actions. Therefore, the actions required by this AD would take less than nine hours of work per airplane.

⁴ This type of flight spoiler failure will be detected within a short time window by a software monitor, which will then fully retract spoiler eliminating the hardover condition, thereby limiting the exposure window for concurrent failures.

Conclusion

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

Material Incorporated by Reference Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 737–27A1325 RB, dated July 14, 2023. This material specifies procedures for spoiler control wire bundles clearance measurement and applicable on-condition actions. On-condition actions include a detailed inspection of the spoiler control wire bundles and adjacent structure for chafing damage, repair of any spoiler control wire bundles and any structural

damage, and adjustment of the spoiler control wire bundles to ensure clearance requirements are met.

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

Costs of Compliance

The FAA estimates that this AD affects 207 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Measurement of wire bundle clearance	1 work-hour × \$85 per hour = \$85	\$0	\$85	\$17,595

The FAA estimates the following costs to do any necessary repairs that

would be required based on the results of the inspection. The agency has no

way of determining the number of aircraft that might need these repairs:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Inspection	1 work-hour × \$85	\$0	\$85
Rework cable bundles without chafing damage to wires or airplane structure.	2 work-hours × \$85 per hour = \$170	0	170
Rework cable bundles with chafing damage to wires or airplane structure.	5 work-hours × \$85 per hour = \$425	0	425

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some or all of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2024–23–11 The Boeing Company: Amendment 39–22890; Docket No. FAA–2024–0463; Project Identifier AD–2023–00792–T.

(a) Effective Date

This airworthiness directive (AD) is effective January 6, 2025.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 737–8, 737–9, and 737–8200 airplanes, certificated in any category, as identified in Boeing Alert Requirements Bulletin 737–27A1325 RB, dated July 14, 2023.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight controls.

(e) Unsafe Condition

This AD was prompted by a report of a non-conforming installation of spoiler wire bundles that led to unintended spoiler motion, including one instance of a flight spoiler hardover. Further investigation identified the potential for a time-limited hardover of more than one flight spoiler on the same wing, which can exceed full lateral control capability leading to loss of control of the airplane. The FAA is issuing this AD to address improper clearance between the spoiler control wire bundles and the adjacent structure, which can lead to damage to the wire bundle, causing unintentional spoiler motion. The unsafe condition, if not addressed, could result in loss of control of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the "Compliance" paragraph of Boeing Alert Requirements Bulletin 737-27A1325 RB, dated July 14, 2023, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 737-27A1325 RB, dated July 14, 2023.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 737-27A1325, dated July 14, 2023, which is referred to in Boeing Alert Requirements Bulletin 737-27A1325 RB, dated July 14, 2023.

(h) Exception to Service Information Specifications

Where the Compliance Time columns of the tables in the "Compliance" paragraph of Boeing Alert Requirements Bulletin 737-27A1325 RB, dated July 14, 2023, use the phrase "the original issue date of Requirements Bulletin 737-27A1325 RB," this AD requires using the effective date of this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR-520, Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j)(1) of this AD. Information may be emailed to: AMOC@faa.gov.

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company

Organization Designation Authorization (ODA) that has been authorized by the Manager, AIR-520, Continued Operational Safety Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

(1) For more information about this AD, contact Michael Closson, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206-231-3973; email: Michael.P.Closson@faa.gov.

(2) Service information identified in this AD that is not incorporated by reference is available at the address specified in paragraph (k)(3) of this AD.

(k) Material Incorporated by Reference

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

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

(i) Boeing Alert Requirements Bulletin 737-27A1325 RB, dated July 14, 2023.

(ii) [Reserved]

(3) For Boeing material identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110-SK57, Seal Beach, CA 90740-5600; telephone 562-797-1717; website myboeingfleet.com.

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

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov.

Issued on November 14, 2024.

John P. Piccola, Jr.,

Director, Integrated Certificate Management Division, Aircraft Certification Service.

[FR Doc. 2024-28120 Filed 11-29-24; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA-2024-2015; Project Identifier MCAI-2023-00769-T; Amendment 39-22887; AD 2024-23-08]

RIN 2120-AA64

Airworthiness Directives; Bombardier, Inc., Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Bombardier, Inc., Model BD-700-1A10 and BD-700-1A11 airplanes. This AD was prompted by reports of missing or damaged inboard flap seal plate assemblies. This AD requires repetitive inspections for cracks of the attaching angles of the inboard flap seal plates and replacement. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 6, 2025.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 6, 2025.

ADDRESSES:

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2024-2015; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For Bombardier material identified in this AD, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514-855-2999; email ac.yul@aero.bombardier.com; website bombardier.com.

- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195. It is also available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2024-2015.

FOR FURTHER INFORMATION CONTACT:

Yaser Osman, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516-228-7300; email 9-avs-nyaco-cos@faa.gov.

SUPPLEMENTARY INFORMATION:**Background**

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Bombardier, Inc., Model BD-700-1A10 and BD-700-1A11 airplanes. The NPRM published in the

Federal Register on August 9, 2024 (89 FR 65264). The NPRM was prompted by AD CF–2023–42, dated June 19, 2023, issued by Transport Canada, which is the aviation authority for Canada (referred to after this as the MCAI). The MCAI states that there have been multiple reports in service of missing or damaged inboard flap seal plates. An investigation revealed a premature fatigue failure mode of the inboard flap seal plates. Left uncorrected, an inboard flap seal plate may partially or totally detach. Under certain flight conditions, a missing inboard flap seal plate could lead to excessive buffeting and vibration, and consequent damage to the airplane.

In the NPRM, the FAA proposed to require repetitive inspections for cracks of the attaching angles of the inboard flap seal plates and replacement. The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2024–2015.

Discussion of Final Airworthiness Directive

Comments

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

Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA’s bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on this product. Except for minor editorial changes, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Material Incorporated by Reference Under 1 CFR Part 51

The FAA reviewed Bombardier Service Bulletins 700–27–5509 and 700–27–6509, both Revision 01, both dated May 5, 2023. This material specifies procedures for repetitive detailed inspections for cracks of the attaching angles of the inboard flap seal plates and replacing the inboard flap seal plates if any crack is detected. This material also specifies procedures for replacing both existing inboard flap seal

plates with structurally more robust redesigned components. The replacement actions include a detailed visual inspection for damage (including signs of failure, cracking, and deformation) of the flap inboard closing ribs and trailing edges, an eddy current or liquid penetrant inspection for cracks running out of the flap inboard closing rib holes common to the outboard stiffener and angle, and repair for cracks and other damage. The replacement would eliminate the need for the repetitive detailed inspections. These documents are distinct since they apply to different airplane models.

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

Costs of Compliance

The FAA estimates that this AD affects 43 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
24 work-hours × \$85 per hour = \$2,040	\$37,919	\$39,959	\$1,718,237

The FAA has received no definitive data on which to base the cost estimates for the repairs specified in this AD.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some or all of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

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

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing

regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2024–23–08 Bombardier, Inc.: Amendment 39–22887; Docket No. FAA–2024–2015; Project Identifier MCAI–2023–00769–T.

(a) Effective Date

This airworthiness directive (AD) is effective January 6, 2025.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc., Model BD–700–1A10 and BD–700–1A11 airplanes, certificated in any category, serial numbers 9861, 9872, 60001 through 60004 inclusive, 60006 through 60023 inclusive,

60025 through 60029 inclusive, 60031, 60033 through 60036 inclusive, 60038 through 60042 inclusive, 60044, 60046 through 60048 inclusive, 60050 through 60055 inclusive, 60058 through 60060 inclusive, 60062 through 60067 inclusive, 60069 through 60071 inclusive, 60073 through 60086 inclusive, and 60088 through 60101 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by reports of missing or damaged inboard flap seal plates. The FAA is issuing this AD to address the unsafe condition, which could result in the partial or total detachment of the flap seal plate. Under certain flight conditions, a

missing inboard flap seal plate could lead to excessive buffeting and vibration, and consequent damage to the airplane.

(f) Compliance

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

(g) Detailed Inspection

At the applicable time specified in figure 1 to paragraph (g) of this AD, perform a detailed inspection for cracks of the attaching angles of the inboard flap seal plates, in accordance with Section 2.B. (Part A) of the Accomplishment Instructions of Bombardier Service Bulletin 700–27–5509 or 700–27–6509, both Revision 01, both dated May 5, 2023, as applicable, except do corrective actions as specified in paragraph (h) of this AD.

FIGURE 1 TO PARAGRAPH (g)—COMPLIANCE REQUIREMENTS

Total flight hours as of the effective date of this AD	Compliance time after the effective date of this AD
Less than or equal to 750	Within 250 flight hours.
More than 750	Within 100 flight hours.

(h) Corrective Actions for Inboard Flap Seal Plates

(1) If no crack is found during any inspection required by paragraph (g) of this AD, repeat the inspection thereafter at intervals not to exceed 250 flight hours, except as specified in paragraph (i) of this AD.

(2) If any crack is found during any inspection required by paragraph (g) of this AD, do the actions specified in paragraph (i) of this AD before further flight.

(i) Replacement of Inboard Flap Seal Plates

Unless already done as specified in paragraph (h)(2) of this AD: Within 12 months after the effective date of this AD, do the actions specified in paragraphs (i)(1) through (3) of this AD, in accordance with Section 2.C. (Part B) of the Accomplishment Instructions of Bombardier Service Bulletin 700–27–5509 or 700–27–6509, both Revision 01, both dated May 5, 2023, as applicable.

(1) Replace the inboard flap seal plates with redesigned plates.

(2) Do a detailed visual inspection for damage of the flap inboard closing ribs and trailing edges.

(3) Do an eddy current or liquid penetrant inspection for cracks running out of the flap inboard closing rib holes common to the outboard stiffener and angle.

(j) Repair for Flap Inboard Closing Ribs and Trailing Edges

If any crack or other damage is found during any inspection required by paragraph (i)(2) or (3) of this AD, repair before further flight using a method approved by the Manager, International Validation Branch, FAA; or Transport Canada; or Bombardier, Inc.'s Transport Canada Design Approval Organization (DAO). If the method is approved by the DAO, the approval must include the DAO-authorized signature.

(k) Terminating Action for Repetitive Inspections

Accomplishment of the actions required by paragraph (i) of this AD terminates the requirements of paragraph (h)(1) of this AD.

(l) Credit for Previous Actions

This paragraph provides credit for actions required by this AD, if those actions were performed before the effective date of this AD using Bombardier Service Bulletin 700–27–5509 or 700–27–6509, both dated October 4, 2022.

(m) No Reporting Requirement

Although Bombardier Service Bulletins 700–27–5509 and 700–27–6509, both Revision 01, both dated May 5, 2023, specify to submit certain information to the manufacturer, this AD does not include that requirement.

(n) Additional AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must

be accomplished using a method approved by the Manager, International Validation Branch, FAA; or Transport Canada; or Bombardier, Inc.'s Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(o) Additional Information

(1) For more information about this AD, contact Yaser Osman, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email 9-avs-nyaco-cos@faa.gov.

(2) Material identified in this AD that is not incorporated by reference is available at the address specified in paragraph (p)(3) of this AD.

(p) Material Incorporated by Reference

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

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

(i) Bombardier Service Bulletin 700–27–5509, Revision 01, dated May 5, 2023.

(ii) Bombardier Service Bulletin 700–27–6509, Revision 01, dated May 5, 2023.

(3) For Bombardier material identified in this AD, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email ac.yul@aero.bombardier.com; website bombardier.com.

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

(5) You may view this material at the National Archives and Records

Administration (NARA). For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov.

Issued on November 12, 2024.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2024–28125 Filed 11–29–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–1474; Project Identifier MCAI–2023–01014–T; Amendment 39–22884; AD 2024–23–05]

RIN 2120–AA64

Airworthiness Directives; Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP)) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. This AD was prompted by reports that the pylon-to-wing area motive flow flexible fuel line assemblies may have been installed incorrectly. This AD requires inspecting the motive flow fuel line assemblies and performing corrective actions as specified in a Transport Canada AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 6, 2025.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 6, 2025.

ADDRESSES:

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA–2024–1474; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For Transport Canada material identified in this AD, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca; website at tc.canada.ca/en/aviation.

- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at regulations.gov under Docket No. FAA–2024–1474.

FOR FURTHER INFORMATION CONTACT:

Joseph Catanzaro, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email joseph.catanzaro@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. The NPRM published in the **Federal Register** on May 23, 2024 (89 FR 45610). The NPRM was prompted by AD CF–2023–64, dated September 18, 2023, issued by Transport Canada, which is the aviation authority for Canada (referred to after this as the MCAI). The MCAI states that reports have been received indicating that the pylon-to-wing area motive flow flexible fuel line assemblies may have been installed incorrectly, potentially resulting in a twist to the motive flow fuel line.

In the NPRM, the FAA proposed to require inspecting the motive flow fuel line assemblies and corrective actions, as specified in Transport Canada AD CF–2023–64. The FAA is issuing this AD to address a possible abrasion of the fuel line causing a fuel leak; if not addressed, the electrical harness connectors in the wing area could be a potential ignition source and pose a risk of fire.

You may examine the MCAI in the AD docket at regulations.gov under Docket No. FAA–2024–1474.

Discussion of Final Airworthiness Directive

Comments

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

The FAA received an additional comment from Delta Airlines. The following presents the comment received on the NPRM and the FAA's response to the comment.

Request for Change to Exceptions Paragraph

Delta requested revising paragraph (h)(3) by removing the word “flexible” and revising certain punctuation. Delta stated the term “flexible” is used only when referring to the flexible-hose assembly installed in the shroud assembly. Therefore, the flexible-hose assembly and the shroud assembly are subassemblies of the fuel motive-flow tube assembly.

The FAA agrees that the term “flexible” should be removed in reference to the entire motive flow fuel line assemblies since the service information referenced in Transport Canada AD CF–2023–64 requires replacement of the fuel motive-flow tube assembly if damage is found on either the flexible-hose assembly or the shroud assembly.

Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data, considered the comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on this product. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Material Incorporated by Reference Under 1 CFR Part 51

The FAA reviewed AD CF–2023–64, dated September 18, 2023. This material specifies procedures for a general visual inspection of the left and right motive flow flexible fuel line assemblies for twisted or damaged fuel lines or damaged shrouds, and replacement of motive flow fuel line assemblies with twisted or damaged fuel lines or damaged shrouds.

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

Costs of Compliance

The FAA estimates that this AD affects 93 airplanes of U.S. registry. The

FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
7 work-hours × \$85 per hour = \$595	\$0	\$0	\$55,335

The FAA estimates the following costs to do any on-condition actions that would be required based on the results

of any required actions. The FAA has no way of determining the number of

aircraft that might need this on-condition action:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
1 work-hour × \$85 per hour = \$85	\$2,500	\$2,585

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities

under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2024–23–05 Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.): Amendment 39–22884; Docket No. FAA–2024–1474; Project Identifier MCAI–2023–01014–T.

(a) Effective Date

This airworthiness directive (AD) is effective January 6, 2025.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Canada Limited Partnership (Type Certificate previously held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.) Model BD–500–1A10 and BD–500–1A11 airplanes, certificated in any category, as identified in Transport Canada AD CF–2023–64, dated

September 18, 2023 (Transport Canada AD CF–2023–64).

(d) Subject

Air Transport Association (ATA) of America Code 28, Fuel.

(e) Unsafe Condition

This AD was prompted by reports that the pylon-to-wing area motive flow flexible fuel line assemblies may have been installed incorrectly. The FAA is issuing this AD to ensure the motive flow flexible fuel line assemblies are installed correctly. The unsafe condition, if not addressed, could result in abrasion of the fuel line and a possible fuel leak; as a result, the electrical harness connectors in the wing area could be a potential ignition source and pose a risk of fire.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, Transport Canada AD CF–2023–64.

(h) Exception to Transport Canada AD CF–2023–64

(1) Where Transport Canada AD CF–2023–64 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where Transport Canada AD CF–2023–64 refers to hours air time, this AD requires using flight hours.

(3) Where the Corrective Actions paragraph of Transport Canada AD CF–2023–64 specifies to "Inspect and, if necessary, replace the left and right motive flow fuel line assemblies," for this AD, replace that text with "Inspect and, as applicable, replace the left and right motive flow fuel line assemblies."

(i) Additional AD Provisions

The following provisions also apply to this AD:

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

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

(j) Additional Information

For more information about this AD, contact Joseph Catanzaro, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516-228-7300; email joseph.catanzaro@faa.gov.

(k) Material Incorporated by Reference

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

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

(i) Transport Canada AD CF-2023-64, dated September 18, 2023.

(ii) [Reserved]

(3) For Transport Canada AD CF-2023-64, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888-663-3639; email TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca. You may find this Transport Canada AD on the Transport Canada website tc.canada.ca/en/aviation.

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

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations, or email fr.inspection@nara.gov.

Issued on November 12, 2024.

Peter A. White,

Deputy Director, Integrated Certificate Management Division, Aircraft Certification Service.

[FR Doc. 2024-28130 Filed 11-29-24; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA-2024-0183; Airspace Docket No. 23-AAL-67]

RIN 2120-AA66

Modification of Class E Airspace; Chenega Bay Airport, Chenega, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies the Class E airspace extending upward from 700 feet above the surface of the earth due to the Area Navigation (RNAV) (Global Positioning System [GPS])-A approach being re-oriented to the north at Chenega Bay Airport, Chenega, AK. Additionally, this action updates the administrative portion of the airport's Class E airspace legal description. These modifications support the safety and management of instrument flight rules (IFR) operations at the airport.

DATES: Effective date 0901 UTC, February 20, 2025. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at www.regulations.gov using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11J, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

FOR FURTHER INFORMATION CONTACT: Nathan A. Chaffman, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S

216th Street, Des Moines, WA 98198; telephone (206) 231-3460.

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 modifies Class E airspace to support IFR operations at Chenega Bay Airport, Chenega, AK.

History

The FAA published a notice of proposed rulemaking for Docket No. FAA-2024-0183 in the **Federal Register** (89 FR 67915; August 22, 2024) proposing to modify Class E airspace at Chenega Bay Airport, Chenega, AK. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

Class E5 airspace areas are published in paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11J, dated July 31, 2024, and effective September 15, 2024. FAA Order JO 7400.11J is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11J lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends 14 CFR part 71 by modifying the Class E airspace extending upward from 700 feet above the surface at Chenega Bay Airport, Chenega, AK.

The Class E airspace extending upward from 700 feet above the surface of the earth at the airport within a 2-mile radius is modified to only contain the arrival procedure to the final

approach fix (FAF), and to contain the departure procedure starting at JODRO—given that arrivals are visual flight rules (VFR) after the FAF, and departures are VFR until reaching JODRO.

In addition, the Chenega, AK, Class E airspace extending upward from 700 feet above the surface of the earth is extended to the north of the airport to contain arriving IFR operations below 1,500 feet above the surface until reaching the FAF.

Finally, the FAA is modifying the airport's associated legal description to update the city name within the text header from "Chenega Bay, AK" to "Chenega, AK."

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures," paragraph 5–6.5.a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

■ 1. The authority citation for 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 part 71.1 of FAA Order JO 7400.11], Airspace Designations and Reporting Points, dated July 31, 2024, and effective September 15, 2024, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AAL AK E5 Chenega, AK [Amended]

Chenega Bay Airport, AK
(Lat. 60°04'43" N, long. 147°59'41" W)

That airspace extending upward from 700 feet above the surface within an area bounded by a line beginning at lat. 60°11'28" N, long. 148°4'30" W; to lat. 60°18'43" N, long. 147°59'37" W; to lat. 60°18'23" N, long. 147°55'19" W; to lat. 60°14'30" N, long. 147°56'37" W; to lat. 60°5'57" N, long. 147°37'29" W; to lat. 60°3'26" N, long. 147°42'48" W; thence to the point of beginning.

* * * * *

Issued in Des Moines, Washington, on November 25, 2024.

B.G. Chew,
*Group Manager, Operations Support Group,
Western Service Center.*

[FR Doc. 2024–28135 Filed 11–29–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

[Docket No. 240829–0230]

RIN 0648–BL31

Chumash Heritage National Marine Sanctuary

AGENCY: Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Notification of effective date of final rule.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) is

providing notice that the final rule published on October 16, 2024, to designate Chumash Heritage National Marine Sanctuary (CHNMS), is effective on November 30, 2024.

DATES: The final rule to designate CHNMS, which was published in the **Federal Register** (89 FR 83554) on October 16, 2024, is effective November 30, 2024.

FOR FURTHER INFORMATION CONTACT:

Laura Ingulsrud, West Coast Regional Policy Analyst, 99 Pacific Street, Suite 100F, Monterey, CA 93940, 831–647–6450, laura.ingulsrud@noaa.gov.

SUPPLEMENTARY INFORMATION: Pursuant to Section 304(b) of the National Marine Sanctuaries Act (NMSA) (16 U.S.C. 1434(b)), NOAA published in the **Federal Register** notification of the designation of CHNMS and final regulations to implement the designation on October 16, 2024 (89 FR 83554). As required by the NMSA, the designation and regulations would become effective following the close of a review period of 45 days of continuous session of Congress beginning on the date of publication (16 U.S.C. 1434(b)(1)). The regulations are effective as of November 30, 2024.

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Coastal zone, Cultural resources, Historic preservation, Marine protected areas, Marine resources, National marine sanctuaries, Recreation and recreation areas, Reporting and recordkeeping requirements, Shipwrecks.

John Armor,

*Director, Office of National Marine Sanctuaries, National Ocean Service,
National Oceanic and Atmospheric
Administration.*

[FR Doc. 2024–27387 Filed 11–29–24; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510, 520, 522, 524, and 558

[Docket No. FDA–2024–N–0002]

New Animal Drugs; Approval of New Animal Drug Applications; Withdrawal of Approval of New Animal Drug Applications; Change of Sponsor

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendments.

SUMMARY: The Food and Drug Administration (FDA or we) is amending the animal drug regulations to reflect application-related actions for new animal drug applications (NADAs) and abbreviated new animal drug applications (ANADAs) during July, August, and September 2024. The animal drug regulations are also being amended to improve their accuracy and readability.

DATES: This rule is effective December 2, 2024.

FOR FURTHER INFORMATION CONTACT: George K. Haibel, Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240-402-5689, George.Haibel@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Approvals

FDA is amending the animal drug regulations to reflect approval actions for NADAs and ANADAs during July, August, and September 2024, as listed in table 1. In addition, FDA is informing the public of the availability, where applicable, of documentation of environmental review required under the National Environmental Policy Act and, for actions requiring review of safety or effectiveness data, summaries of the basis of approval under the Freedom of Information Act. These documents, along with marketing exclusivity and patent information, may be obtained at Animal Drugs @FDA: <https://animaldrugsatfda.fda.gov/adafda/views/#/search>.

Date of approval	File No.	Sponsor (drug labeler code ¹)	Product name	Effect of the action	21 CFR section
July 2, 2024	200-788	Bimeda Animal Health Ltd. (061133)	MOXISOLV Injection (moxidectin)	Original approval as a generic copy of NADA 141-220.	522.1450
July 8, 2024	200-771	Norbrook Laboratories, Ltd. (055529)	FELANORM (methimazole) Oral Solution.	Original approval as a generic copy of NADA 141-292.	520.1372
August 15, 2024	200-770	Pharmgate Inc. (069254)	DERACIN (chlortetracycline) and MGA (melengestrol acetate) Type C medicated feeds.	Original approval as a generic copy of NADA 141-530.	558.128
August 26, 2024	200-783	Huvepharma EOOD (016592)	COXIDIN 90 (monensin) Type C medicated feeds.	Original approval as a generic copy of NADA 038-878 and NADA 130-736.	558.355
September 5, 2024	200-795	Felix Pharmaceuticals Pvt. Ltd. (086101).	CARPROFEN Soft Chewable Tablets (carprofen).	Original approval as a generic copy of NADA 141-111.	520.304
September 5, 2024	200-773	Cronus Pharma Specialties India Private Ltd. (069043).	TULAJECT 100 (tulathromycin injection) Injectable Solution.	Original approval as a generic copy of NADA 141-224.	522.2630
September 10, 2024 ...	200-774	Do	TULAJECT 25 (tulathromycin injection) Injectable Solution.	Original approval as a generic copy of NADA 141-349.	Do.
September 19, 2024 ...	141-585	Elanco US Inc. (058198)	ZENRELIA (ilunocitinib tablet)	Original approval for control of pruritus associated with allergic dermatitis and control of atopic dermatitis in dogs.	520.1136
September 23, 2024 ...	200-776	Pharmgate Inc. (069254)	DERACIN (chlortetracycline), BOVATEC (lasalocid), and MGA (melengestrol acetate) Type C medicated feeds.	Original approval as a generic copy of NADA 141-531.	558.128

¹ See 21 CFR 510.600(c) for sponsor addresses.

II. Withdrawals of Approval

Med-Pharmex, Inc., 2727 Thompson Creek Rd., Pomona, CA 91767-1861

(drug labeler code 054925) requested that FDA withdraw approval of the two NADAs listed in table 2 because the products are no longer manufactured or marketed. As provided in the regulatory text of this document, the animal drug regulations are amended to reflect these actions.

Date of withdrawal of approval	File No.	Product name	21 CFR section
August 8, 2024	130-872	Nitrofurazone Anesthetic Dressing (nitrofurazone and butacaine sulfate)	524.1580c
Do	140-881	Nitrofurazone Soluble Dressing (nitrofurazone)	524.1580a

III. Change of Sponsor

Cephazone Pharma, LLC, 250 East Bonita Ave., Pomona, CA 91767 has informed FDA that it has transferred ownership of, and all rights and interest in, ANADA 200-420 for Ceftiofur Sodium Sterile Powder to Dechra Veterinary Products LLC, 7015 College Blvd., Suite 525, Overland Park, KS 66211. As provided in the regulatory

text, the animal drug regulations are amended to reflect this action.

IV. Technical Amendments

FDA is making the following amendments to improve the accuracy and readability of the animal drug regulations:

- 21 CFR 510.600(c) is amended to remove Cephazone Pharma, LLC and Provetica LLC from the lists of sponsors

of approved applications as these firms are no longer the sponsor of an approved application.

- 21 CFR 520.522 is amended to reflect a 2023 change of sponsorship for cyclosporine oral solution.
- 21 CFR 520.2090 is amended to revise the description of a tablet containing sarolaner, moxidectin, and pyrantel.

• 21 CFR 522.2470 is being amended to reflect previous approval of additional indications for use of tiletamine and zolazepam.

V. Legal Authority

This final rule is issued under section 512(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360b(i)). Although deemed a rule pursuant to the FD&C Act, this document does not meet the definition of “rule” in 5 U.S.C. 804(3)(A) because it is a “rule of particular applicability” and is not subject to the congressional review requirements in 5 U.S.C. 801–808. Likewise, this is not a rule subject to Executive Order 12866.

List of Subjects

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Parts 520, 522, and 524

Animal drugs.

21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 510, 520, 522, 524, and 558 are amended as follows:

PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for part 510 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

§ 510.600 [Amended]

■ 2. In § 510.600, in the table in paragraph (c)(1), remove the entries for “Cephazone Pharma, LLC” and “Provetica LLC”; and in the table in paragraph (c)(2), remove the entries for “068330” and “086097”.

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 3. The authority citation for part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

§ 520.304 [Amended]

■ 4. In § 520.304, in paragraph (b)(2), add in numerical order the text “086101”.

§ 520.522 [Amended]

■ 5. In § 520.522 in paragraph (b)(4), remove the text “086097” and add in its place the text “013744”.

■ 6. Add § 520.1136 to read as follows:

§ 520.1136 Ilunocitinib.

(a) *Specifications.* Each tablet contains 4.8, 6.4, 8.5, and 15 milligrams (mg) ilunocitinib.

(b) *Sponsor.* See No. 058198 in § 510.600(c) of this chapter.

(c) *Conditions of use—(1) Amount.* Administer orally 0.27 to 0.36 mg ilunocitinib/lb (0.6 to 0.8 mg ilunocitinib/kg) body weight, once daily, with or without food.

(2) *Indications for use.* For the control of pruritus associated with allergic dermatitis and control of atopic dermatitis in dogs at least 12 months of age.

(3) *Limitations.* Federal law restricts this drug to use by or on the order of a licensed veterinarian.

§ 520.1372 [Redesignated as § 520.1375]

■ 7. Redesignate § 520.1372 as § 520.1375 and revise the section heading to read as follows:

§ 520.1375 Methimazole tablets.

* * * * *

■ 8. Add § 520.1376 to read as follows:

§ 520.1376 Methimazole solution.

(a) *Specifications.* Each milliliter of solution contains 5 milligrams (mg) methimazole.

(b) *Sponsor.* See No. 055529 in § 510.600(c) of this chapter.

(c) *Conditions of use in cats—(1) Amount.* Administer a starting dose of 2.5 mg every 12 hours. Following 3 weeks of treatment, the dose should be titrated to effect based on individual serum total T4 (TT4) levels and clinical response. Dose adjustments should be made in 2.5 mg increments with a maximum dosage of 20 mg per day divided, not to exceed 10 mg as a single dose.

(2) *Indications for use.* For the treatment of hyperthyroidism.

(3) *Limitations.* Federal law restricts this drug to use by or on the order of a licensed veterinarian.

■ 9. In § 520.2090, revise paragraph (a)(1) to read as follows:

§ 520.2090 Sarolaner, moxidectin, and pyrantel.

(a) * * *

(1) 3.0 milligrams (mg) sarolaner, 0.06 mg moxidectin, and 12.5 mg pyrantel (as pamoate salt);

* * * * *

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 10. The authority citation for part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 11. In § 522.313c, revise paragraph (b) to read as follows:

§ 522.313c Ceftiofur sodium.

* * * * *

(b) *Sponsors.* See Nos. 017033 and 054771 in § 510.600(c) of this chapter.

* * * * *

■ 12. In § 522.1450, revise paragraph (b) to read as follows:

§ 522.1450 Moxidectin solution.

* * * * *

(b) *Sponsors.* See Nos. 055529, 058198, and 061133 in § 510.600(c) of this chapter.

* * * * *

■ 13. In § 522.2470, revise the section heading and paragraph (b) to read as follows:

§ 522.2470 Tiletamine and zolazepam.

* * * * *

(b) *Sponsors.* See Nos. 017033, 051311, and 054771 in § 510.600(c) of this chapter.

* * * * *

§ 522.2630 [Amended]

■ 14. In § 522.2630, in paragraphs (b)(1) and (2), add in numerical order the text “069043”.

PART 524—OPHTHALMIC AND TOPICAL DOSAGE FORM NEW ANIMAL DRUGS

■ 15. The authority citation for part 524 continues to read as follows:

Authority: 21 U.S.C. 360b.

§ 524.1580a [Amended]

■ 16. Amend § 524.1580a in paragraph (b)(1) by removing the text “054925”.

§ 524.1580c [Removed]

■ 17. Remove § 524.1580c.

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 18. The authority citation for part 558 continues to read as follows:

Authority: 21 U.S.C. 354, 360b, 360ccc, 360ccc–1, 371.

■ 19. In § 558.128, revise paragraphs (e)(4)(ii), (vi), (viii), (xxviii), (xxxi), (xxxii), (xxxv), (xxxvi), (xxxix), (xli), (xlii), (li), (lii), (liv), (lvi), (lvii), (lix), and (lx) to read as follows:

§ 558.128 Chlortetracycline.

* * * * *

(e) * * *

(4) * * *

Chlortetracycline amount	Combination in grams/ton	Indications for use	Limitations	Sponsor
(ii) 5.83 to 14 g/ton to provide 70 mg/head/day.	Melengestrol acetate, 0.25 to 2 g/ton to provide 0.25 to 0.5 mg melengestrol acetate per head per day.	Growing beef heifers fed in confinement for slaughter (over 400 lb): For reduction of the incidence of liver abscesses, increased rate of weight gain, improved feed efficiency, and suppression of estrus (heat).	Melengestrol acetate Type C top-dress medicated feed must be top dressed or mixed at feeding with the Type C medicated feed containing 5.83 to 14 g/ton chlortetracycline. Chlortetracycline as provided by Nos. 054771 or 069254; melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
(vi) 33.33 to 50 g/ton to provide 0.5 mg/lb of body weight per day.	Melengestrol acetate, 0.5 to 2 g/ton to provide 0.5 mg melengestrol acetate per head per day.	Replacement beef heifers over 700 lb: For control of active infection of anaplasmosis caused by <i>Anaplasma marginale</i> susceptible to chlortetracycline and for suppression of estrus (heat).	Melengestrol acetate Type C top-dress medicated feed must be top dressed or mixed at feeding with the Type C medicated feed containing 33.33 to 50 g/ton chlortetracycline. Feeding a Type C top-dress medicated feed containing melengestrol acetate shall not exceed 24 days. Chlortetracycline as provided by Nos. 054771 or 069254; melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
(viii) 25 to 1,100 g/ton to provide 0.5 mg/lb of body weight daily.	Lasalocid, 30 to 600; melengestrol acetate, 0.5 to 2 g/ton to provide 0.5 mg/head/day melengestrol acetate.	Replacement beef heifers on pasture over 700 pounds: For control of active infection of anaplasmosis caused by <i>Anaplasma marginale</i> susceptible to chlortetracycline, increased rate of weight gain, and suppression of estrus (heat).	The melengestrol acetate Type C top-dress medicated feed must be top dressed onto or mixed at feeding with a Type C medicated feed containing 25 to 1,100 g/ton of chlortetracycline and 30 to 600 g/ton lasalocid to provide 0.5 mg chlortetracycline per lb body weight per day and not less than 60 mg or more than 300 mg lasalocid per head per day in at least 1 pound of feed. Do not exceed 24 days of feeding. See § 558.311(d) of this chapter. Chlortetracycline as provided by Nos. 054771 or 069254; lasalocid and melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
(xxviii) 500 to 4,000 g/ton to provide 10 mg/lb of body weight daily.	Lasalocid, 30 to 600; Melengestrol acetate, 0.5 to 2 g/ton to provide 0.5 mg/head/day melengestrol acetate.	Replacement dairy heifers on pasture less than 20 months of age and replacement beef heifers on pasture: For treatment of bacterial enteritis caused by <i>Escherichia coli</i> and bacterial pneumonia caused by <i>Pasteurella multocida</i> organisms susceptible to chlortetracycline, increased rate of weight gain, and suppression of estrus (heat).	The melengestrol acetate Type C top-dress medicated feed must be top dressed onto or mixed at feeding with a Type C medicated feed containing 500 to 4,000 g/ton of chlortetracycline and 30 to 600 g/ton lasalocid to provide 10 mg chlortetracycline per lb body weight per day and not less than 60 mg or more than 300 mg lasalocid per head per day in at least 1 pound of feed for not more than 5 days. After completing feeding of this combination, continue feeding a Type C top-dress medicated feed containing melengestrol acetate alone for a total time not exceeding 24 days of feeding. See § 558.311(d) of this chapter. Chlortetracycline as provided by Nos. 054771 or 069254, lasalocid and melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
(xxxi) 500 to 4,000 g/ton to provide 10 mg/lb of body weight daily.	Melengestrol acetate, 0.25 to 2 g/ton to provide 0.25 to 0.5 mg melengestrol acetate per head per day.	Growing beef heifers fed in confinement for slaughter: For the treatment of bacterial enteritis caused by <i>Escherichia coli</i> and bacterial pneumonia caused by <i>Pasteurella multocida</i> organisms susceptible to chlortetracycline, increased rate of weight gain, improved feed efficiency, and suppression of estrus (heat).	Melengestrol acetate Type C top-dress medicated feed must be top dressed onto or mixed at feeding with a Type C medicated feed containing 500 to 4,000 g/ton chlortetracycline for not more than 5 days. After completing feeding of this combination, continue feeding a Type C top-dress medicated feed containing melengestrol acetate alone. Chlortetracycline as provided by Nos. 054771 or 069254; melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254

Chlortetracycline amount	Combination in grams/ton	Indications for use	Limitations	Sponsor
(xxxii) 500 to 4,000 g/ton to provide 10 mg/lb of body weight daily.	Melengestrol acetate, 0.5 to 2 g/ton to provide 0.5 mg melengestrol acetate per head per day.	Replacement dairy heifers less than 20 months of age and replacement beef heifers: For the treatment of bacterial enteritis caused by <i>Escherichia coli</i> and bacterial pneumonia caused by <i>Pasteurella multocida</i> organisms susceptible to chlortetracycline, and for suppression of estrus (heat).	Melengestrol acetate Type C top-dress medicated feed must be top dressed or mixed at feeding with a Type C medicated feed containing 500 to 4,000 g/ton chlortetracycline for not more than 5 days. After completing feeding of this combination, continue feeding a Type C top-dress medicated feed containing melengestrol acetate alone for a total time not exceeding 24 days. Use in dairy heifers less than 20 months of age may cause drug residues in milk and/or in calves born to these cows. A withdrawal period has not been established for this product in pre-ruminating calves. Do not use in calves to be processed for veal. Chlortetracycline as provided by Nos. 054771 or 069254; melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
*	*	*	*	*
(xxxv) 4,000 to 20,000 g/ton to provide 10 mg/lb of body weight per day.	Melengestrol acetate, 0.25 to 2 g/ton to provide 0.25 to 0.5 mg melengestrol acetate per head per day.	Growing beef heifers fed in confinement for slaughter: For the treatment of bacterial enteritis caused by <i>Escherichia coli</i> and bacterial pneumonia caused by <i>Pasteurella multocida</i> organisms susceptible to chlortetracycline, and for increased rate of weight gain, improved feed efficiency, and suppression of estrus (heat).	Top dress 0.5 to 2 pounds of this medicated feed containing both drugs onto or mix at feeding with a non-medicated feed for not more than 5 days to provide 10 mg chlortetracycline per pound of body weight per day. After completing feeding of this combination, continue feeding a Type C top-dress medicated feed containing melengestrol acetate alone. A withdrawal period has not been established for this product in pre-ruminating calves. Do not use in calves to be processed for veal. Chlortetracycline as provided by Nos. 054771 or 069254; melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
(xxxvi) 4,000 to 20,000 g/ton to provide 10 mg/lb of body weight per day.	Melengestrol acetate, 0.5 to 2 g/ton to provide 0.5 mg melengestrol acetate per head per day.	Replacement dairy heifers less than 20 months of age and replacement beef heifers: For the treatment of bacterial enteritis caused by <i>Escherichia coli</i> and bacterial pneumonia caused by <i>Pasteurella multocida</i> organisms susceptible to chlortetracycline, and for suppression of estrus (heat).	Top dress 0.5 to 2 pounds of this medicated feed containing both drugs onto or mix at feeding with a non-medicated feed for not more than 5 days to provide 10 mg chlortetracycline per pound of body weight per day. After completing feeding of this combination, continue feeding a Type C top-dress medicated feed containing melengestrol acetate alone for a total time not exceeding 24 days. Use in dairy heifers less than 20 months of age may cause drug residues in milk and/or in calves born to these cows. A withdrawal period has not been established for this product in pre-ruminating calves. Do not use in calves to be processed for veal. Chlortetracycline as provided by Nos. 054771 or 069254; melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
*	*	*	*	*
(xxxix) 50 to 350 g/ton to provide 350 mg/head/day.	Melengestrol acetate, 0.5 to 2 g/ton to provide 0.5 mg melengestrol acetate per head per day.	Replacement beef heifers under 700 lb: For control of active infection of anaplasmosis caused by <i>Anaplasma marginale</i> susceptible to chlortetracycline and for suppression of estrus (heat).	Melengestrol acetate Type C top-dress medicated feed must be top dressed or mixed at feeding with the Type C medicated feed containing 50 to 350 g/ton chlortetracycline for up to 24 days of feeding. Chlortetracycline as provided by Nos. 054771 or 069254; melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
*	*	*	*	*
(xli) 20 to 350 g/ton to provide 350 mg/head/day.	Melengestrol acetate, 0.25 to 2 g/ton to provide 0.25 to 0.5 mg melengestrol acetate per head per day.	Growing beef heifers fed in confinement for slaughter: For control of bacterial pneumonia associated with shipping fever complex caused by <i>Pasteurella</i> spp. susceptible to chlortetracycline, increased rate of weight gain, improved feed efficiency, and suppression of estrus (heat).	Melengestrol acetate Type C top-dress medicated feed must be top dressed onto or mixed at feeding with the Type C medicated feed containing 20 to 350 g/ton chlortetracycline. Chlortetracycline as provided by Nos. 054771 or 069254; melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254

Chlortetracycline amount	Combination in grams/ton	Indications for use	Limitations	Sponsor
(xlii) 20 to 350 g/ton to provide 350 mg/head/day.	Melengestrol acetate, 0.5 to 2 g/ton to provide 0.5 mg melengestrol acetate per head per day.	Replacement dairy heifers less than 20 months of age and replacement beef heifers: For control of bacterial pneumonia associated with shipping fever complex caused by <i>Pasteurella</i> spp. susceptible to chlortetracycline and suppression of estrus (heat).	Melengestrol acetate Type C top-dress medicated feed must be top dressed or mixed at feeding with the Type C medicated feed containing 20 to 350 g/ton chlortetracycline. Feeding a Type C top-dress medicated feed containing melengestrol acetate shall not exceed 24 days of feeding. Use in dairy heifers less than 20 months of age may cause drug residues in milk and/or in calves born to these cows. A withdrawal period has not been established for this product in pre-ruminating calves. Do not use in calves to be processed for veal. Chlortetracycline as provided by Nos. 054771 or 069254; melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
(l) 25 to 700 g/ton to provide 350 mg/head/day.	Lasalocid, 30 to 600; melengestrol acetate, 0.5 to 2 g/ton to provide 0.5 mg/head/day melengestrol acetate.	Replacement beef heifers on pasture: For control of bacterial pneumonia associated with shipping fever complex caused by <i>Pasteurella</i> spp. susceptible to chlortetracycline, increased rate of weight gain, and suppression of estrus (heat).	The melengestrol acetate Type C top-dress medicated feed must be top dressed onto or mixed at feeding with a Type C medicated feed containing 25 to 700 g/ton of chlortetracycline and 30 to 600 g/ton lasalocid to provide 350 mg chlortetracycline per head daily and not less than 60 mg or more than 300 mg lasalocid per head daily in at least 1 pound of feed. Do not exceed 24 days of feeding. See § 558.311(d) of this chapter. Chlortetracycline as provided by Nos. 054771 or 069254; lasalocid and melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
(lii) 25 to 700 g/ton to provide 350 mg/head/day.	Lasalocid, 30 to 600; melengestrol acetate, 0.5 to 2 g/ton to provide 0.5 mg/head/day melengestrol acetate.	Replacement beef heifers on pasture under 700 pounds: For control of active infection of anaplasmosis caused by <i>Anaplasma marginale</i> susceptible to chlortetracycline, increased rate of weight gain, and suppression of estrus (heat).	The melengestrol acetate Type C top-dress medicated feed must be top dressed onto or mixed at feeding with a Type C medicated feed containing 25 to 700 g/ton of chlortetracycline and 30 to 600 g/ton lasalocid to provide 350 mg chlortetracycline per head daily and not less than 60 mg or more than 300 mg lasalocid per head daily in at least 1 pound of feed. Do not exceed 24 days of feeding. See § 558.311(d) of this chapter. Chlortetracycline as provided by Nos. 054771 or 069254; lasalocid and melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
(liv) 25 to 2,800 g/ton to provide 350 mg/head/day.	Lasalocid, 30 to 181.8; melengestrol acetate, 0.25 to 2 g/ton to provide 0.25 to 0.5 mg/head/day melengestrol acetate.	Growing beef heifers fed in confinement for slaughter under 700 pounds: For control of active infection of anaplasmosis caused by <i>Anaplasma marginale</i> susceptible to chlortetracycline, control of coccidiosis caused by <i>Eimeria bovis</i> and <i>E. zuernii</i> , increased rate of weight gain, improved feed efficiency, and suppression of estrus (heat).	The melengestrol acetate Type C top-dress medicated feed must be top dressed onto or mixed at feeding with a Type C medicated feed containing 25 to 2,800 g/ton of chlortetracycline and 30 to 181.8 g/ton lasalocid to provide 350 mg chlortetracycline per head per day and 1 mg lasalocid per 2.2 lb. of body weight daily with a maximum of 360 mg lasalocid per head per day. See § 558.311(d) of this chapter. Chlortetracycline as provided by Nos. 054771 or 069254; lasalocid and melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
(lvi) 25 to 2,800 g/ton to provide 350 mg/head/day.	Lasalocid, 30 to 181.8; melengestrol acetate, 0.25 to 2 g/ton to provide 0.25 to 0.5 mg/head/day melengestrol acetate.	Growing beef heifers fed in confinement for slaughter up to 800 pounds: For control of bacterial pneumonia associated with shipping fever complex caused by <i>Pasteurella</i> spp. susceptible to chlortetracycline, control of coccidiosis caused by <i>Eimeria bovis</i> and <i>E. zuernii</i> , increased rate of weight gain, improved feed efficiency, and suppression of estrus (heat).	The melengestrol acetate Type C top-dress medicated feed must be top dressed onto or mixed at feeding with a Type C medicated feed containing 25 to 2,800 g/ton of chlortetracycline and 30 to 181.8 g/ton lasalocid to provide 350 mg chlortetracycline per head daily and 1 mg lasalocid per 2.2 lb. of body weight daily with a maximum of 360 mg lasalocid per head per day. See § 558.311(d) of this chapter. Chlortetracycline as provided by Nos. 054771 or 069254; lasalocid and melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254

Chlortetracycline amount	Combination in grams/ton	Indications for use	Limitations	Sponsor
(lvii) 25 to 2,800 g/ton to provide 350 mg/head/day.	Lasalocid, 30 to 181.8; melengestrol acetate, 0.5 to 2 g/ton to provide 0.5 mg/head/day melengestrol acetate.	Replacement beef heifers up to 800 pounds: For control of bacterial pneumonia associated with shipping fever complex caused by <i>Pasteurella</i> spp. susceptible to chlortetracycline, control of coccidiosis caused by <i>Eimeria bovis</i> and <i>E. zuernii</i> , and suppression of estrus (heat).	The melengestrol acetate Type C top-dress medicated feed must be top dressed onto or mixed at feeding with a Type C medicated feed containing 25 to 2,800 g/ton of chlortetracycline and 30 to 181.8 g/ton lasalocid to provide 350 mg chlortetracycline per head daily and 1 mg lasalocid per 2.2 lb. of body weight daily with a maximum of 360 mg lasalocid per head per day. Do not exceed 24 days of feeding. See § 558.311(d) of this chapter. Chlortetracycline as provided by Nos. 054771 or 069254; lasalocid and melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
(lix) 500 to 4,000 g/ton to provide 10 mg/lb of body weight daily.	Lasalocid, 30 to 181.8; melengestrol acetate, 0.25 to 2 g/ton to provide 0.25 to 0.5 mg/head/day melengestrol acetate.	Growing beef heifers fed in confinement for slaughter up to 800 pounds: For the treatment of bacterial enteritis caused by <i>Escherichia coli</i> and bacterial pneumonia caused by <i>Pasteurella multocida</i> organisms susceptible to chlortetracycline, control of coccidiosis caused by <i>Eimeria bovis</i> and <i>E. zuernii</i> , increased rate of weight gain, improved feed efficiency, and suppression of estrus (heat).	The melengestrol acetate Type C top-dress medicated feed must be top dressed onto or mixed at feeding with a Type C medicated feed containing 500 to 4,000 g/ton of chlortetracycline and 30 to 181.8 g/ton lasalocid to provide 10 mg chlortetracycline per lb of body weight per day and 1 mg lasalocid per 2.2 lb of body weight per day with a maximum of 360 mg lasalocid per head per day for not more than 5 days of feeding. After completing feeding of this combination, continue feeding a Type C top-dress medicated feed containing melengestrol acetate alone. See § 558.311(d) of this chapter. Chlortetracycline as provided by Nos. 054771 or 069254; lasalocid and melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254
(lx) 500 to 4,000 g/ton to provide 10 mg/lb of body weight daily.	Lasalocid, 30 to 181.8; melengestrol acetate, 0.5 to 2 g/ton to provide 0.5 mg/head/day melengestrol acetate.	Replacement dairy heifers up to 800 pounds and less than 20 months of age and replacement beef heifers up to 800 pounds: For the treatment of bacterial enteritis caused by <i>Escherichia coli</i> and bacterial pneumonia caused by <i>Pasteurella multocida</i> organisms susceptible to chlortetracycline, control of coccidiosis caused by <i>Eimeria bovis</i> and <i>E. zuernii</i> , and suppression of estrus (heat).	The melengestrol acetate Type C top-dress medicated feed must be top dressed onto or mixed at feeding with a Type C medicated feed containing 500 to 4,000 g/ton of chlortetracycline and 30 to 181.8 g/ton lasalocid to provide 10 mg chlortetracycline per lb of body weight per day and 1 mg lasalocid per 2.2 lb of body weight per day with a maximum of 360 mg lasalocid per head per day for not more than 5 days. After completing feeding of this combination, continue feeding a Type C top-dress medicated feed containing melengestrol acetate alone. See § 558.311(d) of this chapter. Chlortetracycline as provided by Nos. 054771 or 069254; lasalocid and melengestrol as provided by No. 054771 in § 510.600(c) of this chapter.	054771 069254

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■ 20. In § 558.355:

- a. Revise paragraphs (b)(1) and (2);
 - b. Revise the headings for paragraphs (d)(9)(i) and (ii) and (d)(10)(i) and (ii);
 - c. Redesignate paragraph (f) as paragraph (e);
 - d. Revise newly redesignated paragraphs (e)(1)(i) and (ii), (e)(2)(i), and (e)(5);
 - e. Remove newly redesignated paragraph (e)(6); and
 - f. Redesignate newly redesignated paragraph (e)(7) as paragraph (e)(6).
- The revisions read as follows:

§ 558.355 Monensin.

* * * * *

- (b) * * *
- (1) No. 058198 for use as in paragraph (e) of this section.
- (2) No. 016592 for use of a Type A medicated article containing 90.7 grams monensin, USP, per pound as in paragraphs (e)(1)(i), (e)(1)(ii), (e)(2)(i), (e)(3), (e)(4)(v), and (e)(5) of this section.
- (d) * * *
- (9) * * *
- (i) *Cattle (as described in paragraphs (e)(3)(i) through (iii), (vi), and (vii); and*

(e)(4)(i) through (vi) of this section).

* * *

(ii) *Dairy cows (as described in paragraphs (e)(3)(iv) and (v) of this section).* * * *

(10) * * *

(i) *Cattle (as described in paragraphs (e)(3)(i) through (iii), (vi), and (vii); and (e)(4)(i) through (vi) of this section).*

* * *

(ii) *Dairy cows (as described in paragraphs (e)(3)(iv) and (v) of this section).* * * *

* * * * *

(e) * * *

(1) * * *

Monensin in grams/ton	Combination in grams/ton	Indications for use	Limitations	Sponsor
(i) 90 to 110		Broiler chickens: As an aid in the preven- tion of coccidiosis caused by <i>E. necatrix</i> , <i>E. tenella</i> , <i>E. acervulina</i> , <i>E. brunetti</i> , <i>E.</i> <i>mivati</i> , and <i>E. maxima</i> .	Feed continuously as the sole ration. Not for broiler breeder re- placement chickens. Do not feed to chickens over 16 weeks of age. Do not feed to laying chickens. In the absence of coccidi- osis in broiler chickens the use of monensin with no with- drawal period may limit feed intake resulting in reduced weight gain. Do not allow horses, other equines, mature turkeys, or guinea fowl access to feed containing monensin. Ingestion of monensin by horses and guinea fowl has been fatal.	016592 058198
(ii) 90 to 110		Laying hen replacement chickens and layer breeder replacement chickens: As an aid in the prevention of coccidiosis caused by <i>E. necatrix</i> , <i>E. tenella</i> , <i>E.</i> <i>acervulina</i> , <i>E. brunetti</i> , <i>E. mivati</i> , and <i>E.</i> <i>maxima</i> .	Feed continuously as the sole ration. Not for broiler breeder re- placement chickens. Do not feed to chickens over 16 weeks of age. Do not feed to laying chickens. In the absence of coccidi- osis in broiler chickens the use of monensin with no with- drawal period may limit feed intake resulting in reduced weight gain. Do not allow horses, other equines, mature turkeys, or guinea fowl access to feed containing monensin. Ingestion of monensin by horses and guinea fowl has been fatal.	016592 058198
*	*	*	*	*

(2) * * *

Monensin in grams/ton	Combination in grams/ton	Indications for use	Limitations	Sponsor
(i) 54 to 90		Growing turkeys: For the prevention of coccidiosis caused by <i>E. adenoeides</i> , <i>E.</i> <i>meleagrimitis</i> , and <i>E.gallapavonis</i> .	For growing turkeys only. Feed continuously as sole ration. Some strains of turkey coccidia may be monensin tolerant or resistant. Not for broiler breeder replacement chickens. Do not feed to laying hens. Do not feed to chickens over 16 weeks of age. Monensin may interfere with development of immunity to turkey coccidiosis. Do not allow horses, other equines, mature turkeys, or guinea fowl access to feed containing monensin. Ingestion of monensin by horses and guinea fowl has been fatal.	016592 058198
*	*	*	*	*

(5) *Minor species*—

Monensin in grams/ton	Indications for use	Limitations	Sponsor
(i) 73	Growing bobwhite quail: For the prevention of coc- cidiosis caused by <i>Eimeria dispersa</i> and <i>E.</i> <i>lettyae</i> .	Feed continuously as sole ration. Not for broiler breeder replacement chick- ens. Do not feed to laying hens. Do not feed to chickens over 16 weeks of age. Do not allow horses, other equines, mature turkeys, or guinea fowl ac- cess to feed containing monensin. Ingestion of monensin by horses and guinea fowl has been fatal.	016592 058198
(ii) 20	Goats maintained in confinement: For the preven- tion of coccidiosis caused by <i>Eimeria crandallis</i> , <i>E. christenseni</i> , and <i>E. ninakohlyakimovae</i> .	Feed continuously. Do not feed to lactating goats. See paragraph (d)(11) of this section for provisions for monensin liquid Type C goat feeds.	016592 058198
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Dated: November 20, 2024.
P. Ritu Nalubola,
Associate Commissioner for Policy.
[FR Doc. 2024-28061 Filed 11-29-24; 8:45 am]
BILLING CODE 4164-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 10014]

RIN 1545-BL21

**Recourse Partnership Liabilities and
Related Party Rules**

AGENCY: Internal Revenue Service (IRS),
Treasury.

ACTION: Final rule.

SUMMARY: This document contains final
regulations relating to recourse
liabilities of a partnership and special
rules for related persons. These

regulations affect partnerships and their
partners.

DATES:

Effective date: These regulations are
effective on December 2, 2024.

Applicability dates: For dates of
applicability, see §§ 1.704-2(l)(1)(vi),
1.752-2(l)(4), and 1.752-5(a).

FOR FURTHER INFORMATION CONTACT:

Concerning these final regulations,
contact Caroline Hay of the Office of
Associate Chief Counsel (Passthroughs
and Special Industries), (202) 317-6850
(not a toll-free number).

SUPPLEMENTARY INFORMATION:

Authority

This document amends the Income
Tax Regulations (26 CFR part 1) under

section 752 of the Internal Revenue Code (Code) regarding a partner's share of a recourse partnership liability (final regulations).

The final regulations are issued under the express delegation of authority under section 7805(a) of the Code, which provides that “[t]he Secretary shall prescribe all needful rules and regulations for the enforcement of [the Code], including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.”

Background

Section 752(a) provides, in general, that an increase in a partner's share of partnership liabilities (or an increase in a partner's individual liabilities by reason of the assumption by the partner of partnership liabilities) will be considered a contribution of money by the partner to the partnership. Conversely, section 752(b) provides that a decrease in a partner's share of partnership liabilities (or a decrease in a partner's individual liabilities by reason of the assumption by the partnership of the individual liabilities) will be considered a distribution of money to the partner by the partnership.

When determining a partner's share of partnership liabilities, the existing regulations under section 752 (existing §§ 1.752–1 through 1.752–3) distinguish between two categories of liabilities—recourse and nonrecourse. In general, a partnership liability is recourse to the extent that a partner or related person bears the economic risk of loss (EROL) as provided in existing § 1.752–2 and nonrecourse to the extent that no partner or related person bears the EROL under existing § 1.752–2. See existing § 1.752–1(a)(1) and (2). A partner bears the EROL for a partnership liability if the partner or related person: (1) has a payment obligation as provided in existing § 1.752–2(b) (except as provided in existing § 1.752–2(d)(2)); (2) is a lender to the partnership as provided in existing § 1.752–2(c) (except as provided in existing § 1.752–2(d)(1)); (3) guarantees payment of interest on a partnership nonrecourse liability as described in existing § 1.752–2(e); or (4) pledges property as security for a partnership liability as provided in existing § 1.752–2(h).

On December 16, 2013, the Department of the Treasury (Treasury Department) and the IRS published in the **Federal Register** (78 FR 76092) a notice of proposed rulemaking (REG–136984–12) that would amend the existing regulations under section 752 relating to a partner's share of a recourse partnership liability and the rules for

related persons (proposed regulations). The provisions of the proposed regulations are explained in greater detail in the preamble to the proposed regulations. The Treasury Department and the IRS received two comments responding to the proposed regulations. A public hearing on the proposed regulations was not requested or held.

The Treasury Department and the IRS are mindful that the proposed regulations were issued approximately eleven years ago. However, no intervening legislative changes regarding allocations of partnership liabilities have been made, no subsequent changes to regulatory rules concerning allocations of partnership liabilities address the issues in the proposed regulations, and the issues raised by the commenters continue to remain relevant. For these reasons, the Treasury Department and the IRS have determined that a new notice of proposed rulemaking or a further opportunity for public comment would be unlikely to generate different comments. Furthermore, issuing the same rules again as a notice of proposed rulemaking would unnecessarily delay further this rulemaking to the continued detriment of taxpayers desiring to apply these rules to allocate their partnership liabilities.

Accordingly, after full consideration of the comments received, these final regulations adopt the proposed regulations with certain modifications in response to the comments described in the Summary of Comments and Explanation of Revisions.

Summary of Comments and Explanation of Revisions

I. Overlapping Economic Risk of Loss

Under existing § 1.752–2(a), a partner's share of a recourse partnership liability equals the portion of that liability, if any, for which the partner or related person bears the EROL. The proposed regulations would have provided a proportionality rule to determine how partners share a partnership liability when multiple partners bear the EROL for the same liability (overlapping EROL). Under the proportionality rule, the EROL borne by a partner would be the amount of the partnership liability (or portion thereof) multiplied by a fraction obtained by dividing the amount of EROL borne by the partner by the sum of the EROL borne by all partners with respect to that liability.

One commenter suggested that the final regulations should not adopt the proportionality rule but should instead allocate liabilities among partners with

overlapping EROL in a manner analogous to the manner in which a nonrecourse liability is allocated under § 1.752–3. Specifically, the commenter suggested that such liabilities should be allocated in a manner consistent with the partner's interest in partnership profits. The commenter stated that this allocation approach more closely reflects the partners' economic arrangements and permits losses attributable to the liability to be allocated among the partners without any of the losses being suspended under section 704(d) of the Code.

Under the existing section 752 regulations, a recourse partnership liability is shared among partners that bear the EROL for the liability. Conversely, with a nonrecourse partnership liability, no partner bears economic risk with respect to the liability; therefore, the liability is generally allocated in accordance with a partner's share of partnership profits. Adopting a framework applicable to a nonrecourse partnership liability for purposes of determining how a recourse partnership liability should be shared under section 752 could cause the liability to be allocated disproportionately among those partners depending upon their profit-sharing ratios even though the partners bear the same amount of EROL for the liability. The proportionality rule provides a reasonable approach in addressing how a recourse partnership liability should be shared when partners have overlapping EROL. Therefore, the final regulations do not adopt the commenter's suggestion.

Another commenter requested clarification on the effect of local law and separate agreements between partners in determining whether partners have overlapping EROL. Under existing § 1.752–2(b)(3), all statutory and contractual obligations relating to a partnership liability are taken into account for purposes of determining a partner's EROL. Therefore, the proportionality rule applies to cases in which partners have overlapping EROL after taking into account all statutory and contractual obligations relating to the partnership liability. The final regulations illustrate in § 1.752–2(f)(9) that these obligations are considered in determining whether the partners have overlapping EROL.

II. Tiered Partnerships

Another overlapping EROL issue under section 752 relates to tiered partnerships. The proposed regulations would have provided guidance on how a lower-tier partnership (LTP) must allocate a liability in cases in which a

partner of an upper-tier partnership (UTP) is also a partner of the LTP and that partner bears the EROL with respect to the LTP's liability. Under the proposed regulations, the LTP would be required to allocate the liability directly to the partner.

One commenter, while acknowledging that the rule in the proposed regulations provides certainty and is administrable, expressed concerns that this rule could cause the partner in both the UTP and the LTP to recognize gain. The commenter recommended that the final regulations allow the LTP to allocate the liability in any reasonable manner between the partner and the UTP. The final regulations do not adopt this suggestion. The rule in the proposed regulations is the most administrable, especially in a case in which an LTP may not be aware that one of its partners is also a partner in a UTP that is removed from the LTP. Therefore, under the final regulations, an LTP must allocate the liability directly to the partner that bears the EROL with respect to the LTP's liability. Section § 1.752-2(i)(2) of the final regulations also clarifies how the tiered partnership rule applies in a case in which there is overlapping EROL among unrelated partners as provided in § 1.752-2(a)(2). Finally, the final regulations add an example to illustrate the application of the proportionality rule when there are tiered partnerships.

Another commenter suggested that a gap might exist between §§ 1.704-2 and 1.752-2 concerning partner nonrecourse deductions when a partner of a UTP (that is not also a partner of an LTP) bears the EROL for a liability of the LTP. Existing § 1.704-2(i) requires the partnership to allocate partner nonrecourse deductions to the partner that bears the EROL. Existing § 1.704-2(k)(5) treats an LTP's liability that is treated as a UTP's liability under § 1.752-4(a) also as a liability of the UTP for purpose of applying the rules under § 1.704-2(i). Under existing § 1.752-2(i), the LTP allocates its liability to the UTP when a partner of the UTP bears the EROL for the LTP's liability. The commenter asserted that, although existing § 1.752-2(i) requires the LTP to allocate the liability to the UTP, existing § 1.704-2 does not explicitly direct the LTP to allocate partner nonrecourse deductions attributable to that liability to the UTP. Thus, in the commenter's view, the existing rules do not treat the UTP as bearing the EROL for the LTP's liability for purposes of § 1.704-2(i). Contrary to this commenter's suggestion, existing §§ 1.704-2(i) and 1.704-2(k)(5) implicitly require an LTP to allocate

partner nonrecourse deductions attributable to a liability of the LTP to a UTP if a partner in the UTP bears the EROL for the LTP's liability. To eliminate any uncertainty, the final regulations add a sentence to § 1.704-2(k)(5) to clarify that a UTP is treated as bearing the EROL for an LTP's liability that is treated as the UTP's liability under § 1.752-4(a). Therefore, partner nonrecourse deductions attributable to the LTP's liability are allocated to the UTP under § 1.704-2(i).

III. General Issues of EROL

As previously stated, existing § 1.752-2(a) generally provides that a partner's share of a recourse partnership liability equals the portion of that liability, if any, for which the partner or related person bears the EROL. A partner bears the EROL for a partnership liability if the partner or related person has a payment obligation under § 1.752-2(b), is a lender as provided in § 1.752-2(c), guarantees payment of interest on a partnership nonrecourse liability as described in § 1.752-2(e), or pledges property as a security as provided in § 1.752-2(h). In describing when a partner bears the EROL for a partnership liability, the proposed regulations inadvertently failed to include situations under § 1.752-2(e) and (h). A commenter also suggested that references to § 1.752-2(c) relating to when a partner or related person is the lender take into account a de minimis rule under § 1.752-2(d)(1). Existing § 1.752-2(d)(1) provides that the general rule in § 1.752-2(c)(1) does not apply if a partner or related person whose interest (directly or indirectly through one or more partnerships and including the interest of any related person) in each item of partnership income, gain, loss, deduction, or credit for every taxable year that the partner is a partner in the partnership is 10 percent or less, makes a loan to the partnership that constitutes qualified nonrecourse financing within the meaning of section 465(b)(6) (determined without regard to the type of activity financed). To incorporate the rules in § 1.752-2(d)(1), the commenter suggested that the final regulations broadly refer to § 1.752-2 when describing situations that give rise to EROL instead of listing specific applicable paragraphs in § 1.752-2.

The final regulations correct the oversight in the proposed regulations by listing in one section of the regulations all the situations under § 1.752-2 in which a person directly bears the EROL, including by taking into account the de minimis exceptions in § 1.752-2(d). A person directly bears the EROL if that

person, and not a related person, meets the requirements of the listed situations.

IV. Related Party Rules

A. Constructive Ownership Rules

Under existing § 1.752-4(b)(1), a person is related to a partner if the person and the partner bear a relationship to each other that is specified in section 267(b) or section 707(b)(1) of the Code, except that "80 percent or more" is substituted for "more than 50 percent" in each of those sections, a person's family is determined by excluding siblings, and section 267(e)(1) and (f)(1)(A) are disregarded. In determining whether a partner and a person bear a relationship to each other that is specified in section 267(b) or section 707(b)(1), the constructive stock ownership rules in section 267(c) apply. *See* sections 267(c) and 707(b)(3). The proposed regulations would disregard the constructive stock ownership rules under section 267(c)(1) in determining whether to treat stock of a corporation owned, directly or indirectly, by or for a partnership as owned proportionately by or for its partners if the corporation is a lender under § 1.752-2(c) or has a payment obligation with respect to a liability of its partnership owner. The preamble to the proposed regulations explained that a partner's EROL that is limited to the partner's equity investment in the partnership should be treated differently than the risk of loss beyond that investment.

Commenters agreed with the rationale underlying the proposed regulations and suggested that the final regulations disregard two other constructive ownership situations in determining relatedness under § 1.752-4(b)(1). First, commenters suggested that the final regulations also disregard section 267(c)(1) in determining whether to treat a UTP's direct or indirect interest in an LTP as owned proportionately by or for the UTP's partners if the LTP is a lender or has a payment obligation with respect to a liability of the UTP. Commenters expressed the view that in this situation, like the one described in the proposed regulations, a partner should not be treated as bearing the EROL for a partnership liability merely as a result of the UTP's investment in an LTP that has a payment obligation with respect to a liability of the UTP.

Second, commenters suggested that the final regulations disregard section 1563(e)(2) of the Code in determining relatedness under § 1.752-4(b)(1). For purposes of § 1.752-4(b)(1), a person is related to a partner if the two parties bear a relationship to each other as

described in section 267(b)(3). Under section 267(b)(3), a corporate partner and another corporation that are members of the same controlled group (as defined in section 267(f)) are treated as related for purposes of § 1.752–4(b)(1). Section 267(f) gives “controlled group” the same meaning as in section 1563(a). Under section 1563(a), a controlled group of corporations includes a parent-subsidiary controlled group and a brother-sister controlled group. Section 1563(e) provides attribution rules that apply in determining whether a corporation is a member of a parent-subsidiary controlled group or of a brother-sister controlled group. Specific to partnerships, section 1563(e)(2) provides that stock owned, directly or indirectly, by or for a partnership is considered as owned by any partner having an interest of 5 percent or more in either the capital or profits of the partnership in proportion to the partner’s interest in capital or profits, whichever is greater. Therefore, in applying the attribution rules under section 1563(e)(2), a corporate partner in a partnership could be treated as a member of a parent-subsidiary controlled group or of a brother-sister controlled group, and thus, related to a corporation in that group that is owned by the partnership. If the corporate subsidiary of the partnership has a payment obligation with respect to a liability of the partnership, the corporate partner is treated as bearing the EROL for that liability. Commenters recommended not treating the corporate partner as bearing the EROL merely as a result of applying the attribution rules under section 1563(e)(2) because the partner’s risk is limited to the investment in the partnership.

The final regulations adopt these suggestions. Thus, in determining relatedness under § 1.752–4(b)(1), the final regulations disregard: (1) section 267(c)(1) in determining whether a UTP’s interest in an LTP is owned proportionately by or for the UTP’s partners when an LTP directly bears the EROL for a liability of the UTP and (2) section 1563(e)(2) in determining whether a corporate partner in a partnership and a corporation owned by the partnership are members of the same controlled group when the corporation directly bears the EROL for a liability of the owner partnership. In both of these situations, a partner should not be treated as bearing the EROL when the partner’s risk is limited to the partner’s equity investment in the partnership.

B. Related Partner Exception to Related Party Rules

Under the proposed regulations, if a person who owns (directly or indirectly through one or more partnerships) an interest in a partnership is a lender or has a payment obligation with respect to a partnership liability, or portion thereof, then other persons owning interests directly or indirectly (through one or more partnerships) in that partnership would not be treated as related to that person for purposes of determining the EROL borne by each of them for the partnership liability, or portion thereof (related partner exception).

One commenter recommended that the final regulations clarify the meaning of the phrase “not treated as related” as used in proposed examples illustrating the related partner exception. The phrase “not treated as related” is intended to mean that, under § 1.752–4(b)(1), the partner and the other person are not treated as bearing a relationship to each other that is specified in section 267(b) or section 707(b)(1) (taking into account any applicable attribution rules). Accordingly, the phrase “not treated as related” should be broadly interpreted. For instance, in § 1.752–4(b)(5)(iii) of the final regulations, A wholly owns corporations X and Y. X and Y are members of Partnership, an entity treated as a partnership for Federal tax purposes. The partnership agreement provides that X and Y share equally in all items of income, gain, loss, deduction, and credit of Partnership. X owns 79 percent of Z, a corporation, and Y owns 21 percent of Z. Each of X and Z guarantees the entire amount of a liability of Partnership. Under this example, X and Y are not treated as related for purposes of determining the EROL borne by each of them for the partnership’s liability, and, because neither X nor Y owns an 80 percent or more interest in Z, X and Y are not treated as related to Z under § 1.752–4(b)(1). In other words, X and Y are not related to Z within the meaning of § 1.752–4(b)(1), which takes into account any applicable attribution rules.

Another commenter suggested that the related partner exception should apply only to turn off relatedness so that the direct EROL borne by one partner is not attributed to another partner. This commenter recommended that the rule should not turn off the relationship between a partner that directly bears the EROL for a partnership liability and another partner for purposes of determining whether those partners are related to a non-partner that also bears EROL for the partnership’s liability. If

the related partner exception did not apply in this situation, both partners would be treated as bearing the EROL for the partnership liability and share the liability under the proportionality rule.

The proposed regulations would implement the result in *IPO II v. Commissioner*, 122 T.C. 295 (2004), which applied the related partner exception to turn off the relationship between the partners and allocated the entirety of a partnership’s liability to the partner that directly bore the EROL for the partnership’s liability despite a non-partner related person also bearing the EROL. Therefore, the final regulations do not adopt this suggestion.

C. Person Related to Multiple Partners (Multiple Partner Rule)

The proposed regulations provide that if a person is a lender or has a payment obligation with respect to a partnership liability and is related to more than one partner, then those partners that are related to that person (related partners) share the liability equally. One commenter suggested that the multiple partner rule may be unnecessary and recommended that the final regulations only include the proportionality rule in proposed § 1.752–2(a) to address how to allocate EROL when there is overlapping EROL, including because multiple partners are related to a person with a payment obligation. The final regulations do not adopt this suggestion. The multiple partner rule is necessary because, without this rule, the partners might share EROL incorrectly. For example, corporations X, Y, and Z are partners in an entity treated as a partnership for Federal tax purposes. The partnership agreement provides that the partners share equally in all items of income, gain, loss, deduction, and credit of XYZ partnership. A, an individual, wholly owns X and Y. Z is an unrelated third party. Partnership borrows \$1,000 from a bank and A and Z both guarantee the entire amount of the liability. Without the multiple partner rule, each of X and Y has \$1,000 of EROL from A’s \$1,000 guarantee and Z has \$1,000 of EROL from its guarantee. Each would be allocated one-third of the liability under the proportionality rule. In contrast, by applying the multiple partner rule, each of X and Y has \$500 of EROL. When the proportionality rule is applied, X and Y are each allocated one-fourth of the liability and Z is allocated one-half of the liability. This is the correct result because there is one guarantee from A’s related group and one guarantee by Z.

The commenter also recommended that if the final regulations retain the

multiple partner rule, the final regulations allow the related partners to agree among themselves how to allocate the liability, provided that the allocation is consistently applied. The commenter explained that allowing related partners to choose among themselves who receives the allocation could prevent related partners from recognizing an uneconomic gain. To address the commenter's underlying concern, the final regulations under § 1.752-4(b)(3) treat related partners as bearing the EROL for a partnership liability in proportion to each related partner's interest in partnership profits.

V. Ordering Rule

The proposed regulations had different rules regarding allocations of partnership liabilities for related and unrelated parties. In particular, the proportionality rule in proposed § 1.752-2(a) addressed when partners have overlapping EROL, the related partner exception in proposed § 1.752-4(b)(2) described when partners with direct EROL are not treated as related to other partners, and the multiple partner rule in proposed § 1.752-4(b)(3) provided how EROL is shared when multiple partners are related to a person that is a lender or has a payment obligation. One commenter expressed confusion regarding how these rules interact and suggested that the final regulations include an ordering rule.

The final regulations adopt this suggestion. An ordering rule is warranted to clarify how the proportionality rule interacts with the multiple partner rule and how the multiple partner rule interacts with the related partner exception. Therefore, under § 1.752-4(e), the first step is to determine whether any partner (direct or indirect) directly bears the EROL for the partnership liability and apply the related partner exception in § 1.752-4(b)(2). After applying the related partner exception (if applicable), the next step is to determine the amount of EROL each partner is considered to bear under § 1.752-4(b)(3) when multiple partners are related to a person that directly bears the EROL for a partnership liability. The final step is to apply the proportionality rule in § 1.752-2(a)(2) to determine the amount of EROL that each partner is considered to bear when the amount of EROL that multiple partners bear exceed the amount of the partnership liability. The final regulations include an example to illustrate the ordering rule in § 1.752-4(e).

VI. Liquidating Distributions of Partnership Interests

The preamble to the proposed regulations requested comments concerning the proper treatment of liabilities when a UTP bears the EROL for an LTP's liability and distributes, in a liquidating distribution, its interest in the LTP to one of its partners, but the transferee partner does not bear the EROL. As a result of this transaction, the LTP's recourse liability became a nonrecourse liability for purposes of section 752. The preamble requested comments specifically on the timing of the liability reallocation relative to the transaction that caused the liability to change from recourse to nonrecourse.

The Treasury Department and the IRS received thoughtful comments regarding this issue in response to the request for comments and are continuing to consider whether additional guidance regarding the issue is warranted.

VII. Applicability Date

Under the proposed regulations the rules would apply to any liability incurred or assumed by a partnership on or after the date the regulations are published as final regulations in the **Federal Register**. Commenters suggested that the final regulations allow a taxpayer to apply the final regulations to all liabilities incurred or assumed by a partnership (even liabilities incurred or assumed before the date of publication of these regulations), with respect to all returns, including amended returns, filed after the date these regulations are published. The final regulations adopt this suggestion, but clarify that a partnership must apply these rules consistently to all of its partnership liabilities and may not pick and choose which rules apply to them. Allowing taxpayers to apply these regulations before the publication date will provide greater certainty for partnerships and their partners and allow uniform rules to apply to all partnership liabilities. As a result, these final regulations allow a partnership to apply the rules to all liabilities with respect to returns filed on or after December 2, 2024, provided the partnership consistently applies all the rules in these final regulations to those liabilities.

A commenter also suggested that the final regulations permit partnership liabilities that are modified or refinanced and payment obligations that are modified to continue to be subject to the provisions of the regulations in effect prior to the applicability date of the final regulations, but only to the extent of the amount and duration of the pre-modification (or refinancing)

liability or payment obligation. The commenter identified § 1.707-5(c) as a model for a special refinancing rule. The commenter noted that without such a rule, the applicability date in the proposed regulations might discourage partnerships from refinancing debts or subject partners to unexpected adverse results.

The final regulations adopt this suggestion. Accordingly, the final regulations do not apply to refinanced debts to the extent of the amount and duration of the pre-modification liability. Instead, the rules in the regulations as in effect prior to December 2, 2024, continue to apply to those liabilities. For example, assume a partnership borrowed \$1,000 on January 28, 2024, from Bank, and X, a person related to Partners A and B, guaranteed the entire amount of that liability. Further assume that this liability was refinanced after December 2, 2024 so that the liability is now \$2,000 and X continues to guarantee the entire amount of the liability. The rules in effect prior to December 2, 2024 would continue to apply to the \$1,000 of pre-modification liability and X's guarantee of the \$1,000 when determining which partner bears the EROL. The rules in effect after December 2, 2024 would apply to the remaining \$1,000.

Special Analyses

I. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) (PRA) generally requires that a Federal agency obtain the approval of the Office of Management and Budget before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. These regulations do not impose a collection of information and, therefore, the PRA does not apply.

II. Regulatory Flexibility Act

The Treasury Department and the IRS have determined the rule will not have a significant economic impact on a substantial number of small entities. Although the rules affect small entities, data is not readily available about the number of taxpayers affected. Section 752 affects the allocation of partnership liabilities among partners in a partnership. The economic impact of these regulations is not likely to be significant, because the regulations will make it easier for taxpayers to comply with section 752. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), the Secretary hereby certifies that these regulations will not have a

significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f) of the Code, the proposed regulations that preceded these final regulations were submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration (SBA) for comment on its impact on small business. The Chief Counsel for the Office of Advocacy of the SBA did not provide any comments on the proposed regulations.

III. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. This rule does not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

IV. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. These final regulations do not have federalism implications and do not impose substantial direct compliance costs on state and local governments or preempt State law within the meaning of the Executive order.

V. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

VI. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs has designated this rule as not a “major rule,” as defined by 5 U.S.C. 804(2).

Statement of Availability of IRS Documents

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

Drafting Information

The principal author of these regulations is Caroline E. Hay, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.704–2 is amended by:

- 1. Adding a sentence after the first sentence of paragraph (k)(5).
- 2. Adding paragraph (l)(1)(vi).

The additions read as follows:

§1.704–2 Allocations attributable to nonrecourse liabilities.

* * * * *

(k) * * *

(5) * * * In addition, for purposes of applying paragraph (i) of this section, the upper-tier partnership is treated as bearing the economic risk of loss for the lower-tier partnership’s liabilities that are treated as the upper-tier partnership’s liabilities under § 1.752–4(a). * * *

(l) * * *

(1) * * *

(vi) The second sentence of paragraph (k)(5) of this section applies on or after December 2, 2024.

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■ **Par. 3.** Section 1.752–0 is amended by:

- 1. In § 1.752–2:
 - i. Revising the entry (a); and
 - ii. Adding entries (a)(1) through (3) and (i)(1) through (3).
- 2. In § 1.752–4:
 - i. Revising the entry (b)(2);
 - ii. Removing the entries (b)(2)(i) through (iii);

■ iii. Redesignating the entries (b)(2)(iv), (b)(2)(iv)(A) and (B) as (b)(4), (b)(4)(i) and (ii), respectively;

■ iv. Removing the entry (b)(2)(iv)(C); and

■ v. Adding the entries (b)(3) and (5), (e), and (f).

The revisions and additions read as follows:

1.752–0 Table of contents.

* * * * *

§ 1.752–2 Partner’s share of recourse liabilities.

(a) Partner’s share of recourse liabilities.

(1) In general.

(2) Overlapping economic risk of loss.

(3) Direct economic risk of loss.

* * * * *

(i) * * *

(1) In general.

(2) Coordination with overlapping economic risk of loss.

(3) Example.

* * * * *

§ 1.752–4 Special rules.

* * * * *

(b) * * *

(2) Related partner exception.

(3) Person related to more than one partner.

* * * * *

(5) Examples.

* * * * *

(e) Ordering rule.

(f) Example.

* * * * *

■ **Par. 4.** Section 1.752–2 is amended by:

- 1. Revising paragraphs (a).
- 2. Revising the headings for paragraphs (f)(1) through (8).
- 3. Revising paragraphs (f)(9), and (i).
- 4. In the first sentence of paragraph (l)(1), removing the language “Paragraphs (a)” and adding the language “Paragraphs (a)(1)” in its place.
- 5. In the first sentence of paragraph (l)(3), removing the language “§ 1.752–2(a)” and adding “§ 1.752–2(a)(1)” in its place.
- 6. Adding paragraph (l)(4).

The revisions and addition read as follows:

§ 1.752–2 Partner’s share of recourse liabilities.

(a) *Partner’s share of recourse liabilities*—(1) *In general.* A partner’s share of recourse partnership liability equals the portion of that liability, if any, for which the partner or related person bears the economic risk of loss. The determination of the extent to which a partner bears the economic risk of loss for a partnership liability is made under the rules in paragraphs (b) through (k) of this section.

(2) *Overlapping economic risk of loss.* For purposes of determining a partner’s

share of a recourse partnership liability, the amount of the partnership liability is taken into account only once. If the aggregate amount of the economic risk of loss that all partners are determined to bear for a partnership liability (or portion thereof) under paragraph (a)(1) of this section (without regard to this paragraph (a)(2)) exceeds the amount of such liability (or portion thereof), then the economic risk of loss borne by each partner for such liability equals the amount determined by multiplying—

(i) The amount of such liability (or portion thereof) by

(ii) The fraction obtained by dividing the amount of the economic risk of loss that such partner is determined to bear for that liability (or portion thereof) under paragraph (a)(1) of this section, by the sum of such amounts for all partners.

(3) *Direct economic risk of loss.* For purposes of this section and § 1.752-4, a person directly bears the economic risk of loss for a partnership liability if that person has a payment obligation under paragraph (b) of this section (except as provided in paragraph (d)(2) of this section for certain partner guarantees), is a lender as provided in paragraph (c) of this section (except as provided in paragraph (d)(1) of this section for certain partner loans), guarantees payment of interest on a partnership nonrecourse liability as described in paragraph (e) of this section, or pledges property as a security as provided in paragraph (h) of this section.

* * * * *

(f) * * *

(1) *Example 1. Determining when a partner bears the economic risk of loss.* * * *

(2) *Example 2. Recourse liability; deficit restoration obligation.* * * *

(3) *Example 3. Guarantee by limited partner; partner deemed to satisfy obligation.* * * *

(4) *Example 4. Partner guarantee with right of subrogation.* * * *

(5) *Example 5. Bifurcation of partnership liability; guarantee of part of nonrecourse liability.* * * *

(6) *Example 6. Wrapped debt.* * * *

(7) *Example 7. Guarantee of interest by partner treated as part recourse and part nonrecourse.* * * *

(8) *Example 8. Continent obligation not recognized.* * * *

(9) *Example 9. Overlapping economic risk of loss.* (i) A and B are unrelated equal members of limited liability company, AB. AB is treated as a partnership for Federal tax purposes. AB borrows \$1,000 from Bank. A guarantees payment for the entire

amount of AB's \$1,000 liability and B guarantees payment of up to \$500 of the liability, if any amount of the full \$1,000 liability is not recovered by Bank. Under paragraph (b)(1) of this section, A bears \$1,000 of economic risk of loss for AB's liability and B bears \$500 of economic risk of loss for AB's liability. A and B have not entered into a loss-sharing agreement addressing their status as co-guarantors, and local law does not clearly establish responsibility as between them for the liability.

(ii) Because the aggregate amount of A's and B's economic risk of loss under paragraph (a)(1) of this section (\$1,500) exceeds the amount of AB's liability (\$1,000), the economic risk of loss borne by each of A and B is determined under paragraph (a)(2) of this section. Under paragraph (a)(2) of this section, A's economic risk of loss equals \$1,000 multiplied by \$1,000/\$1,500, or \$667, and B's economic risk of loss equals \$1,000 multiplied by \$500/\$1,500, or \$333.

* * * * *

(i) *Treatment of recourse liabilities in tiered partnerships—(1) In general.* If a partnership (upper-tier partnership) owns (directly or indirectly through one or more partnerships) an interest in another partnership (lower-tier partnership), the liabilities of the lower-tier partnership are allocated to the upper-tier partnership in an amount equal to the sum of the following—

(i) The amount of liabilities with respect to which the upper-tier partnership directly bears the economic risk of loss as described in paragraph (a)(3) of this section; and

(ii) The amount of any other liabilities with respect to which a partner of the upper-tier partnership bears the economic risk of loss, provided the partner is not also a partner in the lower-tier partnership.

(2) *Coordination with overlapping economic risk of loss.* A lower-tier partnership takes into account paragraph (a)(2) of this section prior to the application of this paragraph (i).

(3) *Example.* (i) A and B (which is unrelated to A) contribute \$810,000 and \$90,000 to UTP, a limited liability company treated as a partnership for Federal tax purposes, in exchange for a 90 percent and 10 percent interest in UTP, respectively. UTP contributes the \$900,000 to LTP, a partnership for Federal tax purposes, in exchange for a 90 percent interest in LTP and A contributes \$100,000 directly to LTP in exchange for a 10 percent interest in LTP. UTP and LTP both reported losses in their initial years that reduced the partners' bases in UTP and LTP to zero.

LTP borrows \$10 million. UTP and LTP both had no income in the year at issue. At the request of the lender, A and B both provide their personal guaranty for the entire amount of LTP's liability.

(ii) Under paragraph (b)(1) of this section, A has \$10 million of economic risk of loss for LTP's liability and B has \$10 million of economic risk of loss for LTP's liability. Under paragraph (i)(2) of this section, LTP takes into account paragraph (a)(2) of this section prior to determining the amount of liabilities allocated to UTP under paragraph (i)(1) of this section. Under paragraph (a)(2) of this section, A is considered to bear \$5 million ($(\$10 \text{ million}/\$20 \text{ million}) \times \$10 \text{ million}$) of economic risk of loss and B is considered to also bear \$5 million ($(\$10 \text{ million}/\$20 \text{ million}) \times \$10 \text{ million}$) of economic risk of loss for LTP's liability. Pursuant to paragraph (a)(1) of this section, LTP allocates \$5 million to A for A's direct interest in LTP's liability. Under paragraph (i)(1) of this section, LTP allocates \$5 million to UTP (\$5 million attributable to B's economic risk of loss for LTP's liability).

(iii) Pursuant to § 1.752-4(a), UTP treats its share of LTP's liability (\$5 million) as a liability of UTP. Because A bears the economic risk of loss for LTP's liability and is a partner in LTP, under paragraph (i)(1)(ii) of this section, UTP's share of LTP's liability (\$5 million) only includes the amount of LTP's liabilities with respect to which B bears the economic risk of loss. Therefore, under paragraph (a)(1) of this section, UTP allocates \$5 million of UTP's share of LTP's liability to B and none to A.

* * * * *

(l) * * *

(4) Paragraphs (a)(2) and (3), (f)(9), and (i) of this section apply to liabilities incurred or assumed by a partnership on or after December 2, 2024, other than liabilities incurred or assumed by a partnership pursuant to a written binding contract in effect prior to that date. To the extent that the proceeds of a partnership liability (refinancing debt) are allocable under the rules of § 1.163-8T to payments discharging all or part of any other liability (pre-modification liability) of that partnership, the refinancing debt will be treated as though it was incurred or assumed by the partnership prior to December 2, 2024, to the extent of the amount and duration of the pre-modification liability. A partnership may apply paragraphs (a)(2) and (3), (f)(9), and (i) of this section to all of its liabilities (including liabilities incurred or assumed by a partnership prior to December 2, 2024), for any return filed

on or after December 2, 2024 provided the partnership consistently applies all the rules in paragraphs (a)(2) and (3), (f)(9), and (i) of this section and § 1.752–4(b)(1)(iv) and (v), (b)(2) and (3), (b)(5)(i) through (iv), (e), and (f) to those liabilities.

■ **Par. 5.** Section 1.752–4 is amended by:

- 1. In paragraph (b)(1)(i), removing the language “sections;” and adding the language “sections.” in its place.
- 2. In paragraph (b)(1)(ii), removing the language “sisters; and” and adding the language “sisters.” in its place.
- 3. Adding paragraphs (b)(1)(iv) and (v).
- 4. Revising paragraph (b)(2).
- 5. Adding paragraphs (b)(3) through (5), (e), and (f).

The additions and revision read as follows:

§ 1.752–4 Special rules.

* * * * *

(b) * * *

(1) * * *

(iv) Disregard section 267(c)(1) in determining whether—

(A) Stock of a corporation owned, directly or indirectly, by or for a partnership is considered as being owned proportionately by or for its partners when the corporation directly bears the economic risk of loss as described in § 1.752–2(a)(3) for a liability of the partnership; and

(B) A capital interest or a profits interest in a partnership (lower-tier partnership) owned, directly or indirectly, by or for a partnership (upper-tier partnership) is considered as being owned proportionately by or for the upper-tier partnership’s partners when the lower-tier partnership directly bears the economic risk of loss as described in § 1.752–2(a)(3) for a liability of the upper-tier partnership.

(v) Disregard section 1563(e)(2) in determining whether a corporate partner and a corporation are members of the same controlled group (as defined in section 267(f)) under section 267(b)(3) when the corporation directly bears the economic risk of loss as described in § 1.752–2(a)(3) for a liability of the partnership.

(2) *Related partner exception.* Notwithstanding paragraph (b)(1) of this section (which defines related person), if a person who owns (directly or indirectly through one or more partnerships) an interest in a partnership directly bears the economic risk of loss as described in § 1.752–2(a)(3) for a partnership liability, or portion thereof, then other persons owning interests directly or indirectly (through one or more partnerships) in

that partnership are not treated as related to that person for purposes of determining the economic risk of loss borne by each of them for such partnership liability, or portion thereof. This paragraph (b)(2) does not apply when determining a partner’s interest under the de minimis rules in § 1.752–2(d) and (e).

(3) *Person related to more than one partner.* For purposes of determining a partner’s economic risk of loss for a partnership liability, or a portion thereof, when a person who directly bears the economic risk of loss as described in § 1.752–2(a)(3) for the partnership liability is related to more than one partner under paragraph (b)(1) of this section, each partner that is related to such person is considered to bear the economic risk of loss for the partnership liability, or portion thereof, in proportion to the partner’s interest in partnership profits.

(4) *Special rule where entity structured to avoid related person status—(i) In general.* If—

(A) A partnership liability is owed to or guaranteed by another entity that is a partnership, an S corporation, a C corporation, or a trust;

(B) A partner or related person owns (directly or indirectly) a 20 percent or more ownership interest in the other entity; and

(C) A principal purpose of having the other entity act as a lender or guarantor of the liability was to avoid the determination that the partner that owns the interest bears the economic risk of loss for federal income tax purposes for all or part of the liability; then the partner is treated as holding the other entity’s interest as a creditor or guarantor to the extent of the partner’s or related person’s ownership interest in the entity.

(ii) *Ownership interest.* For purposes of paragraph (b)(4)(i) of this section, a person’s ownership interest in—

(A) A partnership equals the partner’s highest percentage interest in any item of partnership loss or deduction for any taxable year;

(B) An S corporation equals the percentage of the outstanding stock in the S corporation owned by the shareholder;

(C) A C corporation equals the percentage of the fair market value of the issued and outstanding stock owned by the shareholder; and

(D) A trust equals the percentage of the actuarial interests owned by the beneficial owner of the trust.

(5) *Examples.* The following examples illustrate the principles of paragraph (b) of this section.

(i) *Example 1: Person related to more than one partner.* A, an individual, owns 100 percent of X, a corporation. X owns 100 percent of Y, a corporation. A owns a 40 percent capital and profits interest and X owns a 60 percent capital and profits interest in P, a limited liability company treated as a partnership for Federal tax purposes. P borrows \$1,000 from Bank. Y guarantees payment of the entire \$1,000 debt owed to Bank. A and X do not directly bear the economic risk of loss as described in § 1.752–2(a)(3) for the liability. Therefore, paragraph (b)(2) of this section does not apply for purposes of determining the economic risk of loss borne by A and X. Under paragraph (b)(1) of this section, Y is related to A and X. Therefore, under paragraph (b)(3) of this section, A bears the economic risk of loss of \$400 and X bears the economic risk of loss of \$600 for the \$1,000 liability.

(ii) *Example 2: Related partner exception.* A, an individual, owns 100 percent of two corporations, X and Y. A and Y are members of P, a limited liability company treated as a partnership for Federal tax purposes. P borrows \$1,000 from Bank. Each of A and X guarantees payment of the entire \$1,000 debt owed to Bank. A and Y are not treated as related to each other pursuant to paragraph (b)(2) of this section because A directly bears the economic risk of loss as described in § 1.752–2(a)(3) for the \$1,000 liability. Y is therefore not treated as related to X. Because A is the only partner that bears the economic risk of loss for P’s \$1,000 liability, A’s share of the liability is \$1,000 under § 1.752–2(a)(1).

(iii) *Example 3: Related partner exception.* A, an individual, owns 100 percent of two corporations, X and Y. X owns 79 percent of a corporation, Z, and Y owns the remaining 21 percent of Z. X and Y are members of P, a limited liability company treated as a partnership for Federal tax purposes. The partnership agreement provides that X and Y share equally in all items of income, gain, loss, deduction, and credit of P. P borrows \$2,000 from Bank. Each of X and Z guarantees payment of the entire \$2,000 debt owed to Bank. X directly bears the economic risk of loss as described in § 1.752–2(a)(3) for P’s \$2,000 liability; therefore, paragraph (b)(2) of this section applies and X and Y are not treated as related for purposes of determining the economic risk of loss borne by each of them for P’s \$2,000 liability. Because X and Y are not treated as related and neither owns an 80 percent or more interest in Z, neither X nor Y is treated as related to Z under paragraph (b)(1) of this section. Because

X bears the economic risk of loss for P's \$2,000 liability, X's share of the liability is \$2,000 under § 1.752-2(a)(1).

(iv) *Example 4: Related partner exception and person related to more than one partner.* Same facts as in paragraph (b)(5)(iii) of this section (*Example 3*), but X guarantees payment of up to \$1,200 of the debt owed to Bank if any amount of the full \$2,000 is not recovered by Bank and Z guarantees payment of \$2,000. Pursuant to paragraph (b)(2) of this section, X and Y are not treated as related to the extent of X's \$1,200 guarantee because X directly bears the economic risk of loss as described in § 1.752-2(a)(3) for \$1,200 of P's \$2,000 liability. X's share of the liability is \$1,200 under § 1.752-2(a)(1). In addition, because paragraph (b)(2) of this section does not apply to the remaining portion of the liability that X did not guarantee, X and Y are treated as related for purposes of the remaining \$800 of the liability pursuant to paragraph (b)(1) of this section. Therefore, Z is treated as related to X and Y under paragraph (b)(1) of this section. Pursuant to paragraph (b)(3) of this section, because X and Y each has a 50 percent interest in all items of income, gain, loss, deduction, and credit of P, X and Y each bear the economic risk of loss for \$400 of the remaining \$800 liability, and thus each has a \$400 share of the liability under § 1.752-2(a)(1). In sum, X's share of P's \$2,000 liability is \$1,600 (\$1,200 plus \$400) and Y's share of P's \$2,000 liability is \$400.

(v) *Example 5: Entity structured to avoid related person status.* A, B, and C form a general partnership, ABC. A, B, and C are equal partners, each contributing \$1,000 to the partnership. A and B want to loan money to ABC and have the loan treated as nonrecourse for purposes of section 752. A and B form partnership AB to which each contributes \$50,000. A and B share losses equally in partnership AB. Partnership AB loans partnership ABC \$100,000 on a nonrecourse basis secured by the property ABC buys with the loan. Under these facts and circumstances, A and B bear the economic risk of loss with respect to the partnership liability equally based on their percentage interest in losses of partnership AB.

* * * * *

(e) *Ordering rule.* In determining a partner's share of a recourse partnership liability, the rules in paragraph (b)(2) of this section, if applicable, apply before the rules in paragraph (b)(3) of this section. The rules in paragraph (b)(3) of

this section apply before the rules in § 1.752-2(a)(2).

(f) *Example.* The following example illustrates the application of paragraph (e) of this section.

(1) *Facts.* A, an individual, owns 100 percent of two corporations, X and Y. X, Y, and Z, a corporation, are members of P, a limited liability company treated as a partnership for Federal tax purposes. The partnership agreement provides that the partners share equally in all items of income, gain, loss, deduction, and credit of P. Z is not related to A, X, or Y. P borrows \$1,000 from Bank. Each of A, X, and Z guarantees payment for the entire amount of P's \$1,000 liability. Each of A, X, and Z has a payment obligation of \$1,000 under § 1.752-2(b) for P's \$1,000 liability.

(2) *Analysis.* (i) Under paragraph (e) of this section, first apply the rules under paragraph (b)(2) of this section, then apply the rules under paragraph (b)(3) of this section, and finally apply the rules under § 1.752-2(a)(2) to determine how to allocate P's \$1,000 liability among X, Y, and Z under § 1.752-2(a)(1). Under paragraph (b)(2) of this section, X and Y are not treated as related to each other with respect to X's payment obligation for the \$1,000 liability because X directly bears the economic risk of loss as described in § 1.752-2(a)(3). Therefore, X is treated as bearing \$1,000 of the economic risk of loss for P's liability.

(ii) Because the rules in paragraph (b)(2) of this section do not affect A's relationship to X and Y, X and Y are related to A under paragraph (b)(1) of this section. Because A is related to both X and Y, each of X and Y is considered to bear the economic risk of loss for P's liability in proportion to X's and Y's interest in P. Because they both have a one-third interest in all items of income, gain, loss, deduction, and credit of P, each of X and Y bears \$500 of economic risk of loss under paragraph (b)(3) of this section with respect to A's \$1,000 payment obligation for P's liability.

(iii) Z has a payment obligation with respect to the \$1,000 liability under § 1.752-2(b)(1) and thus, bears \$1,000 of the economic risk of loss for P's liability.

(iv) After applying paragraphs (b)(2) and (3) of this section, X is considered to bear \$1,500 of the economic risk of loss for P's liability and Y is considered to bear \$500 of the economic risk of loss for P's liability. Z is considered to bear \$1,000 of the economic risk of loss for P's liability. Because the aggregate amount of X's, Y's, and Z's economic risk of loss (\$3,000) exceeds the amount of P's liability (\$1,000), the economic risk of loss borne by X, Y, and Z is

determined under § 1.752-2(a)(2).

Under § 1.752-2(a)(2), X's economic risk of loss is \$500 $((\$1,500/\$3,000) \times \$1,000)$, Y's economic risk of loss is \$167 $((\$500/\$3,000) \times \$1,000)$, and Z's economic risk of loss is \$333 $((\$1,000/\$3,000) \times \$1,000)$. Therefore, under § 1.752-2(a)(1), X's share of P's liability is \$500, Y's share is \$167, and Z's share is \$333.

■ **Par. 6.** Section 1.752-5 is amended by:

■ 1. Revising the section heading.

■ 2. Adding three sentences after the first sentence in paragraph (a).

■ 3. In paragraph (a), removing the word "However" at the beginning of the fifth sentence and adding "In addition" in its place.

The revision and additions read as follows:

§ 1.752-5 Applicability dates and transition rules.

(a) * * * However, § 1.752-4(b)(1)(iv) and (v), (b)(2) and (3), (b)(5)(i) through (iv), (e), and (f) apply to any liability incurred or assumed by a partnership on or after December 2, 2024, other than a liability incurred or assumed by a partnership pursuant to a written binding contract in effect prior to that date. To the extent that the proceeds of a partnership liability (refinancing debt) are allocable under the rules of § 1.163-8T to payments discharging all or part of any other liability (pre-modification liability) of that partnership, the refinancing debt will be treated as though it was incurred or assumed by the partnership prior to December 2, 2024, to the extent of the amount and duration of the pre-modification liability. A partnership may apply § 1.752-4(b)(1)(iv) and (v), (b)(2) and (3), (b)(5)(i) through (iv), (e), and (f) to all of its liabilities (including liabilities incurred or assumed by a partnership prior to December 2, 2024), for any return filed on or after December 2, 2024 provided the partnership consistently applies all the rules in § 1.752-2(a)(2) and (3), (f)(9), and (i) and § 1.752-4(b)(1)(iv) and (v), (b)(2) and (3), (b)(5)(i) through (iv), (e), and (f) to those liabilities. * * *

* * * * *

Douglas W. O'Donnell,
Deputy Commissioner.

Approved: October 30, 2024.

Aviva R. Aron-Dine,
Deputy Assistant Secretary of the Treasury
(Tax Policy).

[FR Doc. 2024-27840 Filed 11-29-24; 8:45 am]

BILLING CODE 4830-01-P

**ENVIRONMENTAL PROTECTION
AGENCY****40 CFR Part 52****[EPA–R08–OAR–2024–0389; FRL–12173–
02–R8]****Air Plan Partial Approval and Partial
Disapproval; Utah; Regional Haze
State Implementation Plan for the
Second Implementation Period; Air
Plan Disapproval; Utah; Prong 4
(Visibility) for the 2015 8-Hour Ozone
National Ambient Air Quality Standard****AGENCY:** Environmental Protection
Agency (EPA).**ACTION:** Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is partially approving and partially disapproving a regional haze state implementation plan (SIP) revision submitted by the State of Utah on August 2, 2022 (Utah's regional haze SIP submission), to address applicable requirements under the Clean Air Act (CAA) and the EPA's Regional Haze Rule (RHR) for the regional haze program's second implementation period. Additionally, the EPA is disapproving the visibility transport "Prong 4" portion of Utah's infrastructure SIP submission submitted on January 9, 2020, for the 2015 Ozone National Ambient Air Quality Standard (NAAQS). The EPA is taking these actions pursuant to the CAA.

DATES: This rule is effective on January 2, 2025.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2024–0389. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Clayton Bean, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD–IO, 1595 Wynkoop Street, Denver, Colorado 80202–1129, telephone number: (303) 312–6143, email address: bean.clayton@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document "we," "us," and "our" means the EPA.

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I. What is being addressed in this document?

The EPA is partially approving and partially disapproving Utah's regional haze plan for the second implementation period. As required by section 169A of the CAA, the RHR calls for State and Federal agencies to work together to improve visibility in 156 national parks and wilderness areas, known as mandatory Class I Federal areas.¹ The rule requires the States, in coordination with the EPA, the National Park Service, the Fish and Wildlife Service, the Forest Service, and other interested parties, to develop and implement air quality protection plans to reduce the pollution that causes visibility impairment in mandatory Class I Federal areas. Visibility impairing pollutants include fine and coarse particulate matter (PM) (e.g., sulfates, nitrates, organic carbon, elemental carbon, and soil dust) and their precursors (e.g., sulfur dioxide (SO₂), oxides of nitrogen (NO_x), and, in some cases, volatile organic compounds (VOC) and ammonia (NH₃)). As discussed in further detail in our proposed rule, this document, and the accompanying Response to Comments (RTC) document, the EPA finds that Utah submitted a regional haze SIP that does not meet all of the statutory and regulatory requirements for the regional haze second implementation period.

Additionally, the EPA is disapproving a portion of Utah's January 9, 2020, infrastructure SIP submission for the 2015 ozone NAAQS that addresses interstate transport of visibility impairing pollutants. Utah submitted this SIP submission to address the applicable requirements of CAA section 110(a)(2) for the 2015 ozone NAAQS. We are disapproving the portion of the infrastructure SIP submission addressing interstate transport of visibility impairing pollutants for not meeting the requirements of CAA section 110(a)(2)(D)(i)(II) ("Prong 4").

The State's submissions, the proposed rule, and the RTC document can be found in the docket for this action.

**II. Summary of the Proposed Action,
Public Comments, and the EPA's
Rationale for Final Action**

Our notice of proposed rulemaking was published on August 19, 2024. 89 FR 67208. Our public comment period closed on September 18, 2024. During the public notice and comment period, we received more than 5,600 comments on our proposal. The full text of comments received is included in the publicly posted docket associated with this action at <https://www.regulations.gov>. Our RTC document, which is also included in the docket, provides full, detailed responses to all significant comments received and further explains the basis for our final action.

**A. Regional Haze Plan for the Second
Implementation Period**

On August 2, 2022, Utah submitted a revision to its SIP to address regional haze for the second implementation period, in accordance with the requirements of the CAA's regional haze program established by CAA sections 169A and 169B and 40 CFR 51.308.

On August 19, 2024, the EPA proposed to disapprove certain provisions of Utah's regional haze SIP submission.² Specifically, we proposed to disapprove the portions of Utah's regional haze SIP submission relating to 40 CFR 51.308(f)(2): long-term strategy; 40 CFR 51.308(f)(3): reasonable progress goals; and 40 CFR 51.308(i): Federal Land Manager (FLM) consultation. We also proposed to approve the portions of Utah's regional haze SIP submission relating to 40 CFR 51.308(f)(1): calculations of baseline, current, and natural visibility conditions, progress to date, and the uniform rate of progress; 40 CFR 51.308(f)(4): reasonably attributable visibility impairment; 40 CFR 51.308(f)(5) and 40 CFR 51.308(g): progress report requirements; and 40 CFR 51.308(f)(6): monitoring strategy and other implementation plan requirements. Consistent with section 110(k)(3) of the CAA, the EPA may partially approve portions of a submittal if those elements meet all applicable requirements and may disapprove the remainder so long as the elements are fully separable.

Our August 19, 2024, proposed rule provided background on the requirements of the CAA and RHR, a summary of Utah's regional haze SIP submittals and related EPA actions, and

¹ See 40 CFR part 81, subpart D.

² 89 FR 67208 (August 19, 2024).

the EPA's rationale for its proposed action. That background and rationale will not be restated in full here, although we briefly summarize the reasons for our partial disapproval of Utah's regional haze SIP submission in the paragraphs that follow.

In CAA section 169A(a)(1), Congress established the national goal of preventing any future and remedying any existing impairment of visibility in mandatory Class I Federal areas that results from manmade (anthropogenic) air pollution. The core component of a regional haze SIP submission for the second implementation period is a long-term strategy for making reasonable progress toward meeting that national goal. CAA section 169A(b)(2)(B), 40 CFR 51.308(f)(2). A state's long-term strategy must address regional haze in each Class I area within the state's borders and each Class I area outside the state that may be affected by emissions originating from within the state. It "must include the enforceable emissions limitations, compliance schedules, and other measures that are necessary to make reasonable progress, as determined pursuant to (f)(2)(i) through (iv)." 40 CFR 51.308(f)(2). The amount of progress that is "reasonable progress" is based on consideration of the four statutory factors in CAA section 169A(g)(1)—the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources³—in an evaluation of potential control measures for sources of visibility impairing pollutants, which is referred to as a "four-factor" analysis. In developing its long-term strategy, the state must document the technical basis, including modeling, monitoring, cost, engineering, and emissions information, on which it is relying to determine the measures that are necessary to make reasonable progress. 40 CFR 51.308(f)(2)(iii).

As detailed in section 3.A. of the RTC document, the CAA authorizes the EPA to substantively review states' SIP submissions for compliance with the statute and EPA's regulations to ensure progress towards the national visibility goal for Class I areas. Congress charged the EPA with exercising "federal oversight" over SIP submissions and "review[ing] all SIPs to ensure that the plans comply with the statute." *Oklahoma v. EPA*, 723 F.3d 1201, 1204 (10th Cir. 2013). The "EPA is left with more than the ministerial task of routinely approving SIP submissions." *North Dakota v. EPA*, 730 F.3d 750, 761

(8th Cir. 2013). Instead, the Agency's "review of a SIP extends not only to whether the state considered the necessary factors in its determination, but also to whether the determination is one that is reasonably moored to the CAA's provisions" and is "based on 'reasoned analysis.'" *Id.* at 761, 766 (citing *Alaska Dep't of Env't. Conservation v. EPA*, 540 U.S. 461 (2004)); see also *Wyoming v. EPA*, 78 F.4th 1171, 1180–81 (10th Cir. 2023) (noting that "the Act provides for substantive and careful EPA review" of SIP submissions and that "the EPA does not have to accept unreasonable analyses"). For the reasons stated in the proposed rule, this document, and in the RTC document, the EPA concludes that Utah's regional haze SIP submission does not meet all of the requirements of the CAA and RHR.

As detailed at length in our proposed rule and in the RTC document, we conclude that Utah's long-term strategy does not meet the requirements of CAA section 169A(b)(2) and 40 CFR 51.308(f)(2) on three independent grounds. Our first basis for disapproval of Utah's long-term strategy is the State's unreasonable rejection of NO_x emission reduction measures at the Hunter and Huntington power plants. Based on its evaluation of the four statutory factors, Utah concluded that installation of selective catalytic reduction (SCR) or other physical NO_x pollution controls is not necessary to achieve reasonable progress toward Congress's national visibility goal. Instead, Utah established plantwide mass-based NO_x emission limits, which cap the total amount of NO_x the Hunter and Huntington power plants can emit during a 12-month rolling period at levels that are similar to the status quo.⁴

Utah's determination that the plantwide mass-based NO_x emission limits for Hunter and Huntington are all that is necessary to make reasonable progress is not grounded in a reasoned evaluation of the four statutory factors or a defensible technical analysis. Utah's assessment of the costs of compliance, one of the four statutory factors, hinged on its finding that physical controls that cost more than

\$5,750/ton are not cost-effective for the plants; a determination that likely reductions in the future utilization of Hunter and Huntington would reduce the cost-effectiveness of SCR; and concern about various affordability considerations associated with the installation of SCR, including an unsubstantiated conclusion that a requirement to install SCR may cause the plants to close early. As detailed in the proposed rule and in the RTC document,⁵ Utah did not provide adequate support for its analysis of and conclusions regarding the costs of compliance. Therefore, we find that Utah did not justify its conclusion that the costs of compliance favored mass-based emission limits over SCR for the Hunter and Huntington power plants.

We also find that Utah's evaluation of the other three statutory factors (the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected anthropogenic source of visibility impairment) was unreasonable. Utah did not take into consideration the factual information supplied by the operator of the plants or the regulation governing how time necessary for compliance may be considered when concluding that the time necessary for compliance favored mass-based emission limits over SCR.⁶ For the energy and non-air quality impacts of SCR, Utah provided no analysis or documentation to support its assertion that because Hunter and Huntington are projected to assist in a transition toward intermittent renewable energy generation (e.g., wind and solar), a requirement to install SCR could lead to early plant closures and thereby negatively affect renewable energy deployment. In considering the plants' remaining useful lives, Utah did not adequately substantiate its concerns about early plant closures or its assessment that Hunter and Huntington would retire before the 30-year amortization period for SCR, further reducing SCR's cost-effectiveness. Utah also relied on the plants' projected retirement dates from the owner's resource plans, which frequently change and are not federally enforceable. For the reasons detailed in the proposed

⁴ 89 FR at 67234–37. Table 13 and figures 2–3 in the proposed rule show that both power plants' recent actual (2014–2021) NO_x emissions were, in many years, lower than the initial (2022), interim (2025), and/or final (2028) mass-based emission limits. Table 12 shows that the final (2028) mass-based emission limits, which are the most stringent, will result in a net increase in NO_x emissions of 8 tons per year from Hunter and Huntington combined, compared to the emissions projections based on an "on the books" (no additional controls) scenario for 2028 that Utah relied on in its SIP development.

⁵ 89 FR at 67240–43; RTC document, section 5.C.iv.

⁶ 40 CFR 51.308(f)(2)(i) provides that if a state concludes that a control measure cannot reasonably be installed and become operational until after the end of the implementation period, the state may not consider this fact in determining whether the measure is necessary to make reasonable progress.

³ CAA section 169A(g)(1); 40 CFR 51.308(f)(2)(i).

rule and in the RTC document,⁷ we find that Utah unreasonably concluded that the remaining three statutory factors support its determination that plantwide mass-based emission limits for the Hunter and Huntington power plants, instead of SCR, are all that is necessary to make reasonable progress toward the national visibility goal.

Furthermore, the specific parameters of the mass-based emission limits that Utah established do not reflect reasoned analysis. In rejecting SCR, Utah relied on its unsupported conclusion that future utilization of Hunter and Huntington was likely to decrease, thereby eroding the cost-effectiveness of SCR.⁸ However, Utah then set the mass-based emission limits at levels premised on *increased* plant utilization, without acknowledging or reconciling the conflict in its treatment of plant utilization within its SIP submission.⁹ Nor did Utah adequately support its determination that mass-based emission limits that apply over the course of a 12-month rolling period, as opposed to a shorter time period such as monthly or seasonally, are sufficient to make reasonable progress.¹⁰ For all of these reasons, and as further detailed in our proposed rule and RTC document,¹¹ we are disapproving Utah's long-term strategy because the State did not reasonably evaluate the NO_x emission reduction measures for Hunter and Huntington that are necessary to make reasonable progress toward Congress's national visibility goal. See CAA section 169A(g)(1); 40 CFR 51.308(f)(2).

Our second basis for disapproval of Utah's long-term strategy is the State's unjustified decision not to evaluate whether emission reduction measures at CCI Paradox Lisbon Natural Gas Plant are necessary for reasonable progress. Utah relied on inaccurately calculated 2020 emissions data and an incorrect determination that anomalously high SO₂ emissions in 2014 and 2015 had caused the facility to exceed Utah's Q/d threshold¹² for requiring four-factor

analysis. In its comments on the proposed rule, Utah conceded that it had erroneously calculated the facility's Q/d value based on incorrect 2020 emissions data and noted its intention to submit a SIP revision or SIP supplement to address this issue. Because this deficiency has not been rectified, and as further detailed in our proposed rule and in the RTC document,¹³ we are disapproving Utah's long-term strategy because the State did not consider the emission reduction measures at CCI Paradox Lisbon Natural Gas Plant that are necessary to make reasonable progress toward the national visibility goal, as required by CAA section 169A(g)(1) and 40 CFR 51.308(f)(2).

Our third basis for disapproval of Utah's long-term strategy is the State's unreasonable rejection of SO₂ emission reduction measures at Sunnyside Cogeneration and its incorporation of unsupported emission limits for that facility into its SIP. As explained in our proposed rule and in the RTC document, Utah unreasonably rejected dry scrubbing (also known as dry sorbent injection), a technically feasible SO₂ control, without providing adequate technical documentation.¹⁴ After rejecting dry scrubbing, Utah determined that the facility's existing emission limits are necessary to achieve reasonable progress and incorporated those emission limits into its SIP.¹⁵ However, the SIP incorporates two separate emission limits for both NO_x and SO₂: one that applies during normal boiler operation and a higher limit that applies during startup, shutdown, and malfunction (SSM) events. Utah did not include a definition of the term "normal boiler operations" and did not provide any documentation of the frequency of normal boiler operations versus SSM events. Utah also did not explain how often the facility operates at the higher SSM emission limits and did not provide adequate technical documentation addressing how those higher limits relate to the State's obligation to make reasonable progress. In sum, due to Utah's unreasonable rejection of SO₂ emission reduction measures and its inclusion of unsupported emission limits for Sunnyside Cogeneration into its SIP, we cannot conclude that the State's long-term strategy includes all the measures necessary to make reasonable progress.

Our proposed rule identified a fourth basis for disapproval of Utah's long-term strategy: Utah's improper inclusion of automatic exemptions for SSM events in the emission restrictions for Intermountain power plant.¹⁶ After careful consideration of comments, we are not relying on this issue as a basis for our disapproval of Utah's long-term strategy in our final rule. Section 5.F.i. of the RTC document sets forth our rationale and contains our full responses to the comments we received regarding the SSM provisions for Intermountain power plant.

Finally, in addition to disapproving the State's long-term strategy, we are disapproving Utah's reasonable progress goals under 40 CFR 51.308(f)(3) and its consultation with FLMs under 40 CFR 51.308(i). As detailed in our proposed rule and in the RTC document,¹⁷ compliance with these requirements is dependent on compliance with the long-term strategy provisions in 40 CFR 51.308(f)(2).

B. Prong 4 (Visibility) of the 2015 Ozone NAAQS Infrastructure SIP

On January 9, 2020, Utah submitted its infrastructure SIP for the 2015 ozone NAAQS to address the applicable requirements of CAA section 110(a)(2). Subsequently, on August 19, 2024, the EPA proposed to disapprove the portion of Utah's January 9, 2020, infrastructure SIP submission for the 2015 ozone NAAQS that addressed interference with visibility protection ("Prong 4").¹⁸ Our public comment period closed on September 18, 2024.

Our August 19, 2024, proposed rule provided background on the requirements of CAA section 110(a)(2) for the 2015 ozone NAAQS, a summary of the portion of Utah's infrastructure SIP submittal being acted on and related EPA actions, and the EPA's rationale for its proposed action. That background and rationale will not be restated here. For the reasons stated in the proposed rule¹⁹ and in section 12 of the accompanying RTC document, the EPA concludes that the Prong 4 portion of Utah's January 9, 2020, infrastructure SIP submission does not meet the requirements of CAA section 110(a)(2)(D)(i)(II).

III. Final Action

For the reasons stated in the proposed rule, in the RTC document, and in this document, we are partially approving

⁷ 89 FR at 67244; RTC document, sections 5.C.iv-v.

⁸ All else equal, lower plant utilization results in physical controls such as SCR becoming relatively less cost-effective, because the cost per ton of emissions reduced increases as plant utilization decreases.

⁹ 89 FR at 67241–43; RTC document, section 5.C.iv.b.

¹⁰ 89 FR at 67244; RTC document, section 5.C.vi.

¹¹ 89 FR at 67240–44; RTC document, section 5.C.

¹² Q/d values represent the ratio of an individual source's annual emissions of visibility-impairing emission precursors (NO_x, SO₂, and PM₁₀) in combined tons ("Q") divided by the distance in kilometers ("d") between the source and a Class I area. The larger the Q/d value, the greater the source's expected effect on visibility impairment in that Class I area.

¹³ 89 FR at 67245–48; RTC document, sections 4.B., 11.

¹⁴ 89 FR at 67249–50; RTC document, section 5.D.i.

¹⁵ 89 FR at 67250; RTC document, section 5.D.iii.

¹⁶ 89 FR at 67248–49.

¹⁷ 89 FR at 67251; RTC document, sections 3.B., 6 (reasonable progress goals). 89 FR at 67253; RTC document, sections 3.C., 7 (FLM consultation).

¹⁸ 89 FR 67208 (August 19, 2024).

¹⁹ 89 FR at 67253–54.

and partially disapproving Utah's regional haze SIP submission.²⁰

We are disapproving the following components of Utah's regional haze SIP submission relating to CAA section 169A:

- Long-term strategy (40 CFR 51.308(f)(2));
- Reasonable progress goals (40 CFR 51.308(f)(3)); and
- FLM consultation (40 CFR 51.308(i)).

We are approving the following components of Utah's regional haze SIP submission relating to CAA section 169A:

- Calculations of baseline, current, and natural visibility conditions, progress to date, and uniform rate of progress (40 CFR 51.308(f)(1));
- Reasonably attributable visibility impairment (40 CFR 51.308(f)(4));
- Progress report requirements (40 CFR 51.308(f)(5) and 40 CFR 51.308(g)); and
- Monitoring strategy and other implementation plan requirements (40 CFR 51.308(f)(6)).

Additionally, as a consequence of our partial disapproval of Utah's regional haze SIP submission for the second implementation period, the EPA is disapproving the Prong 4 portion of Utah's January 9, 2020, infrastructure SIP for the 2015 ozone NAAQS, pursuant to CAA section 110(a)(2)(D)(i)(II).

IV. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of R307–110–28, excluding long-term strategy, reasonable progress goals, and FLM consultation. The EPA has made, and will continue to make, this material generally available through <https://www.regulations.gov> and at the EPA Region 8 Office (please contact the person identified in the **FOR FURTHER**

INFORMATION CONTACT section of this preamble for more information). Therefore, this material has been approved by the EPA for inclusion in Utah's SIP, has been incorporated by reference by the EPA into that plan, is fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.²¹

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action partially approves and partially disapproves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian Tribe has demonstrated that a Tribe has jurisdiction. In those areas of Indian country, the rule does not have Tribal implications and will not impose substantial direct costs on Tribal governments or preempt Tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on communities with environmental justice (EJ) concerns to the greatest extent practicable and permitted by law. Executive Order 14096 (Revitalizing Our Nation's Commitment to Environmental Justice for All, 88 FR 25251, April 26, 2023) builds on and supplements E.O. 12898 and defines EJ as, among other things, the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, or Tribal affiliation, or disability in agency decision-making and other Federal activities that affect human health and the environment.

Utah evaluated EJ considerations as part of its SIP submittal even though the CAA and applicable implementing regulations neither prohibit nor require an evaluation. A summary of Utah's EJ considerations is contained in section VIII. of the proposed rule. The EPA also performed an EJ analysis, as described in the proposed rule. Both Utah's and the EPA's analyses were done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the action. The EPA is taking action under the CAA on bases independent of Utah's evaluation of EJ. In addition, there is no information in the record upon which this decision is based that is inconsistent with the stated goal of E.O. 12898 of achieving EJ for people of color, low-income populations, and Indigenous peoples.

This action is subject to the Congressional Review Act, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 31, 2025. Filing a

²⁰ Based on Utah's specific titles in the regional haze SIP submission, we are disapproving: (1) Section IX.H.21: General Requirements: Control measures for Area and Point Sources, Emission Limits and Operating Practices, Regional Haze Requirements; (2) Section IX.H.23. Source Specific Emission Limitations Regional Haze Requirements, Reasonable Progress Controls; and (3) R307–110–17. General Requirements: State Implementation Plan, Section IX, Control Measures for Area and Point Sources, Part H, Emission Limits. Additionally, based on Utah's specific titles in the regional haze SIP submission, and identified by the bullet list below, we are partially approving and partially disapproving: (1) Section XX.A: Regional Haze Second Implementation Period; and (2) R307–110–28. General Requirements: State Implementation Plan, Regional Haze.

²¹ 62 FR 27968 (May 22, 1997).

petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Greenhouse gases, Incorporation by reference, Intergovernmental relations,

Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 22, 2024.

KC Becker,
Regional Administrator, Region 8.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart TT—Utah

■ 2. Amend § 52.2320 by

■ a. In the table in paragraph (c) revising the entry “R307–110–28”; and

■ b. In the table in paragraph (e) revising the entry “Section XX.A. Executive Summary”.

The revisions read as follows:

§ 52.2320 Identification of plan.

* * * * *

(c) * * *

Rule No.	Rule title	State effective date	Final rule citation, date		Comments	
*	*	*	*	*	*	*
R307–110. General Requirements: State Implementation Plan						
R307–110–28	Regional Haze	1/6/2022	[insert Federal Register citation], 12/2/2024.		Except for long-term strategy, reasonable progress goals, and FLM consultation.	
*	*	*	*	*	*	*
*		(e) *				
Rule title		State effective date	Final rule citation, date		Comments	
*	*	*	*	*	*	*
XX. Regional Haze						
Section XX.A. Regional Haze Second Implementation Plan.		1/6/2022	[insert Federal Register citation], 12/2/2024.		Except for long-term strategy, reasonable progress goals, and FLM consultation.	
*	*	*	*	*	*	*

[FR Doc. 2024–27941 Filed 11–29–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2023–0489; FRL–12135–02–R8]

Air Plan Partial Approval and Partial Disapproval; Wyoming; Regional Haze Plan for the Second Implementation Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is partially approving and partially disapproving a regional haze state implementation plan (SIP) revision submitted by the State of Wyoming on August 10, 2022 (Wyoming’s 2022 SIP submission), to address applicable requirements under the Clean Air Act (CAA) and the EPA’s Regional Haze Rule (RHR) for the regional haze program’s second implementation period. The EPA is taking this action pursuant to the CAA.

DATES: This rule is effective on January 2, 2025.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2023–0489. All

documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.
FOR FURTHER INFORMATION CONTACT: Jaslyn Dobrahner, Air and Radiation

Division, EPA, Region 8, Mailcode 8ARD-IO, 1595 Wynkoop Street, Denver, Colorado 80202-1129, telephone number: (303) 312-6252; email address: dobrahner.jaslyn@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document “we,” “us,” and “our” means the EPA.

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I. What is being addressed in this document?

The EPA is partially approving and partially disapproving Wyoming’s regional haze plan for the second implementation period. As required by section 169A of the CAA, the RHR calls for State and Federal agencies to work together to improve visibility in 156 national parks and wilderness areas, known as mandatory Class I Federal areas.¹ The rule requires the States, in coordination with the EPA, the National Park Service, the Fish and Wildlife Service, the Forest Service, and other interested parties, to develop and implement air quality protection plans to reduce the pollution that causes visibility impairment in mandatory Class I Federal areas. Visibility impairing pollutants include fine and coarse particulate matter (PM) (*e.g.*, sulfates, nitrates, organic carbon, elemental carbon, and soil dust) and their precursors (*e.g.*, sulfur dioxide (SO₂), oxides of nitrogen (NO_x), and, in some cases, volatile organic compounds (VOC) and ammonia (NH₃)). As discussed in further detail in our proposed rule, this document, and the accompanying Response to Comments (RTC) document, the EPA finds that Wyoming submitted a regional haze SIP that does not meet all of the regional haze requirements for the second implementation period. The State’s submission, the proposed rule, and the RTC document can be found in the docket for this action.

II. Summary of the Proposed Action, Public Comments, and the EPA’s Rationale for Final Action

On August 10, 2022, Wyoming submitted a revision to its SIP to address regional haze for the second implementation period, in accordance with the requirements of the CAA’s regional haze program established by

CAA sections 169A and 169B and 40 CFR 51.308.

On August 1, 2024, the EPA proposed to disapprove certain provisions of Wyoming’s 2022 SIP submission.² Specifically, we proposed to disapprove the portions of Wyoming’s 2022 SIP submission relating to 40 CFR 51.308(f)(2): long-term strategy; 40 CFR 51.308(f)(3): reasonable progress goals; and 40 CFR 51.308(i): Federal Land Manager (FLM) consultation. We also proposed to approve the portions of Wyoming’s 2022 SIP submission relating to 40 CFR 51.308(f)(1): calculations of baseline, current, and natural visibility conditions, progress to date, and the uniform rate of progress; 40 CFR 51.308(f)(4): reasonably attributable visibility impairment; 40 CFR 51.308(f)(5) and 40 CFR 51.308(g): progress report requirements; and 40 CFR 51.308(f)(6): monitoring strategy and other implementation plan requirements. Consistent with section 110(k)(3) of the CAA, the EPA may partially approve portions of a submittal if those elements meet all applicable requirements and may disapprove the remainder so long as the elements are fully separable.

Our August 1, 2024 proposed rule provided background on the requirements of the CAA and RHR, a summary of Wyoming’s regional haze SIP submittals and related EPA actions, and the EPA’s rationale for its proposed action. That background and rationale will not be restated in full here, although we briefly summarize the reasons for our partial disapproval of Wyoming’s 2022 SIP submission in the paragraphs that follow.

Our public comment period closed on September 3, 2024. During the public notice and comment period, we received more than 6,000 comments on our proposal. The full text of the comments received are included in the publicly posted docket associated with this action at <https://www.regulations.gov>. Our RTC document, which is also included in the docket, provides full, detailed responses to all significant comments received and further explains the basis for our final action.

In CAA section 169A(a)(1), Congress established the national goal of preventing any future and remedying any existing impairment of visibility in mandatory Class I Federal areas that results from manmade (anthropogenic) air pollution. The core component of a regional haze SIP submission for the second implementation period is a long-term strategy for making reasonable

progress toward meeting that national goal. CAA section 169A(b)(2)(B), 40 CFR 51.308(f)(2). A state’s long-term strategy must address regional haze in each Class I area within the state’s borders and each Class I area outside the state that may be affected by emissions originating from within the state. It “must include the enforceable emissions limitations, compliance schedules, and other measures that are necessary to make reasonable progress, as determined pursuant to (f)(2)(i) through (iv).” 40 CFR 51.308(f)(2). The amount of progress that is “reasonable progress” is based on consideration of the four statutory factors in CAA section 169A(g)(1)—the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources³—in an evaluation of potential control measures for sources of visibility impairing pollutants, which is referred to as a “four-factor” analysis. In developing its long-term strategy, the state must document the technical basis, including modeling, monitoring, cost, engineering, and emissions information, on which it is relying to determine the measures that are necessary to make reasonable progress. 40 CFR 51.308(f)(2)(iii). Wyoming did not include any emission control measures, new or existing, in its long-term strategy for the regional haze second implementation period.

As explained in section 3.A. of the RTC document, the CAA authorizes the EPA to substantively review states’ SIP submissions for compliance with the statute and RHR to ensure progress towards the national visibility goal for Class I areas. Congress charged the EPA with exercising “federal oversight” over SIP submissions and “review[ing] all SIPs to ensure that the plans comply with the statute.” *Oklahoma v. EPA*, 723 F.3d 1201, 1204 (10th Cir. 2013). The “EPA is left with more than the ministerial task of routinely approving SIP submissions.” *North Dakota v. EPA*, 730 F.3d 750, 761 (8th Cir. 2013). Instead, the Agency’s “review of a SIP extends not only to whether the state considered the necessary factors in its determination, but also to whether the determination is one that is reasonably moored to the CAA’s provisions” and is “based on ‘reasoned analysis.’” *Id.* at 761, 766 (citing *Alaska Dep’t of Env’t. Conservation v. EPA*, 540 U.S. 461 (2004)); *see also Wyoming v. EPA*, 78 F.4th 1171, 1180–81 (10th Cir. 2023) (noting that “the Act provides for substantive and careful EPA review” of

¹ See 40 CFR part 81, subpart D.

² 89 FR 63030 (August 1, 2024).

³ CAA section 169A(g)(1); 40 CFR 51.308(f)(2)(i).

SIP submissions and that “the EPA does not have to accept unreasonable analyses”). For the reasons stated in the proposed rule, this document, and in the RTC document, the EPA determines that Wyoming’s 2022 SIP submission does not meet all of the requirements of the CAA and RHR.

As detailed at length in our proposed rule and in the RTC document, we conclude that Wyoming’s long-term strategy does not meet the requirements of CAA section 169A(b)(2) and 40 CFR 51.308(f)(2) on four independent grounds. First, Wyoming failed to

consider the four statutory factors for the sources and associated units and pollutants listed in table 1, despite determining that these sources may contribute to visibility impairment at Class I areas. In some instances, Wyoming provided no justification for the lack of four-factor analysis. In others, Wyoming improperly relied on planned but unenforceable source retirements or on the presence of existing emission control measures at a source, without providing adequate technical documentation of the

effectiveness of those existing controls or a sufficient indication that additional controls would not be cost-effective or reasonable. For the reasons detailed in our proposed rule and in the RTC document,⁴ the State’s reasoning does not justify its decision not to conduct four-factor analyses for these sources, as required under CAA section 169A(g)(1) and 40 CFR 51.308(f)(2). Therefore, we cannot conclude that Wyoming’s long-term strategy includes all the measures that are necessary to make reasonable progress.

TABLE 1—SOURCES, UNITS, AND ASSOCIATED POLLUTANTS THAT MAY AFFECT VISIBILITY AT CLASS I AREAS WHERE NO FOUR-FACTOR ANALYSIS WAS PERFORMED

Source	Unit(s)	Associated pollutant(s)
Jim Bridger (<i>PacifiCorp</i>)	1, 2	NO _x , SO ₂ , PM.
Jim Bridger (<i>PacifiCorp</i>)	3, 4	SO ₂ , PM.
Naughton (<i>PacifiCorp</i>)	1, 2	NO _x , SO ₂ , PM.
Naughton (<i>PacifiCorp</i>)	3	NO _x , PM.
Dave Johnston (<i>PacifiCorp</i>)	1, 2	NO _x , SO ₂ , PM.
Dave Johnston (<i>PacifiCorp</i>)	4	PM.
Wyodak (<i>PacifiCorp</i>)	1	NO _x , SO ₂ , PM.
Laramie River Station (<i>Basin Electric</i>)	1–3	PM.
Laramie Portland Cement (<i>Mountain Cement Company</i>)	Kilns 1, 2	SO ₂ .
Elk Basin Gas Plant (<i>Contango Resources, Inc.</i>)	Engines (9) and incinerator	PM.
Elk Basin Gas Plant (<i>Contango Resources, Inc.</i>)	Engines (9)	SO ₂ .
Elk Basin Gas Plant (<i>Contango Resources, Inc.</i>)	Incinerator	NO _x .

Although we stated in our proposed rule that Wyoming failed to justify the lack of a four-factor analysis of NO_x and PM emission control measures for Lost Cabin Gas Plant, we are not carrying that finding forward into our final rule. Based on our consideration of a comment we received and on our further review of Wyoming’s 2022 SIP submission, we conclude that because the State’s Q/d analysis⁵ shows that the possible impact of the facility’s NO_x and PM emissions on visibility at Class I areas is very small, Wyoming reasonably elected to conduct a four-factor analysis only for SO₂ control measures for this facility, and not for NO_x and PM control measures.

Therefore, the lack of a four-factor analysis of NO_x and PM emissions controls for Lost Cabin Gas Plant is not a reason for our disapproval of the State’s long-term strategy.⁶

Second, Wyoming relied on unsupported rationales and failed to document the technical basis (including cost, engineering, and emissions information)⁷ of its decision not to include any emission control measures in its long-term strategy for the sources listed in table 2. In evaluating the cost of potential control measures for some of these sources, Wyoming used unsubstantiated cost inputs, relied on unjustifiably low estimates of control technology efficiencies, and miscalculated the level of achievable

emission reductions. These methodological errors undercut the technical support for Wyoming’s cost analyses and the State’s resulting determinations that control measures for these sources would not be cost-effective. In other instances, the State provided no reasoning, technical data, or cost information to support its conclusions. For the reasons detailed in our proposed rule and in the RTC document,⁸ these methodological errors and unsupported technical bases, considered collectively, prevent the EPA from determining that the State’s long-term strategy is adequate to make reasonable progress toward meeting the national visibility goal.

TABLE 2—SOURCES, UNITS, AND ASSOCIATED POLLUTANTS WHERE THE STATE FAILED TO DOCUMENT THE TECHNICAL BASIS OF ITS DETERMINATIONS OF THE EMISSION REDUCTION MEASURES NECESSARY TO MAKE REASONABLE PROGRESS

Source	Unit(s)	Associated pollutant(s)
Dave Johnston (<i>PacifiCorp</i>)	4	SO ₂ .
Laramie Portland Cement (<i>Mountain Cement Company</i>)	Kilns 1, 2	NO _x .

⁴ 89 FR at 63056–62; RTC document, sections 7, 8, 14.

⁵ Q/d values represent the ratio of an individual source’s annual emissions of visibility-impairing emission precursors (NO_x, SO₂, and PM₁₀) in combined tons (“Q”) divided by the distance in

kilometers (“d”) between the source and a Class I area. The larger the Q/d value, the greater the source’s expected effect on visibility impairment in that Class I area.

⁶ Section 8.K. of the RTC document contains our full response to the comment we received on this issue.

⁷ See 40 CFR 51.308(f)(2)(iii).

⁸ 89 FR at 63062–65; RTC document, sections 3.C., 7, 8.

TABLE 2—SOURCES, UNITS, AND ASSOCIATED POLLUTANTS WHERE THE STATE FAILED TO DOCUMENT THE TECHNICAL BASIS OF ITS DETERMINATIONS OF THE EMISSION REDUCTION MEASURES NECESSARY TO MAKE REASONABLE PROGRESS—Continued

Source	Unit(s)	Associated pollutant(s)
Green River Works (<i>TATA Chemicals</i>)	Calciner 1, Calciner 2	NO _x , PM.
Elk Basin Gas Plant (<i>Contango Resources, Inc.</i>)	Engines (9)	NO _x .
Elk Basin Gas Plant (<i>Contango Resources, Inc.</i>)	Incinerator	SO ₂ .
Lost Cabin Gas Plant (<i>Burlington Resources</i>)	Trains 2, 3	SO ₂ .

Third, Wyoming unreasonably rejected emission control measures for Elk Basin Gas Plant and Cheyenne Fertilizer Facility (listed in table 3). Wyoming made no determination that these control measures were not cost-effective (based on the cost per ton of emissions reduced);⁹ nor did it explain why these measures were otherwise unwarranted under the four statutory factors.¹⁰ The cost-effectiveness values of these control measures are below the level that the EPA and the states generally found to be reasonable in the first implementation period, even without adjusting for inflation. Instead of justifying its rejection of these control measures based on the four statutory factors, Wyoming cited declining emission trends, its belief that these sources will not increase their emissions during the second implementation

period, and the presence of existing control technologies at the facilities (which the State notably did not determine to be effective for purposes of making reasonable progress).¹¹ As we explained in the context of the 2017 Regional Haze Rule revisions, “a state that elects to consider an additional factor . . . must consider it in a reasonable way that does not undermine or nullify the role of the four statutory factors in determining what controls are necessary to make reasonable progress.”¹² Wyoming improperly relied on these other considerations to reject controls that its four-factor analyses showed to be cost-effective and otherwise reasonable.

Within its 2022 SIP submission, Wyoming conceded that based on the four-factor analyses it conducted for Elk Basin Gas Plant and Cheyenne Fertilizer Facility, these sources may warrant

further analysis of the measures necessary to make reasonable progress.¹³ Wyoming stated it would submit more detailed analyses in the context of its regional haze second implementation progress report due in 2025. However, nothing in the CAA or RHR allows states to avoid their obligation to determine the measures necessary to make reasonable progress through consideration of the four statutory factors by delaying decision-making to a future date.¹⁴ For these reasons, and as further detailed in our proposed rule and in the RTC document,¹⁵ we find that Wyoming’s long-term strategy does not include the measures necessary to make reasonable progress because Wyoming unreasonably rejected control measures for Elk Basin Gas Plant and Cheyenne Fertilizer Facility.

TABLE 3—SOURCES, UNITS, AND ASSOCIATED POLLUTANTS AND EMISSION CONTROL TECHNOLOGY WHERE THE STATE UNREASONABLY REJECTED EMISSION REDUCTION MEASURES

Source	Unit(s)	Associated pollutant(s)	Emission control technology
Elk Basin Gas Plant (<i>Contango Resources, Inc.</i>)	Engines (9)	NO _x	Low emission combustion.
Cheyenne Fertilizer Facility (<i>Dyno Nobel, Inc.</i>)	ENG004, ENG005 (engines)	NO _x	Low emission combustion.
Cheyenne Fertilizer Facility (<i>Dyno Nobel, Inc.</i>)	CTW001, CTW003 (cooling towers)	PM	Upgraded Mist Eliminators.

⁹ For the Cheyenne Fertilizer Facility, as with Elk Basin Gas Plant, Wyoming did not determine that the cost/ton values of the NO_x and PM measures it evaluated were unreasonable. However, Wyoming concluded that the capital costs of installing PM controls (upgraded mist eliminators) on two cooling towers were not justified given what the State determined—without explanation—to be the “minute” amount of PM reductions at stake. Wyoming 2022 SIP submission at 191. We do not find this justification to be sufficient in light of the mist eliminators’ cost-effectiveness values (*i.e.*, cost per ton of emissions reduced), which align with the cost/ton values that were generally found to be reasonable during the first implementation period. See 89 FR at 63065 & n.158. Nor did Wyoming explain why the reduction in PM emissions that could be achieved by upgraded mist eliminators was not necessary to make reasonable progress. As we explained in the 2019 Guidance, capital costs considered in isolation may not provide complete information about the potential reasonableness of a control measure. 2019 Guidance at 39. Indeed, Wyoming itself conceded that “[b]ased on this four-factor analysis, this facility may warrant further analysis of emission controls to reach reasonable progress.” Wyoming 2022 SIP submission at 191.

¹⁰ For Elk Basin Gas Plant, Wyoming did not explicitly determine, based on its four-factor analysis, that NO_x controls are not necessary to make reasonable progress. Wyoming 2022 SIP submission at 172 (“Considering the four factors above, as well as emission trends and permit conditions, this facility may warrant further analysis of emission controls to reach reasonable progress.”). For NO_x and PM controls at the Cheyenne Fertilizer Facility, Wyoming asserted that “[o]verall, considering the four factors discussed above, the Division does not believe that additional emissions control technology on the Cooper Engines . . . or Cooling Towers is necessary to make reasonable progress at this time.” Wyoming 2022 SIP submission at 191. However, aside from pointing to the capital costs of PM control measures, Wyoming did not explain *how* it reached that conclusion.

¹¹ Wyoming 2022 SIP submission at 171–72, 191. Wyoming also noted that the engines at the Cheyenne Fertilizer Facility are natural gas-fired. *Id.* at 191. However, Wyoming did not explain how combustion of natural gas mitigates the need for NO_x emissions reductions measures or why low-emission combustion (the control technology for

these engines that the State evaluated through four-factor analysis) is not necessary to make reasonable progress. As detailed in sections 7.B. and 8.A.ii. of the RTC document, combustion of natural gas does not itself render a source effectively controlled for NO_x emissions.

¹² EPA, Responses to Comments on Protection of Visibility: Amendments to Requirements for State Plans; Proposed Rule, December 2016, at 186 (available in the docket for this action).

¹³ Wyoming 2022 SIP submission at 172, 191.

¹⁴ *Cf. NRDC v. EPA*, 22 F.3d 1125, 1134 (D.C. Cir. 1994) (noting that SIPs must “contain[] something more than a mere promise to take appropriate but unidentified measures in the future”). In addition, because progress reports due in 2025 will not take the form of SIP revisions that must be approved or disapproved by the EPA, it is not clear how Wyoming could evaluate and potentially impose federally enforceable emission reduction measures at these sources through that process. See generally 40 CFR 51.308(g).

¹⁵ 89 FR at 63065; RTC document, sections 5, 8.I., 8.L.

Fourth, as explained in our proposed rule and in the RTC document,¹⁶ the overarching justifications that Wyoming provided for not including any emission control measures in its long-term strategy are either not adequately supported or lack foundation in the CAA and RHR. Following its evaluation and rejection of emission control measures for individual sources, Wyoming explained its overall reasoning for not including any measures in its long-term strategy to make reasonable progress for the regional haze second implementation period.¹⁷ The State asserted that such measures could impose economic hardships on sources, negatively affect rural communities, force energy producers out of the market, harm ratepayers, and cause grid instability. However, the State's reliance on these purported economic impacts does not reflect reasoned analysis because Wyoming provided no analyses, data, or other evidence to support its generalized and unsubstantiated assertions. Similarly, Wyoming provided no support for its declaration that requiring additional controls would not lead to visibility improvements at Class I areas. Finally, Wyoming pointed to contributions to visibility impairment from sources outside its control; past and projected emission reductions resulting from other regulatory programs; and that the State's Class I areas are below the adjusted uniform rate of progress (a tracking metric to help states assess the amount of progress they are making towards the national visibility goal over time in each Class I area). As further explained in our proposed rule and in the RTC document, Wyoming's consideration of those factors was not reasonably moored to the statute and regulations.

In addition to disapproving the State's long-term strategy, we are disapproving Wyoming's reasonable progress goals under 40 CFR 51.308(f)(3) and its consultation with Federal Land Managers under 40 CFR 51.308(i). As detailed in our proposed rule and in the RTC document,¹⁸ compliance with these requirements is dependent on compliance with the long-term strategy provisions in 40 CFR 51.308(f)(2).

III. Final Action

For the reasons stated in the proposed rule, in the RTC document, and in this document, we are partially approving and partially disapproving Wyoming's 2022 SIP submission.

We are disapproving the following components of Wyoming's 2022 SIP submission relating to CAA section 169A:

- Long-term strategy (40 CFR 51.308(f)(2));
- Reasonable progress goals (40 CFR 51.308(f)(3)); and
- FLM consultation (40 CFR 51.308(i)).

We are approving the following components of Wyoming's 2022 SIP submission relating to CAA section 169A:

- Calculations of baseline, current, and natural visibility conditions, progress to date, and uniform rate of progress (40 CFR 51.308(f)(1));
- Reasonably attributable visibility impairment (40 CFR 51.308(f)(4));
- Progress report requirements (40 CFR 51.308(f)(5) and 40 CFR 51.308(g)); and
- Monitoring strategy and other implementation plan requirements (40 CFR 51.308(f)(6)).

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action partially approves and partially disapproves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described

in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian Tribe has demonstrated that a Tribe has jurisdiction. In those areas of Indian country, the rule does not have Tribal implications and will not impose substantial direct costs on Tribal governments or preempt Tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address "disproportionately high and adverse human health or environmental effects" of their actions on communities with environmental justice (EJ) concerns to the greatest extent practicable and permitted by law. Executive Order 14096 (Revitalizing Our Nation's Commitment to Environmental Justice for All, 88 FR 25251, April 26, 2023) builds on and supplements E.O. 12898 and defines EJ as, among other things, the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, or Tribal affiliation, or disability in agency decision-making and other Federal activities that affect human health and the environment.

The State did not evaluate EJ considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA performed an EJ analysis, as is described in the proposed action 89 FR 63030 (August 1, 2024) in the section titled, "Environmental Justice." The analysis was done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the action. In addition, there is no information in the record upon which this decision is based inconsistent with the stated goal

¹⁶ 89 FR at 63065–67; RTC document, sections 3.B., 3.G., 4, and 9.

¹⁷ Wyoming 2022 SIP submission, Chapter 13: Decisions on What Control Measures are Necessary to Make Reasonable Progress.

¹⁸ 89 FR at 63067–68; RTC document, sections 3.B., 10 (reasonable progress goals). 89 FR at 63069–70; RTC document, sections 3.E., 11 (FLM consultation).

of E.O. 12898/14096 of achieving EJ for communities with EJ concerns.

This action is subject to the Congressional Review Act, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 31, 2025. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and

shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Greenhouse gases, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 22, 2024.

KC Becker,
Regional Administrator, Region 8.

For the reasons stated in the preamble, the Environmental Protection

Agency is amending 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart ZZ—Wyoming

■ 2. In § 52.2620, the table in paragraph (e) is amended by adding and entry for “(36) XXXVI” at the end of the table to read as follows:

§ 52.2620 Identification of plan.

* * * * *

(e) * * *

Rule No.	Rule title	State effective date	EPA effective date	Final rule citation/date	Comments
(36) XXXVI	Wyoming State Implementation Plan, Second Planning Period.	2022	1/2/2025	[insert Federal Register citation], 12/2/2024.	Excluding the following: Chapters 3.4, 7, 8, 10, 11, 12, 13, 14, 15, and appendix C–E, G–M. EPA disapproved the portions of Wyoming’s 2022 SIP submission relating to CAA section 169A and 40 CFR 51.308(f)(2): long-term strategy; 40 CFR 51.308(f)(3): reasonable progress goals; and 40 CFR 51.308(i): FLM consultation.

[FR Doc. 2024–27942 Filed 11–29–24; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2023–0495; FRL–12052–02–R8]

Air Plan Partial Approval and Partial Disapproval; North Dakota; Regional Haze State Implementation Plan for the Second Implementation Period

AGENCY: Environmental Protection Agency (EPA).
ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is partially approving and partially disapproving a regional haze state implementation plan (SIP) revision submitted by the State of North Dakota on August 11, 2022 (North Dakota’s 2022 SIP submission) to address applicable requirements under the Clean Air Act (CAA) and the EPA’s Regional Haze Rule (RHR) for the regional haze program’s second

implementation period. The EPA is taking this action pursuant to the CAA.

DATES: This rule is effective January 2, 2025.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2023–0495. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Joe Stein, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD–IO, 1595 Wynkoop Street, Denver, Colorado 80202–1129, telephone number: (303) 312–7078, email address: stein.joseph@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means the EPA.

Table of Contents

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- II. Summary of the Proposed Action, Public Comments, and the EPA’s Reasons for Final Action
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I. What is being addressed in this document?

The EPA is partially approving and partially disapproving North Dakota’s regional haze plan for the second planning period.¹ As required by section 169A of the CAA, the RHR calls for State and Federal agencies to work together to improve visibility in 156 national parks and wilderness areas, known as mandatory Class I Federal areas.² The rule requires the States, in coordination with the EPA, the National Park Service, the Fish and Wildlife Service, the Forest Service, and other interested parties, to develop and

¹ The EPA uses the terms “implementation period” and “planning period” interchangeably.
² See 40 CFR part 81, subpart D.

implement air quality protection plans to reduce the pollution that causes visibility impairment in mandatory Class I Federal areas. Visibility impairing pollutants include fine and coarse particulate matter (PM) (e.g., sulfates, nitrates, organic carbon, elemental carbon, and soil dust) and their precursors (e.g., sulfur dioxide (SO₂), oxides of nitrogen (NO_x), and, in some cases, volatile organic compounds (VOC) and ammonia (NH₃)). As discussed in further detail in our proposed rule, in this document, and in the accompanying Response to Comments (RTC) document, the EPA finds that North Dakota submitted a regional haze SIP that does not meet all the statutory and regulatory requirements for the regional haze second planning period. The State's submission, the proposed rule, and the RTC document can be found in the docket for this action.

II. Summary of the Proposed Action, Public Comments, and the EPA's Reasons for Final Action

On August 11, 2022, North Dakota submitted a revision to its SIP to address regional haze for the second implementation period, in accordance with the requirements of the CAA's regional haze program established by CAA sections 169A and 169B and 40 CFR 51.308.

On July 10, 2024, the EPA proposed to disapprove certain provisions of North Dakota's 2022 SIP submission.³ Specifically, we proposed to disapprove the portions of North Dakota's 2022 SIP submission relating to 40 CFR 51.308(f)(2): long-term strategy; 40 CFR 51.308(f)(3): reasonable progress goals; and 40 CFR 51.308(i): Federal Land Manager (FLM) consultation. We also proposed to approve the portions of North Dakota's 2022 SIP submission relating to 40 CFR 51.308(f)(1): calculations of baseline, current, and natural visibility conditions, progress to date, and the uniform rate of progress (URP); 40 CFR 51.308(f)(4): reasonably attributable visibility impairment; 40 CFR 51.308(f)(5) and 40 CFR 51.308(g): progress report requirements; and 40 CFR 51.308(f)(6): monitoring strategy and other implementation plan requirements. Consistent with section 110(k)(3) of the CAA, the EPA may partially approve portions of a submittal if those elements meet all applicable requirements and may disapprove the remainder so long as the elements are fully separable. Our public comment period closed on August 9, 2024. Our July 10, 2024, proposed rule provided

background on the requirements of the CAA and RHR, a summary of North Dakota's regional haze SIP submittals and related EPA actions, and the EPA's rationale for its proposed action. That background and rationale will not be restated in full here, although we briefly summarize the reasons for our partial disapproval of North Dakota's 2022 SIP submission in the paragraphs that follow.

In CAA section 169A(a)(1), Congress established the national goal of preventing any future and remedying any existing impairment of visibility in mandatory Class I Federal areas that results from manmade (anthropogenic) air pollution. The core component of a regional haze SIP submission for the second implementation period is a long-term strategy for making reasonable progress toward meeting that national goal. CAA section 169A(b)(2)(B), 40 CFR 51.308(f)(2). A state's long-term strategy must address regional haze in each Class I area within the state's borders and each Class I area outside the state that may be affected by emissions originating from within the state. It "must include the enforceable emissions limitations, compliance schedules, and other measures that are necessary to make reasonable progress, as determined pursuant to (f)(2)(i) through (iv)." 40 CFR 51.308(f)(2). The amount of progress that is "reasonable progress" is based on applying the four statutory factors in CAA section 169A(g)(1)—the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources⁴—in an evaluation of potential control measures for sources of visibility impairing pollutants, which is referred to as a "four-factor" analysis. In developing its long-term strategy, the state must document the technical basis, including modeling, monitoring, cost, engineering, and emissions information, on which it is relying to determine the measures that are necessary to make reasonable progress. 40 CFR 51.308(f)(2)(iii).

As detailed in section 3.A. of the RTC document, the CAA authorizes the EPA to substantively review states' SIP submissions for compliance with the statute and EPA's regulations to ensure progress towards the national visibility goal for Class I areas. Congress charged the EPA with exercising "federal oversight" over SIP submissions and "review[ing] all SIPs to ensure that the plans comply with the statute." *Oklahoma v. EPA*, 723 F.3d 1201, 1204

(10th Cir. 2013); *see also id.* at 1207–08 (citing CAA Sections 110(l), 110(a)(2)(j), and 169A(b)(2)). The "EPA is left with more than the ministerial task of routinely approving SIP submissions." *North Dakota v. EPA*, 730 F.3d 750, 761 (8th Cir. 2013). Instead, the Agency's "review of a SIP extends not only to whether the state considered the necessary factors in its determination, but also to whether the determination is one that is reasonably moored to the CAA's provisions" and is "based on 'reasoned analysis.'" *Id.* at 761, 766 (citing *Alaska Dep't of Env't. Conservation v. EPA*, 540 U.S. 461 (2004)); *see also Wyoming v. EPA*, 78 F.4th 1171, 1180–81 (10th Cir. 2023) (noting that "the Act provides for substantive and careful EPA review" of SIP submissions and that "the EPA does not have to accept unreasonable analyses"). For the reasons stated in the proposed rule, this document, and in the RTC document, the EPA concludes that North Dakota's 2022 SIP submission does not meet all the requirements of the CAA and RHR.

As detailed at length in our proposed rule and in the RTC document, we conclude that North Dakota's long-term strategy does not meet the requirements of CAA section 169A(b)(2) and 40 CFR 51.308(f)(2) on two independent grounds. First, North Dakota relied on the URP status of in-state Class I areas and a visibility improvement threshold that is inconsistent with the purpose of the CAA's visibility program to unreasonably reject feasible and reasonably inexpensive controls it evaluated under the four statutory factors at Coyote Station and Antelope Valley. Second, North Dakota failed to consider the four statutory factors for NO_x at Coal Creek and unreasonably rejected feasible and reasonably inexpensive controls it evaluated under the four statutory factors at Coal Creek and Leland Olds. Likewise, North Dakota did not meet the requirements of 40 CFR 51.308(f)(3) because the deficiencies in its long-term strategy prevented the State from developing adequate reasonable progress goals (RPGs). Additionally, we are disapproving North Dakota's FLM consultation under 40 CFR 51.308(i) because compliance with that requirement is dependent on fulfilling the substantive requirements of 40 CFR 51.308(f)(2) (long-term strategy).

During the public notice and comment period, we received 31 comments on our proposal. The full text of comments received is included in the publicly posted docket associated with this action at <https://www.regulations.gov>. Our RTC

³ 89 FR 56693 (July 10, 2024).

⁴ CAA section 169A(g)(1); 40 CFR 51.308(f)(2)(i).

document, which is also included in the docket associated with this action, provides detailed responses to all significant comments received.⁵ Our RTC document is organized by topic. Therefore, if additional information is desired concerning how we addressed a particular comment, the reader should refer to the appropriate section in the RTC document.

We received several comments on our proposed disapproval of North Dakota's long-term strategy on the basis that North Dakota unreasonably considered visibility benefits to reject technically feasible and reasonably inexpensive controls based on an unreasonable interpretation of CAA 169A to select its visibility improvement threshold that essentially nullified the CAA 169A(g)(1) statutory factors. Below, we provide a summary and response to this issue including North Dakota's interpretation that a change of RPG of 1.0 deciview (dv) visibility improvement (a change in visibility impairment visible to the naked eye) is needed to necessitate additional controls to make "reasonable progress." This is inconsistent with the plain language and Congress' explicitly stated national purpose of the CAA's visibility provisions.

In North Dakota's SIP, North Dakota determined that because its visibility improvement analysis showed no "significant" change in visibility after installation of potential controls, it would not be reasonable to require any additional controls to make reasonable progress for Coyote Station and Antelope Valley. We proposed disapproval due to North Dakota's reliance on visibility considerations to reject cost-effect controls at Coyote Station and Antelope Valley. Commenters concluded that this meant the EPA was either prohibiting the State from considering visibility in the four-factor analysis or that we ignored North Dakota's visibility analysis. This is incorrect. The CAA's cooperative federalism framework imposes on EPA a substantive role in determining if a SIP is approvable. See our RTC section 3.A Cooperative Federalism and State Discretion for a detailed explanation. In particular, any approvable regional haze SIP must be consistent with Congress' explicit statutory declaration of the "national goal" for "the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas which impairment results from manmade air pollution." Additionally, in determining reasonable progress, states must

"consider the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements."⁶

The EPA has acknowledged that a state may reasonably consider factors beyond the explicit four CAA section 169A(g)(1) factors, such as visibility, when assessing sources or source categories. In a response to comment on the 2017 RHR, EPA noted that a state that elects to consider an additional factor, such as visibility, must do so in a reasonable way that does not undermine or nullify the role of the four statutory factors.⁷

As this response to comment indicates, the consideration of any non-statutory factor, including visibility, must be reasonable. See, e.g., *North Dakota*, 730 F.3d at 766 ("EPA's review of a SIP extends not only to whether the state considered the necessary factors in its determination, but also to whether the determination is one that is reasonably moored to the CAA's provisions."). The reasonableness of a state's visibility consideration in the four-factor analysis turns on whether the determination is reasonably moored to the CAA visibility provisions and how the state explained and supported its determination in the record.

Here, we find that North Dakota's consideration of visibility in its four-factor analysis is unreasonable and inconsistent with the CAA and the RHR. Specifically, North Dakota rejected technically feasible and reasonably inexpensive controls at Coyote Station and Antelope Valley based on its unreasonable visibility improvement threshold in considering visibility as part of the four-factor analysis.⁸ In its SIP, North Dakota determined that no additional controls are required for Coyote Station and Antelope Valley due to "insignificant" visibility improvement when looking at the change in the RPG for a Class I area (Lostwood and Theodore Roosevelt) from the addition of potential controls. This determination was based on an interpretation that CAA section 169A requires a change in RPG of 1.0 dv improvement from the addition of controls at a single Class I area before that control is required to make "reasonable progress." However, this

interpretation is unreasonable and inconsistent with the CAA.

Congress mandated the national goal of remedying of existing and preventing future visibility impairment air pollution from anthropogenic sources.⁹ In *American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), the D.C. Circuit stated that "[t]he statutory goal enunciated in § 169A(a)(1) is quite clear: 'the prevention of any future, and the remedying of any existing, impairment of visibility.' . . . [Therefore, agency] regulations that aim to remedy any existing impairment of visibility and prevent any future impairment—as the statute commands—will of necessity aim to achieve a state of natural visibility. There is no material inconsistency between the statutory and regulatory goals, for the latter merely elucidates the former." *Id.* at 10. Therefore, as outlined throughout our proposal and this final document, the EPA is within its authority to disapprove North Dakota's long-term strategy for not including the necessary measures. Specifically, North Dakota's consideration of visibility requiring a change in RPG of 1.0 dv improvement at a single Class I area to necessitate the imposition of additional controls under reasonable progress effectively undermines and nullifies the Congressionally mandated national goal and the reasonable progress four-factor analysis requirements enumerated in CAA sections 169A(a)(1) and (g)(1). There are 56,025 anthropogenic industrial sources (electric generating units (EGU), oil and gas, and other industrial point (non-EGU) sources) in the United States that contribute to Lostwood, which is the closest Class I area to the sources evaluated by North Dakota.¹⁰ North Dakota rejected feasible and reasonably inexpensive (\$400/ton–\$1,800/ton) controls at Coyote Station and Antelope Valley under two control scenarios due to asserted non-visible and therefore ostensibly "insignificant" visibility improvement (less than 1.0 dv change in RPG visibility improvement) at a Class I area for the second planning period. However, North Dakota's analysis showed that both potential control scenarios were feasible and reasonably inexpensive and resulted in either a 10% or 25% greater visibility improvement than existing on-the-books controls for this planning period at Lostwood.

In particular, North Dakota's visibility improvement analysis projected visibility improvement from existing

⁶ CAA section 169A(a)(1), (g)(1).

⁷ EPA, Response to Comments on Protection of Visibility: Amendments to Requirements for State Plans; Proposed Rule, December 2016, at 186 (available in the docket for this action).

⁸ 40 CFR 51.308(f)(2)(i).

⁹ CAA section 169A(a)(1).

¹⁰ Censara AOI spreadsheet titled "Appendix C-1_AOI2016EI-tool.xlsx."

⁵ Some commenter tables and figures are excluded from this document.

controls in North Dakota to be 0.4 dv at Lostwood for this 10-year planning period. North Dakota considered two modeling runs to assess visibility impact of controls: Potential Additional Control Scenario 1 (“PAC1:” Replacement of the SO₂ absorber at \$1,800/ton and installation of SNCR for NO_x at \$1,700/ton at Coyote Station as well as increasing the stoichiometric ratio on existing FGD for SO₂ emission reductions at \$700/ton at Antelope Valley) and Potential Additional Control Scenario 2 (“PAC2:” FGD modification for SO₂ emission reductions (\$400/ton) at Coyote Station). Based on North Dakota’s analysis, PAC1 showed an additional 0.1 dv visibility improvement at Lostwood, with control costs ranging from \$700/ton–\$1,700/ton, resulting in a projected 25% visibility improvement at Lostwood for this planning period. Under PAC2, North Dakota’s SIP showed an additional 0.04 dv projected visibility improvement at \$400/ton, which would result in a projected 10% visibility improvement at Lostwood for this planning period. North Dakota rejected both control scenarios due to their lack of “significant” visibility improvement or change in RPG.

In response to comments on our 2017 RHR, we reemphasized that achieving reasonable progress will depend upon obtaining aggregate reductions from possibly thousands of sources, and thus, rejecting a control measure because its effect on the RPG is subjectively assessed as “not meaningful” when that control is identified as feasible and relatively inexpensive under the four statutory factors would be inappropriate. We stated:

The commenter’s second suggestion, that states should be able to reject “costly” control measures if the RPG for the most impaired days is not “meaningfully” different than current visibility conditions, is counterintuitive and at odds with the purpose of the visibility program. In this situation, the state should take a second look to see whether more effective controls or additional measures are available and reasonable. Whether the state takes this second look or not, it may not abandon the controls it has already determined are reasonable based on the four factors. Regional haze is visibility impairment that is caused by the emission of air pollutants from numerous sources located over a wide geographic area. At any given Class I area, hundreds or even thousands of individual sources may contribute to regional haze. Thus, it would not be appropriate for a state to reject a control measure (or measures) because its effect on the RPG is subjectively assessed as not

“meaningful.” Also, for Class I areas where visibility conditions are considerably worse than natural conditions because of continuing anthropogenic impairment from numerous sources, the logarithmic nature of the deciview index makes the effect of a control measure on the value of the RPG less than its effect would be if visibility conditions at the Class I area were better. Thus, if a state could reject a control measure based on its individual effect on the RPG, the state would be more likely to reject those measures that are necessary to make reasonable progress at the dirtiest Class I areas, which would thwart Congress’ national goal (82 FR 3078, 3093; Jan. 10, 2017).

North Dakota’s approach in considering visibility under the four-factor analysis effectively undermines and nullifies Congressional intent, since there is no scenario for this or subsequent planning periods under which controls to improve visibility would ever be required under the CAA visibility program, no matter how low the cost since no one source impairs visibility at a single Class I area (*e.g.* Lostwood and Theodore Roosevelt National Park) above 1.0 dv. This conflicts with the CAA’s stated national visibility goal of elimination of impairment from manmade sources and thus, North Dakota’s consideration of visibility is improper. Specifically, North Dakota’s determination to reject feasible and reasonably inexpensive controls at Coyote Station and Antelope Valley was improper. North Dakota’s own analysis shows significant visibility improvement from additional controls at Coyote Station and Antelope Valley compared against the visibility improvement from all sources that contribute to visibility impairment at Lostwood and/or Theodore Roosevelt National Park during this planning period.

To explore this point further, the EPA included in the docket to this action a Technical Appendix, which examines, using Western Regional Air Partnership (WRAP) data, the total anthropogenic nitrate and sulfate visibility-impairment impacts on North Dakota Class I areas from the EGU sector in North Dakota. As shown in the Technical Appendix, North Dakota’s EGU sources contribute ~22% (a significant portion) of the total anthropogenic impairment (nitrate and sulfate combined) on most-impaired days from all sources in the United States at Lostwood Wilderness Area. When compared to natural conditions,

this translates to 0.92 dv.¹¹ North Dakota’s EGU sources contribute ~14% (a significant portion) of the total anthropogenic impairment (nitrate and sulfate combined) from all sources in the United States at Theodore Roosevelt National Park. When compared to natural conditions, this translates to 0.26 dv.¹² These numbers demonstrate the unreasonableness of North Dakota’s position that controls must produce a perceptible impact to a Class I area RPG, or larger than 1.0 dv, to be necessary for reasonable progress. The EPA acknowledges the significant impact of the North Dakota EGU sector on visibility impairment at Lostwood Wilderness Area¹³ and Theodore Roosevelt National Park,¹⁴ despite these impacts amounting to less than a 1.0 dv impact on the RPG at each Class I area. Thus, North Dakota’s threshold for determining whether visibility improvement on a Class I area RPG necessitates new controls plainly serves to nullify the result of a four-factor analysis, especially given the low cost of controls rejected at Antelope Valley and Coyote Station.

Furthermore, as we have noted previously, regional haze is caused by hundreds or thousands of individual sources and very few remaining sources (or even none of them) will individually have impacts as large as a threshold that might be considered a “perceptible” or “meaningful” impact. However, these sources still contribute to visibility impairment and have a meaningful impact in the aggregate.¹⁵ Under the CAA and the RHR, each state that impacts a Class I area must consider the four statutory factors to determine whether additional measures are necessary for reasonable progress. Based on the WRAP data evaluated in the proposed rule, in the Technical Appendix, and in the RTC document, North Dakota has significant impacts on both in-state and out-of-state Class I areas,¹⁶ which is one of the bases to consider additional measures. In its analysis of additional measures, North Dakota showed that, compared to

¹¹ See the EPA’s Technical Appendix in the docket associated with this action.

¹² *Id.*

¹³ North Dakota’s EGU sources contribute ~22% (a significant portion) of the total anthropogenic impairment (nitrate and sulfate combined) on most-impaired days from all sources in the United States at Lostwood Wilderness Area. See Technical Appendix.

¹⁴ North Dakota’s EGU sources contribute ~14% (a significant portion) of the total anthropogenic impairment (nitrate and sulfate combined) from all sources in the United States at Theodore Roosevelt National Park. See Technical Appendix.

¹⁵ 82 FR at 3093 (January 10, 2017).

¹⁶ 89 FR 56693, 56707–09 (July 10, 2024).

natural conditions, the controls rejected at Antelope Valley and Coyote Station would result in a 0.29 dv reduction at Lostwood Wilderness Area,¹⁷ the highest-impacted Class I area from ND sources. Comparing this to the total impairment resulting from North Dakota EGUs at Lostwood Wilderness Area, the controls North Dakota rejected at Antelope Valley and Coyote Station would result in a ~32% reduction in visibility impairment from North Dakota's EGU sector.¹⁸ Given that North Dakota is by far the largest contributor to impairment at Lostwood Wilderness Area,¹⁹ the EPA finds the reduction in visibility impairment associated with these controls to be significant. In its analysis of additional measures, North Dakota also showed that, compared to natural conditions, the feasible and reasonably inexpensive controls rejected at Antelope Valley and Coyote Station would result in a 0.17 dv reduction in impairment at Theodore Roosevelt National Park.²⁰ Comparing this to the total impairment resulting from North Dakota EGUs at Theodore Roosevelt National Park, the controls North Dakota rejected at Antelope Valley and Coyote Station would result in a ~65% reduction in visibility impairment from North Dakota's EGU sector.²¹ Given that North Dakota is by far the largest contributor to impairment at Theodore Roosevelt National Park,²² the EPA finds that the reduction in visibility impairment associated with installation of these controls would be significant.

In addition, North Dakota's consideration of visibility included various technical flaws that individually, as well as collectively, underrepresented the actual visibility improvement that might be achieved from the addition of controls at Coyote Station and Antelope Valley. As more fully explained in the RTC document, these technical flaws²³ result in an

overall underestimate of the potential visibility improvement that could be achieved by the imposition of controls selected through the consideration of the four reasonable progress factors set forth in CAA section 169A(g)(1) on which North Dakota based its determination. If those errors are corrected, the imposition of controls under either scenario at Coyote Station and/or Antelope Valley would be greater than the anticipated 10–25% visibility improvement from existing controls.

As described in this preamble and in the RTC document, North Dakota's consideration of visibility, namely, its selection and application of a 1.0 dv visibility improvement threshold to reject feasible and reasonably inexpensive controls for reasonable progress at Antelope Valley and Coyote Station, undermines and nullifies the results of the four-factor analyses performed by North Dakota. This is unreasonable and inconsistent with the CAA and the RHR. Thus, EPA is required to disapprove North Dakota's long-term strategy, as well as the associated reasonable progress goals and FLM consultation.

III. Final Action

For the reasons stated in the proposed rule, in the RTC document, and in this document, we are partially approving and partially disapproving North Dakota's 2022 SIP submission.

We are disapproving the following components of North Dakota's 2022 SIP submission relating to CAA section 169A:

- Long-term strategy (40 CFR 51.308(f)(2));
- Reasonable progress goals (40 CFR 51.308(f)(3)); and
- FLM consultation (40 CFR 51.308(i)).

We are approving the following components of North Dakota's 2022 SIP submission relating to CAA section 169A:

- Calculations of baseline, current, and natural visibility conditions, progress to date, and uniform rate of progress (40 CFR 51.308(f)(1));
- Reasonably attributable visibility impairment (40 CFR 51.308(f)(4));
- Progress report requirements (40 CFR 51.308(f)(5) and 40 CFR 51.308(g)); and
- Monitoring strategy and other implementation plan requirements (40 CFR 51.308(f)(6)).

Class I areas when controls at Antelope Valley and Coyote Station also benefit those Class I areas identified by North Dakota under CAA 169A(b)(2).

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action partially approves and partially disapproves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian Tribe has demonstrated that a Tribe has jurisdiction. In those areas of Indian country, the rule does not have Tribal implications and will not impose substantial direct costs on Tribal governments or preempt Tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629,

¹⁷ North Dakota's 2022 SIP Submission, appendix D.5–23.

¹⁸ $0.29/0.92 = \sim 0.32$ or a 32% reduction in impairment.

¹⁹ See the EPA's Technical Appendix in the docket associated with this action.

²⁰ North Dakota's 2022 SIP Submission, appendix D.5–23.

²¹ $0.17/0.26 = \sim 0.65$ or a 65% reduction in impairment.

²² See the EPA's Technical Appendix in the docket associated with this action.

²³ As detailed in the RTC document, the technical flaws in North Dakota's visibility improvement analysis included the comparison to a dirty background rather than natural conditions (North Dakota then provided updated numbers comparing to natural conditions in response to comment on the draft plan) and using the 20% most-impaired days rather than all days to assess impacts from individual sources. In addition, North Dakota did not consider the visibility benefits to out-of-state

Feb. 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on communities with environmental justice (EJ) concerns to the greatest extent practicable and permitted by law. Executive Order 14096 (Revitalizing Our Nation’s Commitment to Environmental Justice for All, 88 FR 25251, April 26, 2023) builds on and supplements E.O. 12898 and defines EJ as, among other things, the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, or Tribal affiliation, or disability in agency decision-making and other Federal activities that affect human health and the environment.

The State did not evaluate EJ considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA performed an EJ analysis, as is described in the proposed action 89 FR 56693 (July 10, 2024) in the section titled, “Environmental Justice.” The analysis was done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the action. In

addition, there is no information in the record upon which this decision is based inconsistent with the stated goal of E.O. 12898/14096 of achieving EJ for communities with EJ concerns.

This action is subject to the Congressional Review Act, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 31, 2025. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Greenhouse gases, Incorporation by

reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 22, 2024.

KC Becker,
Regional Administrator, Region 8.

For the reasons stated in the preamble, the Environmental Protection Agency is amending 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart JJ—North Dakota

- 2. In § 52.1820, the table in paragraph (e) is amended by adding an entry for “North Dakota State Implementation Plan for Regional Haze (Second Implementation Period)” at the end of the table to read as follows:

§ 52.1820 Identification of plan.

* * * * *
(e) * * *

Rule No.	Rule title	State effective date	EPA effective date	Final rule citation/date	Comments
*	*	*	*	*	*
North Dakota State Implementation Plan For Regional Haze					
*	*	*	*	*	*
North Dakota State Implementation Plan for Regional Haze (Second Implementation Period).	North Dakota State Implementation Plan for Regional Haze	8/10/2022	1/2/2025	[insert Federal Register citation], 12/2/2024	Excluding the sections disapproved in this action. EPA disapproved the portions of North Dakota’s 2022 SIP submission relating to CAA section 169A and 40 CFR 51.308(f)(2): long-term strategy; 40 CFR 51.308(f)(3): reasonable progress goals; and 40 CFR 51.308(i): FLM consultation.

[FR Doc. 2024–27940 Filed 11–29–24; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2023–0368; FRL–12393–01–OCSPJ]

Fatty acids, C_{16–18} and C₁₈-unsatd., esters With polyethylene glycol mono-Me ether in Pesticide Formulations; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of fatty acids, C_{16–18} and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether (CAS Reg. No. 518299–31–5) when used as an inert ingredient (surfactant and related adjuvant of surfactant) on growing crops and raw agricultural commodities pre- and post-harvest limited to 25% by weight in pesticide formulations. Spring Regulatory

Sciences on behalf of Sasol Chemicals (USA) LLC submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA) requesting establishment of an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether, when used in accordance with the terms of this exemption.

DATES: This regulation is effective December 2, 2024. Objections and requests for hearings must be received on or before January 31, 2025 and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA-HQ-OPP-2023-0368, is available at <https://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460-0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room and the OPP docket is (202) 566-1744. Please review the visitor instructions and additional information about the docket available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: Charles Smith, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; main telephone number: (202) 566-1030; email address: RDfRNNotices@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).

- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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

You may access a frequently updated electronic version of 40 CFR part 180 through the **Federal Register** Office's e-CFR site at <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-E/part-180?toc=1>.

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

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA-HQ-OPP-2023-0368 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 31, 2025. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA-HQ-OPP-2023-0368, by one of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.

- **Mail:** OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001.

- **Hand Delivery:** To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <https://www.epa.gov/dockets/where-send-comments-epa-dockets#express>.

Additional instructions on commenting or visiting the docket, along with more information about

dockets generally, is available at <https://www.epa.gov/dockets>.

II. Petition for Exemption

In the **Federal Register** of September 19, 2023 (88 FR 64398, FRL-10579-08), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the filing of a pesticide petition (PP IN-11755) by Spring Regulatory Sciences (6620 Cypresswood Dr., Suite 250, Spring, TX 77379) on behalf of Sasol Chemicals (USA) LLC (12120 Wickchester Lane, Houston, TX 77224). The petition requested that 40 CFR 180.910 be amended by establishing an exemption from the requirement of a tolerance for residues of fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether (CAS Reg. No. 518299-31-5) when used as an inert ingredient (surfactant and related adjuvant of surfactant) in pesticide formulations applied to growing crops or raw agricultural commodities pre- and post-harvest limited to 25% by weight in pesticide formulations. That document referenced a summary of the petition prepared by Spring Regulatory Sciences on behalf of Sasol Chemicals (USA) LLC, the petitioner, which is available in the docket at <https://www.regulations.gov>. There were no comments received in response to the notice of filing.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term "inert" is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Aggregate Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA

determines that the tolerance is “safe.” Section 408(c)(2)(A)(ii) of FFDCA defines “safe” to mean that “there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.” This includes exposure through drinking water and in residential settings but does not include occupational exposure. FFDCA section 408(c)(2)(B) directs EPA to take into account the considerations in section 408(b)(2)(C) and (D) when making a safety determination for an exemption from the requirement of a tolerance. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to “ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . .” Section 408(b)(2)(D) lists other factors for EPA consideration when making safety determinations, including the validity, completeness, and reliability of available data, nature of toxic effects, available information concerning the cumulative effects of the pesticide chemical and other substances with a common mechanism of toxicity, and available information concerning aggregate exposure levels to the pesticide chemical and other related substances.

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no harm to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(c)(2)(A), and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has

sufficient data to assess the hazards of and to make a determination on aggregate exposure for fatty acids, C_{16–18} and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether, including exposure resulting from the exemption established by this action. EPA’s assessment of exposures and risks associated with fatty acids, C_{16–18} and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by fatty acids, C_{16–18} and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies are discussed in this unit.

The toxicological database of fatty acids, C_{16–18} and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether is supported by data regarding methyl laurate and alcohol ethoxylates (C₁₂AE₇, C₁₃AE₃, C₁₄AE₃, C₁₄AE₇, C₁₄AE₁₂, C₁₅AE₃ and C₁₅AE₇). EPA has determined that it is appropriate to bridge methyl laurate and the aforementioned alcohol ethoxylates data to assess fatty acids, C_{16–18} and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether based on similarities in the functional groups/structure, composition, and physical/chemical properties.

Fatty acids, C_{16–18} and C₁₈-unsatd., esters with polyethylene glycol mono-Me exhibits low levels of acute toxicity via the oral, dermal, and inhalation routes of exposure. It is not a skin irritant or a skin sensitizer, but it is minimally irritating to the eyes. Reduced body weight starting at 250 mg/kg/day was observed in the combined reproduction and developmental toxicity test, 2-generation reproduction toxicity, and chronic/carcinogenicity studies. Increased offspring susceptibility was observed in the two-generation reproduction toxicity study in rats. Reduced body weight in pups was observed at 250 mg/kg/day in the absence of maternal toxicity. However, the concern for offspring susceptibility is low because the established chronic

reference dose (cRfD, 1.6 mg/kg/day) will be protective of offspring effects observed at 250 mg/kg/day. No effects on reproductive parameters, neurotoxicity or immunotoxicity were observed in the available studies. Concern for carcinogenicity is low, based on no evidence of tumors or cancer in chronic/carcinogenicity studies and negative results in mutagenicity studies.

B. Toxicological Points of Departure/ Levels of Concern

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

An acute dietary endpoint was not selected because no effect attributable to a single dose was identified in the database. Co-critical chronic/carcinogenicity studies in rats were selected for the chronic dietary exposure scenario as well as short- and intermediate-term incidental oral, dermal and inhalation exposure scenarios. The NOAEL of 160 mg/kg/day and LOAEL of 250 mg/kg/day, based on decreased body weight, are selected for risk assessment. The studies are appropriate for the duration of exposure, protective of all subchronic effects, protective of the general population, and are protective of the most sensitive lifestage (children). The standard inter- and intra-species

uncertainty factors of 10x are applied (total uncertainty factor = 100x). A dermal absorption factor of 20% is applied. The default factor of 100% is applied for the inhalation absorption rate.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether, EPA considered exposure under the proposed exemption from the requirement of a tolerance. There are no known non-pesticidal dietary exposures for fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether. EPA assessed dietary exposures from fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether in food as follows:

In conducting the dietary exposure assessment using the Dietary Exposure Evaluation Model DEEM—FCIDTM, Version 4.02, EPA used food consumption information from the U.S. Department of Agriculture's (USDA's) 2005–2010 National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA). As to residue levels in food, no residue data were submitted for fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether. In the absence of specific residue data, EPA has developed an approach which uses surrogate information to derive upper bound exposure estimates for the subject inert ingredient. Upper bound exposure estimates are based on the highest tolerance for a given commodity from a list of high use insecticides, herbicides, and fungicides. A complete description of the general approach taken to assess inert ingredient risks in the absence of residue data is contained in the memorandum titled "Update to D361707: Dietary Exposure and Risk Assessments for the Inerts." (12/21/2021) and can be found at <https://www.regulations.gov> in docket ID number EPA-HQ-OPP-2018-0090.

In the dietary exposure assessments, the Agency assumed that the residue level of the inert ingredient would be no higher than the highest tolerance for a given commodity. Implicit in this assumption is that there would be similar rates of degradation (if any) between the active and inert ingredient and that the concentration of inert ingredient in the scenarios leading to these highest levels of tolerances would be no higher than the concentration of the active ingredient.

The Agency believes the assumptions used to estimate dietary exposures lead

to an extremely conservative assessment of dietary risk due to a series of compounded conservatisms. First, assuming that the level of residue for an inert ingredient is equal to the level of residue for the active ingredient will overstate exposure. The concentrations of active ingredient in agricultural products are generally at least 50 percent of the product and often can be much higher. Further, pesticide products rarely have a single inert ingredient; rather there is generally a combination of different inert ingredients used which additionally reduces the concentration of any single inert ingredient in the pesticide product in relation to that of the active ingredient. In the case of fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether, EPA made a specific adjustment to the dietary exposure assessment to account for the use limitations of the amount of fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether that may be in pesticide formulations (limited to no more than 25%) present at the maximum limitation rather than at equal quantities with the active ingredient.

For the purpose of the screening level dietary risk assessment, a conservative drinking water concentration value of 100 parts per billion (ppb) based on screening level modeling was used to assess the contribution to drinking water for the chronic dietary risk assessments for fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether.

2. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., textiles (clothing and diapers), carpets, swimming pools, and hard surface disinfection on walls, floors, tables).

Fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether may be used as an inert ingredient in pesticide products that are registered for specific uses that may result in residential exposure, such as pesticides used in and around the home. Therefore, screening level residential handler and post-application risk assessments have been performed for common residential exposure scenarios, using assumptions detailed in the 2012 Residential SOPs (available at <https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/standard-operating-procedures-residential-pesticide>).

3. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA

requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA has not found fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether to share a common mechanism of toxicity with any other substances, and fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance exemption, therefore, EPA has assumed that fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at <https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides>.

D. Additional Safety Factor for the Protection of Infants and Children

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

Based on the evaluation of available toxicity studies, there is low concern for pre- and postnatal susceptibility from exposure to fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether. The FQPA safety factor has been reduced to 1X because: (1) the toxicity database is adequate to characterize potential pre- and postnatal risk; (2) the established PoD (160 mg/kg/day) will be protective of the body weight decrease in offspring seen at 250 mg/kg/day in the 2-generation reproduction toxicity study in rats; (3) no evidence of neurotoxicity was

observed in the database; and (4) the assumptions for the exposure assessment are conservative and unlikely to underestimate risk.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether is not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether from food and water will utilize approximately 8.9% and 32.3% of the cPAD for the U.S. population and children 1–2 years old (the most highly exposed populations).

3. *Short- and intermediate term risks.* Short- and intermediate term aggregate exposures take into account short- and intermediate-term residential exposures plus chronic exposures to food and water (considered to be a background exposure level).

Fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether may be used as an inert ingredient in pesticide products that are registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether.

Using the exposure assumptions described in this unit for short- and intermediate-term exposures, EPA has concluded the combined short- and intermediate-term food, water, and residential exposures result in an aggregate margin of exposure (MOE) of

268 for adults. Adult residential exposure combines high end dermal and inhalation handler exposure from aerosol spray/trigger pump with a high-end post application dermal exposure from contact with treated lawns. The combined short- and intermediate-term aggregated food, water, and residential pesticide exposures result in an aggregate MOE of 127 for children. Children's residential exposure includes total exposures associated with contact with treated lawns (dermal and hand-to-mouth exposures). Because EPA's level of concern for fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether is an MOE of 100 or below, these MOEs are not of concern.

V. Other Considerations

Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is not establishing a numerical tolerance for residues of fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether in or on any food commodities. EPA is establishing a limitation on the amount of fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether that may be used in pesticide formulations applied pre- and post-harvest. This limitation will be enforced through the pesticide registration process under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. 136 *et seq.* EPA will not register any pesticide formulation for food use that exceeds 25% fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether in the final pesticide formulations to be applied pre- and post-harvest.

VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established for residues of fatty acids, C₁₆₋₁₈ and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether (CAS Reg. No. 518299–31–5) when used as an inert ingredient (surfactant and related adjuvant of surfactant) in pesticide formulations applied to growing crops and raw agricultural commodities after harvest under 40 CFR 180.910, limited to a maximum concentration of 25% in a pesticide formulation.

VII. Statutory and Executive Order Reviews

This action establishes an exemption from the requirement of a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types

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

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

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

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology

Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure,

Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 21, 2024.

Charles Smith,
Director, Registration Division, Office of Pesticide Programs.

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

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

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

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

■ 2. In § 180.910, amend Table 1 to 180.910 by adding, in alphabetical order, the entry “Fatty acids, C_{16–18} and C₁₈-unsatd., esters with polyethylene glycol mono-Me ether” to read as follows:

§ 180.910 Inert ingredients used pre- and post-harvest; exemptions from the requirement of a tolerance.

* * * * *

TABLE 1 TO 180.910

Inert ingredients	Limits	Uses
Fatty acids, C _{16–18} and C ₁₈ -unsatd., esters with polyethylene glycol mono-Me ether (CAS Reg. No. 518299–31–5).	25% by weight	Surfactant and related adjuvant of surfactant.

[FR Doc. 2024–28080 Filed 11–29–24; 8:45 am]
BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 93

45 CFR Parts 46 and 73

Final Scientific Integrity Policy; Withdrawal

AGENCY: Office of the Assistant Secretary for Planning and Evaluation, Office of the Secretary, HHS.
ACTION: Withdrawal.

SUMMARY: The Department of Health and Human Services (HHS) is withdrawing the **Federal Register** document published at 89 FR 92830. The HHS Scientific Integrity Policy remains in effect.

DATES: As of December 2, 2024, the document published at 89 FR 92830, on November 25, 2024, is withdrawn.

FOR FURTHER INFORMATION CONTACT: Karen Wehner, Ph.D., Scientific Integrity Officer, Office of Science and Data Policy, Office of the Assistant Secretary for Planning and Evaluation, Office of the Secretary, HHS at 240–453–8435 or scientificintegrity@hhs.gov.

SUPPLEMENTARY INFORMATION: Scientific integrity plays a vital role in the mission of HHS. Ensuring integrity in science throughout the Department allows HHS

to foster and produce high-quality science, communicate effectively with the public, and base critical policy decisions on trustworthy and rigorous scientific findings. HHS has adopted a Department-wide scientific integrity policy to further strengthen scientific integrity and evidence-based policymaking throughout the Department.

The Scientific Integrity Policy of the U.S. Department of Health and Human Services (Policy) was approved on September 16, 2024. The finalized Policy was announced to the HHS community and posted on the HHS scientific integrity website, at <https://www.hhs.gov/programs/research/scientificintegrity/index.html>, on September 30, 2024.

The document that published on Monday November 25, 2024, at 89 FR 92830 is being withdrawn. The Policy itself remains in effect and the public may continue to access the policy on the HHS website, at <https://www.hhs.gov/sites/default/files/hhs-scientific-integrity-policy.pdf>.

HHS would like to clarify that the Policy does not modify, implement, or change the Rules referenced in the CFR citations section, *i.e.*, 42 CFR part 93 and 45 CFR parts 46 and 73; and is not intended to be guidance about implementing those Rules. HHS also notes that the Policy is an internal HHS policy and only applies to HHS employees and other covered individuals as indicated in the Policy.

The effective date of the Policy remains October 16, 2024.

Dated: November 25, 2024.

Katherine N. Bent,
Associate Deputy Assistant Secretary, Office of Science and Data Policy, Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services.

[FR Doc. 2024–28128 Filed 11–27–24; 8:45 am]
BILLING CODE 4150–05–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[GN Docket No. 23–65, IB Docket No. 22–271, FCC 24–28; FR ID 264974]

Single Network Future: Supplemental Coverage From Space; Space Innovation

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Federal Communications Commission (Commission) announces that the Office of Management and Budget (OMB) has approved, for a period of three years, information collections associated with certain rules adopted in the 2024 Single Network Future: Supplemental Coverage from Space; Space Innovation Report and Order and Further Notice of

Proposed Rulemaking (Report and Order), FCC 24–28. The Commission also announces the effective date for these rules.

DATES: The amendments to 47 CFR 1.9047(d)(2), published at 89 FR 34148 on April 30, 2024, are effective on December 5, 2024.

FOR FURTHER INFORMATION CONTACT: For further information, please contact Christine Parola, Attorney Advisor, Mobility Division, Wireless Telecommunications Bureau at (202) 418–7851 or Christine.Parola@fcc.gov. For additional information concerning the Paperwork Reduction Act information collection requirements, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION: This document announces that OMB approved, for a period of three years, the information collection requirements in 47 CFR 1.9047(d)(2) on October 30, 2024.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received OMB approval on October 30, 2024, for the information collection requirements contained in the Commission's rules at 47 CFR 1.9047(d)(2) under OMB control number 3060–1058.

Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–1058.

OMB Approval Date: October 30, 2024.

OMB Expiration Date: October 31, 2027.

Title: FCC Application or Notification for Spectrum Leasing Arrangement or Private Commons Arrangement: WTB and PSHS Bureaus.

Form Number: FCC Form 608.

Respondents: Individual and households; Businesses or other for-profit entities; State, local, or tribal government, and Not for profit institutions.

Number of Respondents: 1,697 respondents; 1,697 responses.

Estimated Time per Response: 0.05 hours–3 hours.

Frequency of Response:

Recordkeeping requirement, third party disclosure requirement, on occasion reporting requirement, one-time reporting requirement and periodic reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 1, 4(i), 157, 301, 303, 307, 308, 309, and 310 of the Communications Act of 1934, as amended.

Total Annual Burden: 2,878 hours.

Total Annual Cost: \$1,763,375.

Needs and Uses: FCC Form 608 is a multi-purpose form. It is used to provide notification or request approval for any spectrum leasing arrangement (“Lease”) entered into between an existing licensee in certain Wireless and/or Public Safety Radio Services and a spectrum lessee. This form also is required to notify or request approval for any spectrum subleasing arrangement (“Sublease”). The data collected on the form is used by the FCC to determine whether the public interest would be served by the Lease or Sublease. The form is also used to provide notification for any Private Commons Arrangement entered into between a licensee, lessee, or sublessee and a class of third-party users (as defined in section 1.9080 of the Commission's Rules).

The Commission is revising this form to collect information in order to confirm that satellite service operators and terrestrial service providers who seek to enter lease agreements in order to offer supplemental coverage from space (SCS) do so in compliance with the rules that govern SCS operations. On March 15, 2024, the Commission released the Report and Order, which adds new § 1.9047(d)(2) to the Commission's rules requiring the spectrum lessee or sublessee seeking to engage in spectrum leasing under this section to provide certain information within the Commission Form 608 when seeking a leasing agreement to provide SCS. Applicants will file Form 608 into the Commission's Universal Licensing System (ULS) database.

The Commission anticipates that SCS will enable consumers in areas not covered by terrestrial networks to be

connected using their existing devices via satellite-based communications. SCS is a crucial component of the Commission's vision for a “single network future,” in which satellite and terrestrial networks work seamlessly together to provide coverage that neither network can achieve on its own. In order to ensure that prospective SCS operators will be able to comply with the applicable rules, that the public interest will be served by granting their applications, and that harmful interference will be avoided to the greatest extent possible thereafter, the Commission seeks to collect the following information from prospective SCS spectrum lessees.

The Commission has adopted new requirements in its part 1 rules that obligate lessees to provide the following on FCC Form 608: a certification that they are entering a leasing agreement in order to provide SCS; a description of the type of permitted arrangement the parties will enter (*e.g.*, is there a single terrestrial licensee or multiple terrestrial licensees that together hold the required licenses); and, if there are multiple terrestrial licensees, a further description of the leasing arrangement and explanation of how those licensees together hold all of the relevant licenses in a particular geographically independent area (GIA). Entities completing FCC Form 608 for the purposes of providing SCS must also indicate that the application is for SCS by checking a box on Form 608.

This information collection is designed to allow Commission staff to carry out its statutory duties to regulate satellite communications in the public interest; namely, to ensure that prospective providers of SCS will operate in compliance with the applicable regulatory framework. This process utilizes an existing Commission form, which will remove confusion by employing the procedures that are already in place. The modifications for Form 608 covered herein will enable the Commission to more accurately track filings related to the provision of SCS, a critical component of application review given the interplay between part 1 lease filings and part 25 license applications inherent in the SCS framework. This is especially crucial where multiple entities together hold all co-channel licenses in a particular band throughout a geographically independent area (GIA) and wish to deploy a leasing agreement with a satellite operator to provide SCS. Such arrangements are only permitted in the circumstances described in § 1.9047(d)(1)(ii)(A) through (B); specifically, the Commission must be

able to confirm that the multiple licensees in fact cover the entirety of the GIA in question and that, when reviewing related part 25 license applications, the entire area of the proposed service is covered by the associated leases. This collection will thereby enable the Commission to monitor and enforce the entry criteria that SCS providers must satisfy, and which are designed to minimize the possibility of harmful interference. Finally, the collection will play a critical role in the Commission's effort to review and track leasing arrangements that will result in entities providing SCS.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024-28172 Filed 11-29-24; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 231221-0314; RTID 0648-XE492]

Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; Quota Transfer From Massachusetts to North Carolina

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

ACTION: Temporary rule; quota transfer.

SUMMARY: NMFS announces that the Commonwealth of Massachusetts is transferring a portion of their 2024 commercial bluefish quota to the State of North Carolina. This quota adjustment is necessary to comply with the Atlantic Bluefish Fishery Management Plan (FMP) quota transfer provisions. This announcement informs the public of the revised 2024 commercial bluefish quotas for Massachusetts and North Carolina.

DATES: Effective November 29, 2024, through December 31, 2024.

FOR FURTHER INFORMATION CONTACT:

Matthew Rigdon, Fishery Management Specialist, (978) 281-9336.

SUPPLEMENTARY INFORMATION:

Regulations governing the Atlantic bluefish fishery are found in 50 CFR 648.160 through 648.167. These regulations require annual specification of a commercial quota that is apportioned among the coastal states from Maine through Florida. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.162, and the final 2024 allocations were published on January 2, 2024 (89 FR 34).

The final rule implementing amendment 1 to the FMP, as published in the **Federal Register** on July 26, 2000 (65 FR 45844), provided a mechanism for transferring bluefish commercial quota from one state to another. Two or more states, under mutual agreement and with the concurrence of the NMFS Greater Atlantic Regional Administrator, can request approval to transfer or combine bluefish commercial quota

under § 648.162(e). The Regional Administrator is required to consider three criteria in the evaluation of requests for quota transfers or combinations: (1) the transfers would not preclude the overall annual quota from being fully harvested; (2) the transfers address an unforeseen variation or contingency in the fishery; and (3) the transfers are consistent with the objectives of the FMP and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Regional Administrator has determined these criteria have been met for the transfers approved in this notification.

Massachusetts is transferring 65,000 lb (29,484 kg) to North Carolina through mutual agreement of the states. This transfer was requested to ensure North Carolina would not exceed its 2024 state quota. The revised bluefish quotas for 2024 are: Massachusetts, 155,862 lb (70,698 kg) and North Carolina, 1,030,996 lb (467,652 kg).

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 648.162(e)(1)(i) through (iii), which was issued pursuant to section 304(b), and is exempted from review under Executive Order 12866.

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

Dated: November 26, 2024.

Karen H. Abrams,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2024-28201 Filed 11-29-24; 8:45 am]

BILLING CODE 3510-22-P

Proposed Rules

Federal Register

Vol. 89, No. 231

Monday, December 2, 2024

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2024-2544; Project Identifier MCAI-2024-00569-E]

RIN 2120-AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2024-06-06, which applies to all Rolls-Royce Deutschland Ltd & Co KG (RRD) Model Trent7000-72 and Trent7000-72C engines. AD 2024-06-06 requires revising the airworthiness limitations section (ALS) of the operator's existing approved engine maintenance or inspection program, as applicable, to incorporate new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts. Since the FAA issued AD 2024-06-06, the manufacturer has revised the engine time limits manual (TLM) to introduce new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts, which prompted this AD. This proposed AD would require revising the ALS of the existing approved engine maintenance or inspection program, as applicable, to incorporate new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this NPRM by January 16, 2025.

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 [regulations.gov](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.

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2024-2544; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI) any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For EASA material identified in this proposed AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADS@easa.europa.eu; website: easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu.

- You may view this material at the FAA, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222-5110.

FOR FURTHER INFORMATION CONTACT:

Barbara Caufield, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238-7146; email: barbara.caufield@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-2024-2544; Project Identifier MCAI-2024-00569-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 [regulations.gov](https://www.regulations.gov), including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as "PROPIN." The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Barbara Caufield, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198. 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 2024-06-06, Amendment 39-22711 (89 FR 26755, April 16, 2024) (AD 2024-06-06), for all RRD Model Trent7000-72 and Trent7000-72C engines. AD 2024-06-06 was prompted by MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued EASA AD 2022-0248, dated December 14, 2022 (EASA AD 2022-0248), to address the manufacturer revising the engine TLM life limits to introduce new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts.

AD 2024-06-06 requires revising the ALS of the operator's existing approved

engine maintenance or inspection program, as applicable, to incorporate new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts. The FAA issued AD 2024–06–06 to prevent failure of critical rotating parts, which, if not addressed, could result in failure of one or more engines, loss of thrust control, and loss of the airplane.

Actions Since AD 2024–06–06 was Issued

Since the FAA issued AD 2024–06–06, EASA has superseded EASA AD 2022–0248 and issued EASA AD 2024–0041, dated February 9, 2024 (EASA AD 2024–0041) (also referred to as the MCAI). The MCAI states that the manufacturer published a revised engine TLM to introduce new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts.

You may examine the MCAI in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2024–2544.

Material Incorporated by Reference Under 1 CFR Part 51

The FAA reviewed EASA AD 2024–0041, which specifies revising the ALS of the existing approved engine maintenance or inspection program, as applicable, to incorporate new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts.

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

FAA’s Determination

These products have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA’s bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. 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.

Proposed AD Requirements in This NPRM

This proposed AD would retain none of the requirements of AD 2024–0041. This proposed AD would require accomplishing the actions specified in the MCAI, described previously, except as discussed under “Differences Between this Proposed AD and the MCAI ” and identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA’s ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and CAAs to use this process. As a result, the FAA proposes to incorporate by reference EASA AD 2024–0041 in the FAA final rule. This proposed AD would, therefore, require compliance with

EASA AD 2024–0041 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to “all required actions within the compliance times,” compliance with this AD requirement is not limited to the section titled “Required Action(s) and Compliance Time(s)” in EASA AD 2024–0041. Service information required by the EASA AD for compliance will be available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2024–2544 after the FAA final rule is published.

Differences Between This Proposed AD and the MCAI

Where paragraph (3) of EASA AD 2024–0041 specifies revising the approved Aircraft Maintenance Programme within 12 months after the effective date of EASA AD 2022–0248, this proposed AD would require revising the ALS of the existing approved engine maintenance or inspection program, as applicable, within 30 days after the effective date of this AD.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 54 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
Revise the ALS	1 work-hour × \$85 per hour = \$85	\$0	\$85	\$4,590

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 2024–06–06, Amendment 39–22711 (89 FR 26755, April 16, 2024); and

■ b. Adding the following new airworthiness directive:

Rolls-Royce Deutschland Ltd & Co KG:
Docket No. FAA–2024–2544; Project Identifier MCAI–2024–00569–E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by January 16, 2025.

(b) Affected ADs

This AD replaces AD 2024–06–06, Amendment 39–22711 (89 FR 26755, April 16, 2024).

(c) Applicability

This AD applies to Rolls-Royce Deutschland Ltd & Co KG Model Trent7000–72 and Trent7000–72C engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7200, Engine (Turbine/Turboprop).

(e) Unsafe Condition

This AD was prompted by the manufacturer revising the engine time limits manual to introduce new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts. The FAA is issuing this AD to prevent failure of critical rotating parts. The unsafe condition, if not addressed, could result in failure of one or more engines, loss of thrust control, and loss of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraph (h) of this AD: Perform all required actions within the compliance times specified in, and in accordance with, European Union Aviation Safety Agency AD 2024–0041, dated February 9, 2024 (EASA AD 2024–0041).

(h) Exceptions to EASA AD 2024–0041

(1) Where EASA AD 2024–0041 defines the AMP as the approved Aircraft Maintenance Programme containing the tasks on the basis of which the scheduled maintenance is conducted to ensure the continuing airworthiness of each operated engine, this AD defines the AMP as the aircraft maintenance program containing the tasks on the basis of which the scheduled maintenance is conducted to ensure the continuing airworthiness of each operated airplane.

(2) Where EASA AD 2024–0041 refers to its effective date, this AD requires using the effective date of this AD.

(3) This AD does not require compliance with paragraphs (1), (2), (4), and (5) of EASA AD 2024–0041.

(4) Where paragraph (3) of EASA AD 2024–0041 specifies “Within 12 months after the effective date of this AD, revise the approved AMP,” replace that text with “Within 30 days after the effective date of this AD, revise the airworthiness limitation section (ALS) of the existing approved engine maintenance or inspection program, as applicable.”

(5) This AD does not adopt the Remarks paragraph of EASA AD 2024–0041.

(i) Provisions for Alternative Actions and Intervals

After performing the actions required by paragraph (g) of this AD, no alternative actions and associated thresholds and intervals, including life limits, are allowed unless they are approved as specified in the provisions of the “Ref. Publications” section of EASA AD 2024–0041.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520 Continued Operational Safety 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 AIR–520 Continued Operational Safety Branch, send it to the attention of the person identified in paragraph (k) of this AD and email to: AMOC@faa.gov.

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

(k) Additional Information

For more information about this AD, contact Barbara Caufield, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7146; email: barbara.caufield@faa.gov.

(l) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2024–0041, dated February 9, 2024.

(ii) [Reserved]

(3) For EASA material identified in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADs@easa.europa.eu; website: easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu.

(4) You may view this material at FAA, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov.

Issued on November 22, 2024.

Peter A. White,

Deputy Director, Integrated Certificate Management Division, Aircraft Certification Service.

[FR Doc. 2024–28073 Filed 11–29–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA–2024–2511; Airspace Docket No. 24–ASW–21]

RIN 2120–AA66

Amendment of Class E Airspace; Austin, TX; Establishment of Class E Airspace; Austin, Lago Vista, and Lakeway, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Class E airspace at Austin, TX, and establish Class E airspace at Austin, Lago Vista, and Lakeway, TX. The FAA is proposing this action as the result of biennial airspace reviews. This action will bring the airspace into compliance with FAA orders and support instrument flight rule (IFR) procedures and operations.

DATES: Comments must be received on or before January 16, 2025.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2024–2511 and Airspace Docket No. 24–ASW–21 using any of the following methods:

* *Federal eRulemaking Portal:* Go to www.regulations.gov and follow the online instruction for sending your comments electronically.

* *Mail*: Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier*: Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

* *Fax*: Fax comments to Docket Operations at (202) 493–2251.

Docket: Background documents or comments received may be read at www.regulations.gov at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FAA Order JO 7400.11J, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish Class E airspace designated as an extension to the Class C surface area at Austin-Bergstrom International Airport, Austin, TX; amend the Class E airspace extending upward from 700 feet above the surface at Austin-Bergstrom International Airport and

Austin Executive Airport, Austin, TX; and establish Class E airspace extending upward from 700 feet above the surface at Lago Vista TX/Rusty Allen Airport, Lago Vista, TX, and Lakeway Airpark, Lakeway, TX, to bring the airspace into compliance with FAA orders and support IFR operations at these airports.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it received on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT post 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–14FDMS), which can be reviewed at www.dot.gov/privacy.

Availability of Rulemaking Documents

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

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address, phone number, and hours of

operations). An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Incorporation by Reference

Class E airspace is published in paragraphs 6003 and 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11J, dated July 31, 2024, and effective September 15, 2024. These updates would be published subsequently in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11J lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 by:

Establishing Class E airspace extending upward from the surface designated as an extension to a Class C surface area within 2.2 miles each side of the 359° bearing from the Austin-Bergstrom INTL: RWY 18R–LOC extending from the 5-mile radius to 7.1 miles north of the Austin-Bergstrom INTL: RWY 18R–LOC; and within 2 miles each side of the 359° bearing from the Austin-Bergstrom International Airport, Austin, TX, extending from the 5-mile radius of Austin-Bergstrom International Airport to 6 miles north of the Austin-Bergstrom International Airport;

Modifying the Class E airspace extending upward from 700 feet above the surface at Austin, TX, by removing the point of origin reference and the associated airspace as it is no longer required; removing Lakeway Airpark and the Lago-Vista Rusty Allen Airport and the associated airspace as the airspace will no longer adjoin the Austin, TX, Class E airspace and separate Class E airspace is being established for these airports; adding within a 7.5-mile radius of the Austin-Bergstrom International Airport; adding within 4 miles either side of the 179° bearing from the Austin-Bergstrom INTL: RWY 36R–GS extending from the 7.5-mile radius of Austin-Bergstrom International Airport to 7.7 miles south of the Austin-Bergstrom INTL: RWY 36R–GS; within a 6.6-mile (increased from a 6.3-mile) radius of the Austin

Executive Airport, Austin, TX; within 2 miles each side of the 131° bearing from Austin Executive Airport extending from the 6.6-mile (previously 6.3-mile) radius of Austin Executive Airport to 11.2 (decreased from 11.3) miles southeast of the Austin Executive Airport; and within 2 miles each side of the 311° bearing from the Austin Executive Airport extending from the 6.6-mile (previously 6.3-mile) radius of Austin Executive Airport to 10.9 (increased from 10.5) miles northwest of the Austin Executive Airport; Establishing Class E airspace extending upward from 700 feet above the surface within a 7-mile radius of Lago Vista TX/Rusty Allen Airport, Lago Vista, TX;

And establishing Class E airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Lakeway Airport, Lakeway, TX.

This action is the result of biennial airspace reviews and to bring the airspace into compliance with FAA orders and support IFR operations at these airports.

Regulatory Notices and Analyses

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

Environmental Review

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

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 7400.11J, Airspace Designations and Reporting Points, dated July 31, 2024, and effective September 15, 2024, is amended as follows:

Paragraph 6003 Class E Airspace Areas Designated as an Extension.

* * * * *

ASW TX E3 Austin, TX [Establish]

Austin-Bergstrom International Airport, TX
(Lat 30°11'40" N, long 97°40'12" W)

Austin-Bergstrom INTL: RWY 18R–LOC, TX
(Lat 30°11'36" N, long 97°40'42" W)

That airspace extending upward from the surface within 2.2 miles each side of the 359° bearing from the Austin-Bergstrom INTL: RWY 18R–LOC extending from the 5-mile radius to 7.1 miles north of the Austin-Bergstrom INTL: RWY 18R–LOC; and within 2 miles each side of the 359° bearing from the Austin-Bergstrom International Airport extending from the 5-mile radius of Austin-Bergstrom International Airport to 6 miles north of the Austin-Bergstrom International Airport.

* * * * *

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ASW TX E5 Austin, TX [Amended]

Austin-Bergstrom International Airport, TX
(Lat 30°11'40" N, long 97°40'12" W)

Austin-Bergstrom INTL: RWY 36R–GS, TX
(Lat 30°10'54" N, long 97°39'22" W)

Austin Executive Airport, TX
(Lat 30°23'51" N, long 97°33'59" W)

That airspace extending upward from 700 feet above the surface within a 7.5-miles radius of the Austin-Bergstrom International Airport; and within 4 miles either side of the 179° bearing from the Austin-Bergstrom INTL: RWY 36R–GS extending from the 7.5-mile radius of Austin-Bergstrom International Airport to 7.7 miles south of the Austin-Bergstrom INTL: RWY 36R–GS; and within a 6.6-mile radius of Austin Executive Airport; and within 2 miles each side of the 131° bearing from Austin Executive Airport extending from the 6.6-mile radius of Austin Executive Airport to 11.2 miles southeast of Austin Executive Airport; and within 2 miles each side of the 311° bearing from Austin Executive Airport extending from the 6.6-mile radius of Austin Executive Airport to

10.9 miles northwest of Austin Executive Airport.

* * * * *

ASW TX E5 Lago Vista, TX [Establish]

Lago Vista TX/Rusty Allen Airport, TX
(Lat 30°29'55" N, long 97°58'10" W)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of the Lago Vista TX/Rusty Allen Airport.

* * * * *

ASW TX E5 Lakeway, TX [Establish]

Lakeway Airpark, TX
(Lat 30°21'27" N, long 97°59'40" W)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of the Lakeway Airpark.

* * * * *

Issued in Fort Worth, Texas, on November 26, 2024.

Steven T. Phillips,

*Acting Manager, Operations Support Group,
ATO Central Service Center.*

[FR Doc. 2024–28149 Filed 11–29–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

42 CFR Parts 1000 and 1001

RIN 0936–AA12

Health Care Programs: Fraud and Abuse; Revisions to the Office of Inspector General's Exclusion Authorities

AGENCY: Office of Inspector General (OIG), Department of Health and Human Services (HHS).

ACTION: Proposed rule.

SUMMARY: This proposed rule proposes to amend the regulations relating to exclusion authorities under the authority of the Office of Inspector General (OIG) of the Department of Health and Human Services (HHS or the Department). The proposed rule would codify changes made by the Medicaid Services Investment and Accountability Act of 2019 (MSIAA), that added exclusion authorities related to misclassification and false information about outpatient drugs. The proposed rule would also update and clarify OIG's procedures for excluding individuals and entities from participation in the Federal health care programs, including the factors that will be considered in determining the length of exclusions, the provisions governing notices of exclusions, and certain provisions related to reinstatement into the programs.

DATES: To ensure consideration, public comments must be received no later than 5 p.m. eastern time on January 31, 2025.

ADDRESSES: In commenting, please refer to file code OIG–2401–P. Because of staff and resource limitations, we cannot accept comments by fax transmission. You may submit comments in one of two ways (no duplicates, please):

1. *Electronically.* You may submit comments electronically at <https://www.regulations.gov>. Follow the “Submit a comment” instructions and refer to file code OIG–2401–P.

2. *By regular, express, or overnight mail.* You may send written comments to the following address: OIG, Regulatory Affairs, HHS, Attention: OIG–2401–P, Room 5267, Cohen Building, 330 Independence Avenue SW, Washington, DC 20201. Please allow sufficient time for mailed comments to be received before the close of the comment period.

For information on viewing public comments, please see the **SUPPLEMENTARY INFORMATION** section.

Docket: Go to the Federal eRulemaking Portal at <https://www.regulations.gov> for access to the rulemaking docket, including any background documents and the plain-language summary of the proposed rule of not more than 100 words in length required by the Providing Accountability Through Transparency Act of 2023.

FOR FURTHER INFORMATION CONTACT: David Fuchs, Deputy Branch Chief, Office of Counsel to the Inspector General, at (202) 763–4750.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period as soon as possible after they have been received on the following website: <https://www.regulations.gov>.

I. Executive Summary

A. Purpose and Need for Regulatory Action

MSIAA expanded OIG’s exclusion authority to protect the Federal health care programs from fraud and abuse by allowing OIG to exclude certain individuals and entities that knowingly misclassify a covered outpatient drug, knowingly fail to correct such misclassification, or knowingly provide false information related to drug pricing,

drug product information, or data related to drug pricing or drug product information. OIG proposes to update its regulations to codify the changes made by MSIAA in the regulations. At the same time, OIG proposes to amend other sections of the exclusion regulations to ensure consistency with statutory authority, decrease administrative burdens, enhance transparency, and improve the efficiency and effectiveness of government. The proposed amendments include factors that will be considered in determining the lengths of exclusions, the processes governing notices of exclusions, and certain provisions related to reinstatement into the programs, as well as clarifying changes and updates to the regulations.

B. Legal Authority

The legal authority for this regulatory action is found in: 42 U.S.C. 1302; 1320a–7; 1395u(j); 1395u(k); 1395y(e); and 1395hh.

II. Summary of Major Provisions

We propose changes to the exclusion regulations at 42 CFR parts 1000 and 1001 to codify an authority under MSIAA, update processes, and make clarifying and technical changes to existing regulations. Specifically, section 6(d) of MSIAA amended section 1128(b) of the Social Security Act (the Act) to add an exclusion authority for certain conduct related to the misclassification of outpatient drugs, and knowingly providing false information related to drug pricing, drug product information, or data related to drug pricing or drug product information.

We propose clarifying changes to aggravating and mitigating factors that are used to determine periods of exclusion under section 1128 of the Act. We propose to simplify the mitigating factor relating to cooperation and to consolidate certain aggravating factors relating to other criminal, civil, and administrative sanctions into a single factor. We propose to modify the exclusion authority under section 1128(b)(12) of the Act, for failure to grant immediate access, to eliminate a requirement for OIG or a State Medicaid Fraud Control Unit (MFCU) to demonstrate that the requested material is about to be altered or destroyed in order to obtain access to the material at the time the request is made. We propose to modify OIG’s obligations with respect to beneficiaries’ access to physician services in imposing exclusions under section 1128(b)(14) of the Act in accordance with the Act. We propose to modify the regulatory language to align the regulations with

certain, current OIG practices for exclusions imposed under sections 1128(a) and (b) of the Act and for waivers. We propose certain changes to the definitions to remove duplication. We propose to modify the circumstances under which early reinstatement is available for individuals and entities excluded under section 1128(b)(4) of the Act to permit individuals who lost their health care licenses for reasons related to patient abuse and neglect to apply for early reinstatement in limited circumstances.

III. Costs and Benefits

There are no significant costs associated with the proposed regulatory revisions that would impose any mandates on State, local, or Tribal governments or the private sector.

IV. Background

A. Exclusion Authority

The exclusion authorities found in section 1128 of the Act are intended to protect the Federal health care programs and their beneficiaries from untrustworthy individuals and entities whose behavior has demonstrated that those individuals and entities pose a risk to program beneficiaries or to the integrity of these programs. These authorities encompass both mandatory exclusions (section 1128(a) of the Act) and permissive exclusions (section 1128(b) of the Act). The Secretary’s authority under section 1128 of the Act has been delegated to OIG. *See* 53 FR 12993 (Apr. 20, 1988).

The mandatory exclusion authorities require OIG to exclude from program participation any individual or entity convicted of an offense that is: related to items or services delivered under Medicare and Medicaid; related to patient abuse or neglect; or a felony related to health care delivery, governmental health care programs, or controlled substances. Mandatory exclusions must be imposed for a minimum 5-year period. The permissive authorities do not require the imposition of an exclusion and may either be: (1) “derivative” exclusions that are based on actions previously taken by a court, other law enforcement, or regulatory agencies; or (2) “non-derivative” exclusions that are based on OIG-initiated determinations of misconduct, *e.g.*, poor quality care or submission of false claims for Medicare or Medicaid payment. With certain exceptions, there are no specified minimum periods of exclusion under these permissive authorities.

Over the years, several statutory and regulatory provisions have amended or

further clarified OIG's exclusion authorities. For example, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) expanded OIG's authorities to add several exclusion authorities (sections 1128(a)(3), (a)(4), and (b)(15)) and increase minimum or benchmark periods of exclusion for certain permissive exclusions. The Balanced Budget Act (BBA) of 1997 further amended OIG's exclusion authorities by: (1) extending the scope of an OIG exclusion beyond Medicare and State health care programs to all Federal health care programs; (2) establishing permanent exclusions for persons convicted of three or more health care-related crimes and 10-year exclusions for persons convicted of two health care-related crimes; and (3) expanding the scope of exclusions under section 1128(b)(8) of the Act.

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) amended OIG's authority to waive mandatory exclusions. In 2010, the Patient Protection and Affordable Care Act, Public Law 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Public Law 111-152, 124 Stat. 1029 (2010) (ACA), broadened OIG's waiver authority to permit the administrator of a Federal health care program to request a waiver if the administrator determines that exclusion would impose a hardship on beneficiaries of that program. In addition, the ACA expanded OIG's exclusion authority in several ways, including by establishing a new permissive exclusion authority under section 1128(b)(16) of the Act. On January 17, 2017, OIG published a final rule addressing new and revised exclusion authorities in accordance with the ACA and the MMA, as well as technical, policy, and clarifying changes to 42 CFR parts 1000, 1001, 1002, and 1006.

B. Changes Made by MSIAA

MSIAA expanded OIG's authority to exclude certain individuals and entities from participation in the Federal health care programs under section 1128 of the Act. Section 6(d) of MSIAA established a new permissive exclusion authority applicable to any manufacturer, or officer, director, agent, or managing employee of such manufacturer, that knowingly misclassifies a covered outpatient drug, knowingly fails to correct such misclassification, or knowingly provides false information related to drug pricing, drug product information, or data related to drug pricing or drug product information.

The proposed rule would codify this statutory authority within the existing regulatory framework and address how OIG will set the length of exclusions imposed under that authority.

C. Proposed Policy Changes and Clarifying Changes

The proposed rule would revise the section governing exclusions under section 1128(b)(14) of the Act based on an individual's default on a health education loan or scholarship obligation. The section currently requires OIG to take into account access of beneficiaries to physician services for which payment may be made under Medicare, Medicaid, or other Federal health care programs in determining whether to impose an exclusion. We propose to align the regulation with section 1128(b)(14) of the Act by limiting OIG's obligations under this section to take into account access of beneficiaries to only Medicare and Medicaid physician services. By aligning the regulation with the statutory authority and removing the requirement for OIG to take into account beneficiary access to physician services under Federal health care programs other than Medicare and Medicaid, we hope to allow for more efficient imposition of exclusions under this section.

We propose clarifying changes to aggravating and mitigating factors that are used to determine periods of exclusion under section 1128 of the Act. We propose to simplify the mitigating factor relating to cooperation and to combine certain overlapping factors relating to prior civil, criminal, and administrative sanctions into a single factor. We propose to revise the regulation that permits OIG to exclude individuals and entities who fail to grant OIG or a State MFCU immediate access to certain records, to eliminate the requirement that OIG or a MFCU demonstrate that the requested materials are about to be altered or destroyed in order to obtain access to the materials at the time the request is made, instead of within 24 hours of the request. We propose to make technical changes to the regulations governing exclusions under section 1128 of the Act and for waivers. We propose to modify the circumstances under which early reinstatement is available for individuals and entities excluded under section 1128(b)(4) of the Act.

The proposed rule would also modify the sections governing notice to the public and other agencies regarding exclusions, notice regarding approval of reinstatement requests, and notice regarding denial of reinstatement

requests. These proposed changes would modernize notice to the public and other agencies and more clearly outline OIG's process for appeals of denials of reinstatement requests.

Finally, the proposed rule would also include clarifying changes and updates to the exclusion regulations, including plain language changes to definitions, phrasing, and verbiage ensuring higher readability and comprehension for the public. Additionally, the proposed rule proposes to modernize pronoun references.

V. Provisions of the Proposed Rule

A. Changes to Part 1000 (Definitions)

We propose to move the definitions of "agent," "indirect ownership interest," "ownership interest," and "patient" from § 1001.2 to § 1000.10 (General definitions), because these terms are used not only in part 1001 but also in other parts of subchapter B. We propose to modify "indirect ownership interest" to correct certain language. The current language states that "'Indirect ownership interest' includes an ownership interest through any other entities that ultimately have an ownership interest in the entity in issue." We propose to modify this language to clarify that the indirect ownership interest could be in one entity or through multiple entities. We also propose a technical edit changing "in issue" to "at issue." We propose to modify the definition of "ownership interest" to correct certain language. The current language states that an ownership interest includes any interest in any mortgage, deed, trust or note, or other obligation secured in whole or in part by the assets of the entity. We propose to replace the phrase "deed, trust or note, or other obligation" with "deed of trust, note, or other obligation." The reference to "deed of trust" appears in the definition of "ownership or control interest" at § 1001.2 and in section 1124 of the Act, and we believe that "deed, trust or note" was a typographical error in the regulatory definition because a "deed of trust" is an obligation similar to a mortgage or note.

We also propose to modify the definition of "patient" to change the reference to "Medicare, Medicaid and any other Federal health care program" to "any Federal health care program" because "Federal health care program" is a statutorily defined term that includes (and is broader than) Medicare and State health care programs. See 42 U.S.C. 1320a-7b(f). Section 1320a-7b(f) of U.S. Code title 42 and § 1000.10 define "Federal health care program" as

“(1) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5); or (2) any State health care program, as defined as defined in section 1128(h).”

Lastly, we propose to add a regulatory definition of “knowingly” to § 1000.10 because the term is used in the new exclusion authority added by MSIAA. We propose the same definition of “knowingly” that appears in § 1003.110, applicable to OIG’s civil monetary penalty authorities in section 1128A of the Social Security Act (Act). By adding the definition to § 1000.10, the definition will apply to the regulations interpreting both the exclusion statute (section 1128 of the Act) and the OIG’s civil monetary penalty authorities (section 1128A of the Act). The proposed language is as follows: “*Knowingly* means that a person, with respect to an act, has actual knowledge of the act, acts in deliberate ignorance of the act, or acts in reckless disregard of the act, and no proof of specific intent to defraud is required.” The definition mirrors the definition used in the False Claims Act, and is the most widely used knowledge standard for civil health care fraud.

B. Changes to Part 1001

References to Medicare, Medicaid, and State Health Care Programs. Title, Sections 1001.1, 1001.2, 1001.101, 1001.102, 1001.201, 1001.301, 1001.401, 1001.701, 1001.1301, 1001.1401, 1001.1901, 1001.3002, 1001.3005

We propose to change the title of part 1001 from “Medicare and State health care programs” to “The Federal health care programs” because the statutory basis for many of the OIG authorities in part 1001 derives from section 1128 of the Act, which references “Federal health care program,” a defined term that includes (and is broader than) Medicare and State health care programs, as described above. Similarly, we propose removing references to Medicare and Medicaid in variations of the phrase “Medicare, Medicaid and all other Federal health care programs” throughout part 1001, because the statutorily defined term “Federal health care program” encompasses Medicare and Medicaid. We are proposing to remove the references to Medicare and Medicaid in the following sections: 1001.1(a), 1001.101(b), 1001.401(c)(2)(ii), 1001.701(d)(2)(iv), 1001.1301(b)(2)(iii), 1001.1401(b)(1), 1001.1401(b)(4); 1001.1901(a),

1001.1901(b)(1), 1001.1901(c)(3), and 1001.1901(c)(5)(i), 1001.3002(b)(3), and 1001.3005(a). We also propose corresponding technical changes to the phrases in those sections to account for the removal of the references to Medicare and Medicaid. Neither the removal of the references to Medicare and Medicaid, nor the technical conforming changes, are meant to change the meaning of the phrases to which the changes are made. Finally, we propose to modernize the pronouns throughout part 1001 and make corresponding grammatical edits.

Section 1001.2 Definitions

We propose deleting the definition of “Controlled substance” from 1001.2 because the relevant regulations at §§ 1001.101(d) and 1001.401 already indicate that the term “controlled substance” is being used as defined in Federal or State law, so the definition of “Controlled substance” in § 1001.2 is unnecessary. We also propose to move certain definitions from § 1001.2 to § 1000.10 and modify them as described above.

Section 1001.101 Basis for Liability

In § 1001.101(c) and (d), we propose to remove the date limitation of August 21, 1996. The date limitation was included because when HIPAA amended section 1128 of the Act to add new exclusion authorities in sections 1128(a)(3) and (a)(4) of the Act, it specified that only convictions after August 21, 1996 (the date of HIPAA’s enactment) would be subject to the exclusion authorities in those subsections. We are proposing to delete the date limitation in the corresponding regulatory authorities in § 1001.101(c) and (d) because it is now obsolete. We believe that this change will not impact any future exclusions because virtually all criminal offenses before August 21, 1996, are now time-barred from prosecution.

Section 1001.101(c)(2) states “with respect to any act or omission in a health care program (other than Medicare and a State health care program). . . .” We propose to make a technical change from the word “and” to the word “or” in the parenthetical for grammatical accuracy. Similar language appears in § 1001.201(a)(1)(ii). We propose the same technical change for that section for grammatical accuracy.

Aggravating Factors

When OIG imposes an exclusion under section 1128(a), the minimum period of the exclusion is required by statute to be at least 5 years. However, under the regulations the length of an

exclusion may be extended beyond the 5-year minimum period if certain aggravating factors, as defined in the regulations, are present. OIG exclusions under certain permissive authorities in section 1128(b) are for a period of 3 years but may be lengthened if certain aggravating factors (again, as defined in the regulations) are present. This section discusses proposed changes to these aggravating factors.

Financial Loss

The financial loss aggravating factor at § 1001.102(b)(1) currently reads as follows: “The acts resulting in the conviction, or similar acts, caused, or were intended to cause, a financial loss to a government agency or program or to one or more other entities of \$50,000 or more. (The entire amount of financial loss to such government agencies or programs or to other entities, including any amounts resulting from similar acts not adjudicated, will be considered regardless of whether full or partial restitution has been made).” A similar aggravating factor appears in §§ 1001.201 and 1001.301. We believe that the language of this factor should be consistent in each place it appears to avoid any question about whether court decisions interpreting it under one section should apply to its application under other sections. Therefore, we propose two technical changes to § 1001.102(b)(1) to match the language of this factor as it appears in §§ 1001.201(b)(2)(i) and 1001.301(b)(2)(viii): to move the phrase “of \$50,000 or more” to after “a financial loss,” and to delete the phrase in the parenthetical “to such government agencies or programs or to other agencies” because it is duplicative of language outside the parenthetical. In §§ 1001.201(b)(2)(i) and 1001.301(b)(2)(viii), we propose to delete the phrase “or had a significant financial impact on program beneficiaries or other individuals” because we propose adding this concept to a separate aggravating factor at §§ 1001.201(b)(2)(iii) and 1001.301(b)(2)(ii) as described in the next paragraph.

Impact on Beneficiaries and Other Individuals

Section 1001.102(b)(3), applicable to mandatory exclusions, includes as an aggravating factor whether the acts that resulted in the conviction, or similar acts, had a significant adverse physical, mental, or financial impact on one or more program beneficiaries or other individuals. A similar aggravating factor applies to certain permissive exclusions under §§ 1001.201 and 1001.301, but

those sections do not reference “financial” impact. In §§ 1001.201(b)(2)(iii) and 1001.301(b)(2)(ii), we propose to add “or financial” to the aggravating factor relating to impact on program beneficiaries and other individuals. We believe it is appropriate to consider all impacts on beneficiaries under the same aggravating factor. This change would make this aggravating factor consistent with a similar factor applicable to mandatory exclusions under § 1001.102(b)(3) and would move the analysis of financial impact on beneficiaries from the aggravating factor relating to financial loss (discussed above) to the aggravating factor relating to impact on beneficiaries.

In § 1001.301(b)(2)(ii), the aggravating factor is applied to convictions related to obstruction of an investigation or audit under section 1128(b)(2) of the Act. We are proposing language changes to this factor because we believe it is important to apply similar factors consistently in all applicable exclusions. Consistent language ensures that judicial interpretations of certain language will be applicable wherever the language appears, and that the public can reasonably expect OIG to apply the factors consistently. Therefore, we propose to replace the words “interference or obstruction” with “acts that resulted in the conviction.” When referring to the conduct leading to a conviction, other sections of the regulation use the word “acts,” and interference or obstruction are the “acts” at issue in the exclusion authority related to convictions for obstruction.

For the same reason, in § 1001.401(c)(2)(ii), which applies this aggravating factor to misdemeanor convictions relating to controlled substances, we propose to reorder the words “mental, physical or financial impact” to “physical, mental, or financial impact” for consistency with the language as it appears in this factor in other sections of the regulation. Neither of these modifications are intended to change the substance of this aggravating factor in either § 1001.301 or § 1001.401; instead, these changes are intended to simplify the regulations by using consistent language across various sections where the same meaning is intended.

Convictions Involving Patient Abuse and Neglect

Section 1001.102(b) includes the following as an aggravating factor: “In convictions involving patient abuse or neglect, the action that resulted in the conviction was premeditated, was part

of a continuing pattern of behavior, or consisted of non-consensual sexual acts.” See § 1001.102(b)(4). We propose a technical change to change “action” to “acts” for consistency with § 1001.102(b)(1) through (3). We propose additional conforming and technical changes to § 1001.102(b)(4) to account for the grammatical change from “action” to “acts” so that the new language would read as follows: “In convictions involving patient abuse or neglect, the acts that resulted in the conviction were premeditated, were part of a continuing pattern of behavior, or consisted of non-consensual sexual acts.” These changes to § 1001.102(b)(4) are not meant to change the meaning of the phrases to which the changes are made.

Criminal, Civil, and Administrative Sanctions

We propose to modify the aggravating factors relating to criminal, civil, and administrative sanctions. For mandatory exclusions, the regulations contain four separate factors that can be overlapping: “The convicted individual or entity has a prior criminal, civil or administrative sanction record” (§ 1001.102(b)(6)); “The individual or entity has previously been convicted of a criminal offense involving the same or similar circumstances” (§ 1001.102(b)(7)); “The individual or entity has been convicted of other offenses besides those that formed the basis for the exclusion” (§ 1001.102(b)(8)); and “The individual or entity has been the subject of any other adverse action by any Federal, State or local government agency or board if the adverse action is based on the same set of circumstances that serves as the basis for the imposition of the exclusion” (§ 1001.102(b)(9)). We propose to modify these factors to clarify how OIG would consider other civil, criminal, or administrative actions involving the excluded person for purposes of setting the period of exclusion.

First, we propose to modify § 1001.102(b)(6) to replace the phrase “a prior” with “other documented instances” and replace “sanction record” with “wrongdoing.” The proposed revised language would read as follows: “The individual or entity has other documented instances of criminal, civil, or administrative wrongdoing.” This proposed language is intended to encompass any documented instances of other criminal, civil, or administrative wrongdoing, including convictions that occurred before, at the same time as, or after the conviction forming the basis for exclusion. OIG may place greater emphasis on this

aggravating factor in determining the appropriate period of exclusion if multiple documented instances exist (e.g., an individual or entity has a prior conviction, the individual or entity was found liable under the False Claims Act, or a licensing authority imposed a sanction on the individual’s or entity’s license to provide health care).

Second, we propose to remove § 1001.102(b)(7) and (8) because they are duplicative of proposed § 1001.102(b)(6). Both a previous conviction of a criminal offense involving the same or similar circumstances (§ 1001.102(b)(7)) and a conviction for other offenses besides those that formed the basis for the exclusion (§ 1001.102(b)(8)) would be included in the proposed aggravating factor for other documented instances of criminal, civil, or administrative wrongdoing in § 1001.102(b)(6).

Third, we propose to remove the aggravating factor relating to “any other adverse action” in § 1001.102(b)(9) because it would be unnecessary with the new proposed language in § 1001.102(b)(6). Adverse actions by Federal, State, or local government agencies and boards would be included in other documented instances of administrative wrongdoing under proposed § 1001.102(b)(6).

For permissive exclusions, the regulations contain three separate aggravating factors relating to civil, criminal, and administrative sanctions that can be overlapping: (1) “Whether the individual or entity has a documented history of criminal, civil, or administrative wrongdoing;” (2) “Whether the individual or entity has been convicted of other offenses besides those that formed the basis for the exclusion;” and (3) “Whether the individual or entity has been the subject of any other adverse action by any Federal, State, or local government agency or board if the adverse action is based on the same set of circumstances that serves as the basis for the imposition of the exclusion.” See, e.g., § 1001.201(b)(2)(v) through (vii). One or more of these three aggravating factors, with some language variations (as addressed below) also appear in §§ 1001.301, 1001.401, 1001.701, 1001.801, 1001.901, 1001.951, 1001.1101, 1001.1201, 1001.1301, 1001.1552, 1001.1601, and 1001.1701. We intend the proposed changes described below to clarify how OIG would consider other civil, criminal, and administrative sanctions involving an excluded person for purposes of setting the length of exclusion.

First, we propose to modify §§ 1001.201(b)(2)(v), 1001.301(b)(2)(v),

1001.401(c)(2)(iv), 1001.701(d)(2)(iii), 1001.801(c)(2)(iv), 1001.901(b)(3), 1001.951(b)(1)(iii), 1001.1101(b)(3), 1001.1201(b)(4), 1001.1301(b)(2)(iv), 1001.1401(b)(5), 1001.1552(d)(3), 1001.1601(b)(1)(iv), and 1001.1701(c)(1)(v) to make the first of the three aggravating factors referenced above consistent in each section, as “The individual or entity has other documented instances of criminal, civil, or administrative wrongdoing.” The proposed language is intended to encompass any documented instances of other criminal, civil, or administrative wrongdoing, including convictions that occurred before, at the same time as, or after the conviction forming the basis for exclusion. OIG may place greater emphasis on this aggravating factor in determining the appropriate period of exclusion if multiple documented instances exist (e.g., an individual or entity has a prior conviction, the individual or entity was previously found liable under the False Claims Act, or a licensing authority imposed a sanction on the individual’s or the entity’s license to provide health care).

Several of the permissive exclusion authority sections (§§ 1001.901, 1001.951, 1001.1101, 1001.1201, 1001.1301, 1001.1401, 1001.1601, and 1001.1701) include a parenthetical stating that “the lack of any prior record is to be considered neutral.” In these sections, we propose to replace “lack” with “absence” to increase readability and “prior record” with “such instances” for consistency within the factor. In § 1001.1401(b)(5), the proposed language would use “hospital” instead of “individual or entity,” as that section applies to hospitals only. In §§ 1001.1601(b)(1)(iv) and 1001.1701(c)(1)(v), the proposed language would use “physician” instead of “individual or entity,” as those sections apply to physicians only. The change from “lack” to “absence” is not meant to change the meaning of the phrase to which the change is made. Lastly, in §§ 1001.201(b)(2)(v), 1001.301(b)(2)(v), 1001.401(c)(2)(iv), 1001.701(d)(2)(iii), and 1001.801(c)(2)(iv), the proposed language would remove the word “whether” at the beginning of this factor, as the word is extraneous. This technical change is not meant to change the meaning of the phrases to which the changes are made. In § 1001.801(c)(2)(iv), which currently reads, “Whether the individual or entity has a documented history of criminal, civil or administrative wrongdoing,” we propose to remove the words “Whether

the individual or” because this authority only applies to entities.

Second, we propose to remove the second aggravating factor discussed above (whether the individual or entity has been convicted of other offenses besides those that formed the basis for the exclusion) found in §§ 1001.201(b)(2)(vi), 1001.301(b)(2)(vi), and 1001.401(c)(2)(v) as duplicative of the proposed aggravating factor in §§ 1001.201(b)(2)(v), 1001.301(b)(2)(v), and 1001.401(c)(2)(iv), described in the preceding paragraph. A conviction for other offenses besides those that formed the basis for the exclusion would be included in the proposed aggravating factor for other documented instances of criminal, civil, or administrative wrongdoing.

We also propose to remove the aggravating factor relating to “any other adverse action” in §§ 1001.201(b)(2)(vii), 1001.301(b)(2)(vii), 1001.401(c)(2)(vi), 1001.701(d)(2)(v), 1001.801(c)(2)(v), 1001.901(b)(4), and 1001.951(b)(iv) because it would be unnecessary. Adverse actions by Federal, State, or local government agencies and boards would be included in other documented instances of administrative wrongdoing under the proposed changes to §§ 1001.201(b)(2)(v), 1001.301(b)(2)(v), 1001.401(c)(2)(iv), 1001.701(d)(2)(iii), 1001.801(c)(2)(iv), 1001.901(b)(3), 1001.951(b)(1)(iii), 1001.1101(b)(3), 1001.1201(b)(4), 1001.1301(b)(2)(iv), 1001.1552(d)(3), 1001.1601(b)(1)(iv), and 1001.1701(c)(1)(v). We propose technical changes renumbering § 1001.901(b)(5) to § 1001.901(b)(4) and technical changes to the other sections to account for the deletions described above.

Effect on Civil and Administrative Investigations

The exclusion authority in section 1128(b)(2) of the Act and in § 1001.301, in part, allows OIG to exclude for convictions for obstruction of or interference with investigations related to the use of funds received from the Federal health care programs. We propose to remove the aggravating factors at § 1001.301(b)(2)(i) (the interference or obstruction caused the expenditure of significant additional time and resources) and § 1001.301(b)(2)(iii) (the interference or obstruction also affected a civil or administrative investigation). We propose removing § 1001.301(b)(2)(i) because in our experience the subjectivity of the language makes it challenging to apply consistently. We propose removing § 1001.301(b)(2)(iii) because it is OIG’s position that this

exclusion authority already includes administrative and civil investigations in the scope of the term “investigations.” We are concerned that including a separate aggravating factor at § 1001.301(b)(2)(iii) where the interference or obstruction affected a civil or administrative investigation could be misconstrued as suggesting that the exclusion authority does not include civil and administrative investigations. Also, the application of this factor in matters where the obstruction or interference occurred in a civil or administrative investigation would be duplicative of the statutory basis for exclusions under section 1128(b)(2) of the Act. To avoid confusion, we propose to remove this aggravating factor. Lastly, we propose to renumber the aggravating factors consistent with the proposed changes described above.

Nature of Violations, Length of Scheme, and Impact on Beneficiaries

We propose to modify the aggravating factor at § 1001.701(d)(2)(i) for exclusions related to excessive claims or furnishing of unnecessary or substandard care. The aggravating factor currently reads “the violations were serious in nature, and occurred over a period of one year or more.” We propose to replace the phrase “violations were serious in nature, and” with “conduct.” The severity of the conduct is considered under the impact on beneficiaries aggravating factor at § 1001.701(d)(2)(ii) (“the violations had a significant adverse physical, mental or financial impact on program beneficiaries or other individuals”) and does not also need to be separately considered under the length of scheme factor at § 1001.701(d)(2)(i). We also propose to modify the aggravating factor at § 1001.701(d)(2)(ii), by replacing the word “violations” with “conduct.”

Finally, we propose to modify the aggravating factor at § 1001.701(d)(2)(iv), which currently reads, “The violation resulted in financial loss to Medicare, Medicaid, or any other Federal health care program of \$15,000 or more” to change “violation” to “conduct,” to increase the amount of financial loss from \$15,000 to \$50,000, and to change “Medicare, Medicaid, or any other Federal health care program” to “any Federal health care program” as described above.

The use of the word “conduct” in this section reflects that § 1001.701 contemplates behavior that may not be easily characterized as a set of identifiable violations or acts, such as the provision of health care that, over time or in one instance, may be of a

quality that fails to meet professionally recognized standards of health care. Also, the change in the financial loss amount makes this section consistent with §§ 1001.102(b)(1), 1001.201(b)(2)(i), and 1001.301(b)(2)(viii) (proposed to become § 1001.301(b)(2)(i)) and reflects that the passage of time and inflation have increased the average amount of financial loss to the Federal health care programs in fraud schemes.

Serious Adverse Effect

We propose technical changes to § 1001.801(c)(2)(iii), for exclusions relating to the failure of health maintenance organizations to furnish medically necessary care. For § 1001.801(c)(2)(iii), which currently reads, “The entity’s failure to provide a necessary item or service that had or could have had a serious adverse effect,” we propose to remove “that” after “service” as an unnecessary word that causes the language to be confusing and grammatically incorrect (and therefore difficult to apply). The revised language would read: “The entity’s failure to provide a necessary item or service had or could have had a serious adverse effect.”

Mitigating Factors

When OIG is determining the length of exclusion for a mandatory exclusion with a minimum exclusion period of 5 years, if any of the aggravating factors described in the regulations are present and result in a period of exclusion longer than 5 years, OIG may consider the mitigating factors specified in the regulations as a basis for reducing the period of exclusion to no less than 5 years. For exclusions imposed under the permissive authorities with a baseline period of 3 years (§§ 1001.201, 1001.301, and 1001.401) the presence of any of the mitigating factors specified in the regulations may provide a basis for shortening the period of exclusion. Proposed changes to some of these mitigating factors are described below.

We propose to remove §§ 1001.102(c)(1) and 1001.201(b)(3)(i), which are mitigating factors for situations in which a person was convicted of three or fewer misdemeanors and caused less than \$5,000 of loss. First, in our experience, this factor is very rarely present in mandatory exclusion cases that present aggravating factors warranting an exclusion period longer than the minimum period of 5 years. Second, we question whether it is appropriate to shorten an exclusion for conduct involving patient harm, a criminal scheme that extended beyond 1 year, an

individual or entity with a record of additional sanctions, or conduct that warranted incarceration, simply because the person was convicted of three or fewer misdemeanors. Third, in the case of permissive exclusions under § 1001.201 we believe this factor should be considered by OIG in determining whether a permissive exclusion should be imposed, but not whether to reduce the length of exclusion.

Reduced Culpability

Sections 1001.102(c)(2), 1001.201(b)(3)(ii), and 1001.301(b)(3)(i) describe a mitigating factor that considers whether the record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional, or physical condition before or during the commission of the offense that reduced the individual’s culpability.

We propose to revise §§ 1001.102(c)(2), 1001.201(b)(3)(ii), and 1001.301(b)(3)(i) to remove the phrase “including sentencing documents” because those documents are clearly part of the record in the criminal proceedings. We also propose to delete the phrase “mental, emotional or physical” prior to “condition” to allow OIG to consider any condition that a court determines to have reduced an individual’s culpability. We also propose to renumber the remaining paragraphs accordingly.

Addition of Mitigating Factor to § 1001.401

In § 1001.401(c)(3), we propose to add a mitigating factor relating to whether a court determined that the excluded individual had a condition that reduced their culpability for the underlying criminal offense. Section 1001.401 permits OIG to exclude individuals or entities convicted of misdemeanors related to controlled substances, while § 1001.101(d) mandates OIG exclude individuals and entities for felonies related to controlled substances. The mandatory authority permits consideration of a mitigating factor relating to whether a court determined that the excluded individual had a condition that reduced their culpability for the underlying criminal offense (currently § 1001.102(c)(2)). We propose adding the same factor to § 1001.401 because we believe it is appropriate to consider the same mitigating circumstances under the permissive authority and the mandatory authority.

Cooperation

Sections 1001.102(c)(3), 1001.201(b)(3)(iii), 1001.301(b)(3)(ii),

and 1001.401(c)(3) include a mitigating factor that reads as follows: “The individual’s or entity’s cooperation with Federal or State officials resulted in— (A) Others being convicted or excluded from Medicare, Medicaid, and all other Federal health care programs, (B) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or (C) The imposition of a civil money penalty against others.” We propose to revise §§ 1001.102(c)(3), 1001.201(b)(3)(iii), 1001.301(b)(3)(ii), and 1001.401(c)(3) to allow the mitigating factor of cooperation to be demonstrated based on the record in the criminal proceedings or a written statement by a government official that demonstrates that the individual’s or entity’s cooperation resulted in other individuals or entities being excluded, indicted, or otherwise charged, convicted, or investigated. Under the proposed language, the application of the cooperation mitigating factor would be based on documentation provided by an official involved in the underlying criminal proceedings rather than OIG’s later independent assessment of the criminal proceedings. In OIG’s experience, it is not always possible to obtain court records relating to cooperation because they may be sealed or otherwise unavailable at the time the exclusion is processed. In addition, the proposed language would broaden the first criteria for cooperation (*i.e.*, the cooperation resulted in others being convicted or excluded) to include circumstances in which others have been indicted or otherwise charged or investigated. In OIG’s experience, subjects have not relied on reports being issued by law enforcement agencies identifying program vulnerabilities or weaknesses, or civil monetary penalties being imposed against other individuals or entities as a basis to demonstrate cooperation, so we are proposing to remove those criteria.

Alternative Sources of Health Care Items and Services Mitigating Factor

We propose to delete §§ 1001.201(b)(3)(iv) and 1001.301(b)(3)(iii), a mitigating factor applicable to exclusions related to misdemeanor convictions for health care fraud and convictions for obstruction. The factor allows OIG to consider whether alternative sources of the type of health care items or services furnished by the individual or entity are not available. We propose to remove this factor from these two sections because we believe this factor should be considered by OIG in determining

whether a permissive exclusion should be imposed and whether a waiver is appropriate but does not relate to the length of exclusion. Therefore, we propose removing this mitigating factor.

Few Violations Over a Short Period of Time Mitigating Factor

We propose to modify § 1001.701(d)(3), which currently reads: “Only the following factor may be considered mitigating and a basis for reducing the period of exclusion: Whether there were few violations and they occurred over a short period of time,” to read as follows: “Only the following factor may be considered mitigating and a basis for reducing the period of exclusion: Whether there were few occurrences of the conduct, and the conduct occurred over a short period of time.” This change makes this section consistent with the changes from “violations” to “conduct” in § 1001.701(d)(2) discussed above.

Other Changes to § 1001.102 (Length of Exclusion)

Section 1001.102(d) describes the requirement, added by HIPAA, that OIG impose exclusions for at least 10 years or permanently in certain situations involving multiple criminal convictions. We propose to modify § 1001.102(d) to remove the reference to August 5, 1997, in the flush language, as unnecessary because virtually all criminal offenses before August 5, 1997, are now time-barred from prosecution.

We propose a technical modification to § 1001.102(d)(1) and (2) to replace “effected” with “imposed” for consistency with § 1001.102(a), which references exclusions being imposed. The revision is not intended to change the meaning of § 1001.102(d)(1) and (2). In § 1001.102(d)(1), we propose to revise the parenthetical language (which allows OIG to lengthen exclusions beyond 10 years if aggravating and mitigating factors are present) to remove the reference to mitigating factors because only aggravating factors can be used to impose a period of more than 10 years.

Section 1001.401 Conviction Relating to Controlled Substances

We propose removing § 1001.401(b), which states “the definition of controlled substance will be the definition that applies to the law forming the basis for the conviction,” because it is unnecessary. This definition is already incorporated into § 1001.401(a) by the phrase “as defined under Federal or State law.” In other words, the definition of controlled substance will be based on the Federal

or State law under which the individual or entity is convicted. We also propose corresponding technical changes renumbering § 1001.401(c) to § 1001.401(b).

Section 1001.501 Exclusions Based on the Loss or Suspension of a Health Care License

We propose removing the aggravating factors outlined in § 1001.501(b)(2), which permit OIG to lengthen periods of exclusion based on the loss of the individual’s or entity’s health care license, and the mitigating factors outlined in § 1001.501(b)(3), which could be considered by OIG if aggravating factors are applied. Because exclusions under section 1128(b)(4) of the Act are derivative of a licensing board action, OIG generally imposes exclusions under this section for the same period of time as that of the licensing board’s action. As a result, an individual is generally eligible for reinstatement once they regain the health care license on which the exclusion is based. Our proposed removal of these aggravating and mitigating factors would make the regulations consistent with OIG’s general practice of imposing exclusions under this section that are the same length as the licensing board actions. We propose corresponding technical changes by renumbering § 1001.501(b)(4) to § 1001.501(b)(2) and modifying the flush language at § 1001.501(b)(1) to remove language referring to § 1001.501(b)(2).

We are also proposing adding the word “surrendered” to § 1001.501(b)(1) so that this section addresses all the bases upon which an exclusion may be imposed under this section, which includes when an individual’s or entity’s license is revoked, suspended, surrendered, or otherwise lost. See section 1128(b)(4)(B) of the Act.

We also propose changes to § 1001.501(c). In 2017, OIG published a Final Rule implementing a process that allows individuals and entities excluded under section 1128(b)(4) of the Act to request reinstatement before regaining the license that was lost and on which the exclusion is based (referred to as “early reinstatement”) under two sets of circumstances. 82 FR 4100, 4105 (Jan. 12, 2017). We propose modifications to both sets of circumstances.

First, under § 1001.501(c)(1), an individual or entity excluded under § 1001.501 can apply for reinstatement if, after fully and accurately disclosing the circumstances surrounding the original license action that formed the basis for the exclusion, the individual or

entity obtained a health care license in another State or a different health care license in the same State, or was allowed to retain a health care license in another State or a different health care license in the same State. We discuss proposed changes to this section below.

Second, under § 1001.501(c)(2), a person excluded under this section could request early reinstatement if they did not have a valid license to provide health care of any kind, based on OIG’s consideration of several factors outlined in the regulation. One of these factors is the length of time the person has been excluded. The regulation states that OIG will apply a presumption against early reinstatement if the individual or entity has been excluded for less than 3 years and, if the revocation or suspension on which the exclusion was based was for a set period of longer than 3 years, the presumption against reinstatement would be coterminous with the period set by the licensing board.

We propose modifying § 1001.501(c)(2)(i) to state that, rather than applying a presumption against early reinstatement for persons who are excluded less than 3 years, OIG will not consider a request for early reinstatement submitted by an individual or entity if such individual or entity has been excluded for less than 3 years. We think this change is appropriate because the statute provides a 3-year baseline period in certain other permissive exclusion authorities (§§ 1001.201, 1001.301, and 1001.401). The proposal would further modify the language in the second clause of the second sentence of § 1001.501(c)(2)(i). This clause of § 1001.501(c)(2)(i) states that if the action on which the exclusion is based is for a set period longer than 3 years, OIG will apply a presumption against early reinstatement “coterminous with the period set by the licensing board.” We propose to modify this language to state that when the action underlying the exclusion is for a set period longer than 3 years, OIG will not consider a request for early reinstatement at any time before the expiration of the period set by the licensing board. We believe this change is appropriate because the period of exclusion should be at least as long as the period of the underlying action.

At § 1001.501(c)(3), the early reinstatement regulation includes a bar to early reinstatement for individuals excluded under this section whose license revocation or suspension was for reasons related to patient abuse or neglect. We propose to modify this prohibition. In OIG’s experience, the bar has the unintended consequence of

creating a permanent period of exclusion for certain individuals and entities who have been excluded under § 1001.501 due to a license revocation or suspension related to patient abuse or neglect, unless that individual or entity has regained the original license. This *de facto* permanent bar to reinstatement creates an imbalance between mandatory and permissive exclusion because individuals and entities that have been convicted of an offense related to the neglect or abuse of a patient and excluded under section 1128(a)(2) of the Act are eligible to apply for reinstatement at the end of their period of exclusion, which may be the statutory minimum period of 5 years. OIG recognizes that the loss of a professional license for issues related to patient abuse or neglect is significant and the circumstances of the loss of such license in those instances should be taken into consideration in determining whether early reinstatement should be granted. Therefore, we propose to modify § 1001.501(c)(1)(i) and (ii) such that, in reviewing requests for early reinstatement, OIG will consider the circumstances that formed the basis for the exclusion, including whether such circumstances were related to patient abuse or neglect. In addition, we propose to modify this section to require that, in the case of a license revocation or suspension for reasons related to patient abuse or neglect, OIG will not consider a request for early reinstatement until the individual or entity has been excluded for at least 5 years for parity with those excluded for the statutory minimum period of 5 years for a conviction related to the neglect or abuse of a patient.

We also propose several clarifying changes throughout § 1001.501(c). These changes are not intended to change the meaning of § 1001.501 but are intended to make the language clearer based upon our experience implementing this section since 2017. We propose to add references to “entity” every time the word “individual” is used in § 1001.501 to clarify that, consistent with section 1128(b)(4) of the Act, entities as well as individuals are subject to exclusion under this section. In § 1001.501(c)(1)(iii), we propose replacing “Evidence that” with “Documentation from” to clarify that OIG expects documentation from the second licensing authority and not evidence from a proceeding with that authority. We also propose adding “indicating that it” after “second licensing authority” to clarify that the documentation must indicate that the

licensing authority knew of the circumstances surrounding the action that formed the basis for the exclusion. In § 1001.501(c)(1)(iv), we propose removing “satisfactorily” and adding “to OIG’s satisfaction” after “has demonstrated” to clarify that whether the individual or entity has resolved any underlying problem is in the opinion of OIG and not the excluded party. We propose a nearly identical change in § 1001.501(c)(2)(iii) for the same reason.

Section 1001.601 Exclusion or Suspension Under a Federal or State Health Care Program

We propose a technical change to § 1001.601(a)(1)(ii) to offset the phrase “for reasons bearing on the individual’s or entity’s professional competence, professional performance or financial integrity,” as it applies to both circumstances under § 1001.601(a)(1). As currently written, the phrase could be read to modify only § 1001.601(a)(1)(ii), referring to actions by State health care programs, but the statute clearly requires that this clause apply to all exclusions under section 1128(b)(5) of the Act.

We propose revising § 1001.601(a)(2) by replacing the phrase “is intended to cover” with “means” to clarify that “otherwise sanctioned” is limited to the definition provided (and does not include anything else). We also propose adding the phrase “or otherwise sanctioned” to § 1001.601(b)(1) for consistency with § 1001.601(a)(1) and section 1128(b)(5) of the Act, and changing the word “from” to “by” for grammatical accuracy.

We propose removing the aggravating and mitigating factors outlined in § 1001.601(b)(2) and (3), which permit OIG to lengthen periods of exclusion based on an individual’s or entity’s exclusion, suspension, or other sanction by a Federal or State health care program, so that all exclusions under this section would be coterminous with the period of time that the individual or entity is excluded, suspended, or otherwise sanctioned by the applicable Federal or State health care program. Because exclusions under section 1128(b)(5) of the Act are derivative of a Federal or State health care program action, OIG generally imposes exclusions under this section for the same period of time as the agency’s action. As a result, individuals and entities are generally eligible to apply for reinstatement once the individual or entity is allowed to resume participation in the Federal or State health care program under which the individual or entity was previously suspended, excluded, or sanctioned. Our proposed

removal of these aggravating and mitigating factors would make the regulations consistent with OIG’s general practice under this section and clarifies our intention. Due to the removal of § 1001.601(b)(2) and (3), we propose a technical change renumbering § 1001.601(b)(4) to § 1001.601(b)(2).

Section 1001.901 False or Improper Claims

In § 1001.901(b), we propose to change “will” to “may” to reflect OIG’s discretion to consider only the factors that are appropriate according to the facts and circumstances of each case and to reflect that not every factor will be present in every case.

Section 1001.951 Fraud and Kickbacks and Other Prohibited Activities

We propose several changes to § 1001.951 to align the factors with those found in the proposed revisions to § 1001.901. These two sections should align because both authorities are based on section 1128(b)(7) of the Act and require OIG to affirmatively prove fraud, kickbacks, or other prohibited activities. Because neither authority is derivative of other actions taken by adjudicative bodies, aligning the factors for determining length of exclusions under § 1001.951 with the factors under § 1001.901 would create parity and provide OIG discretion to consider relevant facts and circumstances under both authorities that are not derivative of the actions of other courts or adjudicative bodies, as is appropriate for derivative exclusions.

Specifically, to align §§ 1001.951 and 1001.901, we are proposing a series of revisions and technical changes, which collectively will result in both authorities having the same factors for determining length of exclusion, as follows. We propose to remove the numbering for § 1001.951(b)(1) to make it flush language and to revise the language to mirror the proposed language in proposed § 1001.901(b) by changing “will” to “may.” We propose to modify the numbering of the factors to change the factor at § 1001.951(b)(1)(i) to § 1001.951(b)(1) and to modify the language to mirror § 1001.901(b)(1). The proposed language would read: “The nature and circumstances surrounding the actions that are the basis for liability, including the period of time over which the acts occurred, the number of acts, whether there is evidence of a pattern and the amount claimed.”

We propose to delete the factor at § 1001.951(b)(1)(ii), which is not a factor in § 1001.901(b). We propose to add a factor at new § 1001.951(b)(2), “the

degree of culpability,” which appears at § 1001.901(b)(2). We propose to change the numbering of § 1001.951(b)(1)(iii) (related to other documented instances of wrongdoing) to § 1001.951(b)(3) and modify its language consistent with proposed § 1001.901(b)(3) and the other places this language appears in part 1001 as described above. We propose to add new § 1001.951(b)(4), “Other matters as justice may require,” consistent with the proposed § 1001.901(b)(4). We further propose to remove the factors at § 1001.951(b)(1)(iv) and (v) and remove the mitigating factors at § 1001.951(b)(2) to align § 1001.951 with § 1001.901. Removal of mitigating factors under this section is appropriate because the factors proposed for § 1001.951 allow OIG to consider all the relevant facts and circumstances, aggravating and mitigating, in setting lengths of exclusion under this section.

Section 1001.1301 Failure To Grant Immediate Access

This section provides OIG with the authority to exclude individuals and entities that fail to grant immediate access to, among others, OIG or a State MFCU. Section 1001.1301(a)(2) currently defines a “failure to grant immediate access” for purposes of paragraphs (a)(1)(i) and (ii) of this section (applying to requests for immediate access by the Secretary or a State survey agency) as “the failure to grant access at the time of a reasonable request or to provide a compelling reason why access may not be granted.” The regulation does not explain what circumstance would constitute “a compelling reason.”

We propose to revise the definition of “failure to grant immediate access” in § 1001.1301(a)(2) to specify what would constitute “a compelling reason,” namely, that the requested material does not exist or is not at the location where the request is presented. The proposed language is consistent with OIG’s general practice in evaluating immediate access requests.

Section 1001.1301(a)(3) provides a separate definition of “failure to grant immediate access” for purposes of paragraphs (a)(1)(iii) and (iv) of the section (applying to requests for immediate access by OIG and State MFCUs) as “(i) The failure to produce or make available for inspection and copying the requested material upon reasonable request, or to provide a compelling reason why they cannot be produced, within 24 hours of such request, except when the OIG or State Medicaid Fraud Control Unit (MFCU) reasonably believes that the requested

material is about to be altered or destroyed, or (ii) When the OIG or MFCU has reason to believe that the requested material is about to be altered or destroyed, the failure to provide access to the requested material at the time the request is made.” We propose to revise this section so that the definition of “failure to grant immediate access” for purposes of § 1001.1301(a)(1)(iii) and (iv) is consistent with the proposed definition of “failure to grant immediate access” for purposes of § 1001.1301(a)(1)(i) and (ii). The impact of this change would be that all immediate access requests will require production of materials at the time the request is made unless the records do not exist or are in a different location and would eliminate the analysis of whether records are about to be altered or destroyed. We believe this change is appropriate because it is consistent with the common meaning of “immediate” as requiring something instantly or without delay, and it removes the burden from the requesting agency to determine whether records may be altered or destroyed in the intervening 24 hours, which may be impossible to know.

Section 1001.1501 Default of Health Education Loan or Scholarship Obligations

Section 1128(b)(14) of the Act, which authorizes OIG to exclude individuals who default on repayments of health education loan or scholarship obligations, or the obligations of any loan repayment program, requires OIG to take into account “access of beneficiaries to physician services for which payment may be made under title XVIII or XIX.”¹ Section 1001.1501(a)(3) of the regulations expands this requirement to access to physicians’ services for which payment may be made under Medicare, Medicaid, or other Federal health care programs, expanding OIG’s obligations beyond Medicare and Medicaid. As a result, we propose modifying § 1001.1501(a)(3) to limit the requirement in this section to the Medicare and Medicaid programs, consistent with section 1128(b)(14) of

¹ Section 1128(b)(14) has been used by OIG to exclude borrowers that have defaulted on loans from the Health Education Assistance Loan (HEAL) Program. The HEAL program is a program of Federal insurance of educational loans that were made to graduate students in the fields of medicine, osteopathic medicine, dentistry, veterinary medicine, optometry, podiatric medicine, pharmacy, public health, chiropractic, health administration, and clinical psychology. See 34 CFR 681.1. Authorization to fund new HEAL loans expired September 30, 1998. 82 FR 53374 (Nov. 15, 2017). A list of borrowers currently in default can be found at 86 FR 54950 (Oct. 5, 2021).

the Act. We propose a technical modification to § 1001.1501(a)(3) to replace “physicians’ services” with “physician services” for consistency with section 1128(b)(14) of the Act. The revision is not intended to change the meaning of § 1001.1501(a)(3).

Next, § 1001.1501(b) indicates that an individual excluded under this section will remain excluded until OIG receives notice that the individual has cured the payment default that provided the basis for the exclusion, at which time OIG notifies the individual that the individual is eligible to apply for reinstatement. However, it has been OIG’s longstanding practice to allow individuals excluded under this section to participate in the Federal health care programs prior to their health education loan or scholarship obligation being completely repaid if such individual has entered into a repayment agreement with the administrator of the health education loan, scholarship, or loan repayment program following an initial payment default. We propose modifying § 1001.1501(b) so that an individual who has entered into such repayment agreements would be eligible to obtain a “stay” of their exclusion for as long as the individual remains in compliance with the terms of the agreement. While this “stay” is in place, the individual would be eligible to participate in the Federal health care programs. However, if OIG receives notice from the administrator of the health education loan, scholarship, or loan repayment program that the individual is no longer in compliance with the repayment agreement, the “stay” would be lifted and the exclusion would be given full effect. This proposed change would make the regulations consistent with OIG’s current practice.

Section 1001.1551 Exclusion of Individuals With Ownership or Control Interest in Sanctioned Entities

We propose modifying § 1001.1551(b)(2) to change “Medicare, Medicaid and all other Federal health care programs” to “Medicare or a State health care program” and to remove the phrase “terminated or” for consistency with the language of section 1128(b)(15), which does not reference all Federal health care programs or use the word “terminated.”

We also propose modifying § 1001.1551(c)(1) to clarify that the length of the individual’s term of exclusion will be the same as that of the sanctioned entity, regardless of whether the individual terminates their relationship with the sanctioned entity after they have been excluded. For example, if Entity A is excluded by OIG

for a period of 5 years and Person A (who has an ownership interest in Entity A) is excluded by OIG under section 1128(b)(15) of the Act 6 months later, the term of Person A's exclusion will be for 5 years, starting from the effective date of Person A's exclusion. Also, Person A will remain excluded for the entire 5-year term even if Person A divests their ownership interest in Entity A at any point during the 5-year term of Person A's exclusion. It would be inequitable for an individual with knowledge of the conduct that resulted in an entity being excluded by OIG and who had an ownership interest in the entity at the time the conduct occurred to be able to avoid exclusion by divesting their interest after the entity's term of exclusion is imposed.

Section 1001.1553 Establishment of a New Permissive Exclusion Authority

Section 6(d) of MSIAA granted a new permissive exclusion authority to the Secretary under Section 1128(b) of the Act. Under the newly enacted section 1128(b)(17) of the Act, the Secretary may exclude any manufacturer or an officer, director, agent, or managing employee of such manufacturer that knowingly misclassifies a covered outpatient drug under an agreement under section 1927 of the Act, knowingly fails to correct such misclassification, or knowingly provides false information related to drug pricing, drug product information, or data related to drug pricing or drug product information. Accordingly, we propose adding a new § 1001.1553 entitled "Knowingly misclassifying covered outpatient drugs." Under this proposal, OIG would have the authority to exclude any manufacturer (as defined in section 1927 of the Act) or an officer, director, agent, or managing employee of such manufacturer that knowingly misclassifies a covered outpatient drug, knowingly fails to correct such misclassification, or knowingly provides false information to HHS related to drug pricing, drug product information, or data related to drug pricing or drug product information. This exclusion authority applies to covered outpatient drugs supplied by manufacturers under agreements under section 1927 of the Act in effect on or after April 18, 2019. The definitions proposed for § 1000.10 would apply to the terms "agent," "managing employee," and "knowingly."

Under this proposal, we would determine the length of exclusion based on five factors consistent with OIG's other non-derivative exclusion authorities in §§ 1001.901 and 1001.951: the nature and circumstances

surrounding the actions that are the basis for liability, including the period of time over which the acts occurred, the number of acts, whether there is evidence of a pattern, and the amount claimed; the degree of culpability; whether the entity has other documented instances of criminal, civil, or administrative wrongdoing; or other matters as justice may require. Because this authority requires OIG to prove that the manufacturer knowingly misclassified a drug or made false statements and is not derivative of actions taken by other adjudicative bodies, we believe it is appropriate to apply the same factors to this authority that apply to §§ 1001.901 and 1001.951, which are also non-derivative authorities.

Section 1001.1801 Waivers of Exclusions

We propose deleting the cross-reference to the statutory definition of Federal health care program in § 1001.1801(a) as unnecessary because the term "Federal health care program" is defined in § 1000.10. We also propose revising § 1001.1801(d), which currently states that "if the basis for the waiver ceases to exist, the waiver will be rescinded, and the individual or entity will be excluded for the period remaining on the exclusion, measured from the time the exclusion would have been imposed if the waiver had not been granted," to state: "If the basis for the waiver ceases to exist, the waiver will be rescinded." The existing reference to "the time the exclusion would have been imposed if the waiver had not been granted" implies that the waiver stops the exclusion from being imposed; however, exclusions typically are imposed prior to a waiver being put in place. We do not intend for the proposal to change the current meaning of the original provision, which is: If the basis for a waiver ceases to exist, the waiver will be rescinded, and the existing exclusion will then be in effect.

Section 1001.1901 Scope and Effect of Exclusion

At the end of § 1001.1901(a), we propose to correct a cross-reference to the definition of "Federal health care programs" from § 1001.2 to § 1000.10 because the definition does not appear in § 1001.2. We also propose inserting the phrase "Federal health care" prior to the word "program" and "programs" in § 1001.1901(b)(2) and (4), respectively, for clarity. Finally, we propose deleting the parenthetical in § 1001.1901(c)(3)(iii) because it refers to an exemption that was limited to the period between October 2, 1998, and

October 4, 1999, and therefore is no longer applicable. None of the proposed changes to § 1001.1901 are intended to change the meaning of the provisions of that section.

Section 1001.2001 Notice of Intent To Exclude

Under the current regulatory text in this section, OIG is only required to issue a notice of intent to exclude with respect to mandatory exclusions under section 1128(a) of the Act if the proposed period of exclusion is for longer than 5 years. We propose modifying § 1001.2001(a) to provide that OIG will issue a notice of intent to exclude for all mandatory and permissive exclusions, of any length, that are proposed under subpart B or C of part 1001. The notice of intent to exclude affords individuals and entities the opportunity to provide OIG with information related to the proposed exclusion before it goes into effect and, in our experience, the process allows OIG to impose exclusions after considering as much relevant information as possible. We therefore believe it should apply to all exclusions under subparts B and C of part 1001.

We also propose modifying this section to indicate that a notice of intent to exclude will be deemed to have been received 7 days after the date of the notice (instead of 5 days, as currently specified), based on changes in service standards and expected delivery times for First-Class Mail.

Sections 1001.2004 Through 1001.2006 Notice to State Agencies, State Licensing Agencies, and Others Regarding Exclusion

We propose to clarify that the notice to State Medicaid program agencies, State licensing authorities, and others required by §§ 1001.2004, 1001.2005, and 1001.2006 is made by OIG, not by HHS. In § 1001.2005(a), we propose to remove the words "from participation" and the parenthetical "(or directed to be excluded)," and to reword the sentence so that this section now reads as follows: "OIG will promptly notify the appropriate State(s) or local agencies or authorities having responsibility for the licensing or certification of an excluded individual or entity of the facts and circumstances of the exclusion." These changes are not intended to change the meaning of this section.

Section 1001.2006 currently provides that OIG will give notice of an exclusion and the effective date to the public, beneficiaries, and as appropriate to various agencies and entities specified in the regulation including: (1) any entity in which the excluded individual

is known to be serving as an employee, administrator, or operator, or in which the individual is serving in any other capacity and is receiving payment for providing services; (2) medical societies and other professional organizations; and (3) other Federal agencies or organizations, as appropriate. However, many of these notifications are not required by the statute and it is impractical for OIG to provide individual notice of each exclusion imposed by OIG to all the entities listed in § 1001.2006. Furthermore, OIG has made exclusion information available online since at least 1999. As a result, we propose to modify § 1001.2006(a) by stating that OIG will give notice of exclusions to the public, beneficiaries, and others via monthly online updates to the List of Excluded Individuals/Entities (commonly referred to as “the LEIE”), which reflects OIG’s longstanding practice.

Section 1001.2007 Appeal of Exclusions

We propose a few technical changes in § 1001.2007. First, in § 1001.2007(a)(1)(i) we propose to change the word “sanction” to “exclusion” for consistency with other parts of this section and because the only relevant actions under this section are exclusions. Second, we propose to replace the word “should” with “shall” in § 1001.2007(a)(3) to reflect that certain information must be included in the request for a hearing. For example, § 1005.2(d) requires a request for a hearing to contain certain information, and § 1005.2(e)(4) requires dismissal of a hearing request that fails to raise any issues which may be properly addressed in a hearing. Third, in § 1001.2007(b), we propose to add “the” before “notice of exclusion” and delete “such” before “a hearing.” Finally, in § 1001.2007(d) we propose to change “Government” to “government.” These changes are not intended to change the meaning of this section.

Sections 1001.3001 Through 1001.3002 Timing and Method of Request and Basis for Reinstatement

We propose making changes to §§ 1001.3001(a)(1) and 1001.3002(b)(5) to replace references to “program provider number” with “Federal health care program provider number” for clarity.

Section 1001.3003 Approval of Request for Reinstatement

We propose changes to § 1001.3003 to track the statutory language in section 1128(g) of the Act, which requires that notice of reinstatement be provided to

each appropriate State agency administering or supervising the administration of each State health care program and requires notice to the Attorney General in the case of exclusions under section 1128(a) of the Act to which section 304(a)(95) of the Controlled Substances Act may apply. We also are proposing to revise this section to state that OIG will notify the public and others through posting of reinstatement information on OIG’s website. We are proposing to limit the direct notice requirements for reinstatements to reduce the burden on OIG and to reflect OIG’s longstanding practice of providing general notice of all reinstatements through the posting of a monthly reinstatement file on OIG’s public website. Lastly, we are proposing to modify § 1001.3003(b) to clarify that a reinstatement by OIG does not require any other Federal health care program to reinstate such individual or entity into that program if the program has taken an action against the individual or entity under its own authority. This proposal is intended to clarify the language of this section and is not intended to change the substance of the provision. The current language, which states that a reinstatement by OIG has no effect if a Federal health care program has imposed a longer period of exclusion under its own authorities, is imprecise and confusing because a reinstatement by OIG has effect independent of the actions of individual Federal health care programs.

Section 1001.3004 Denial of Request for Reinstatement

We propose several changes to § 1001.3004 to better reflect OIG’s current processes regarding denial of reinstatement appeal requests and to clarify for the public the process by which an individual or entity may appeal the denial of their request for reinstatement. We propose to modify § 1001.3004(a) to reflect a three-step process when a request for reinstatement is denied. First, OIG would send a written notice to the individual or entity notifying them that their request for reinstatement has been denied and the basis for the denial. Second, the individual or entity would then have 30 days from the date of the notice of the reinstatement denial to submit a written request to appeal the denial. Third, once the individual or entity has submitted a written appeal request, the individual would have 30 days from the date of the written request for appeal to submit: (1) any written argument or additional evidence the individual or entity has regarding the basis for the denial of reinstatement

identified in the denial notice, or (2) a written request to present oral argument or any additional evidence to an OIG official. The proposed language would provide requesters with an additional 30 days to submit the documentary evidence or the request for oral argument allowed under § 1001.3004(a).

We also propose to clarify § 1001.3004(b) to indicate that OIG will only issue a decision regarding a reinstatement denial if a written argument or additional evidence are submitted to OIG or any oral argument or additional evidence are presented to an OIG official. The current language may incorrectly suggest that a decision might be issued at the end of the 30-day appeal period even if no written or oral argument and additional evidence are submitted or presented regarding the denial of the request for reinstatement.

Section 1001.3005 Withdrawal of Exclusion for Reversed or Vacated Decisions

We propose a technical change to clarify § 1001.3005(b) by deleting the words “CMS and other” before Federal health care programs (because the Centers for Medicare & Medicaid Services (CMS) is not itself a Federal health care program but the agency that administers Medicare and Medicaid). Finally, we propose to change the word “exclusion” to “action” in § 1001.3004(d) to reflect the fact that all other Federal health care programs do not use the term “exclusion.”

VI. Regulatory Impact Statement

We have examined the impacts of this rulemaking 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), Executive Order 14094 entitled “Modernizing Regulatory Review” (April 6, 2023), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), and Executive Order 13132 on Federalism (August 4, 1999).

Executive Order Nos. 12866, 13563, and 14094

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). The Executive Order 14094 entitled “Modernizing Regulatory Review” (hereinafter, the Modernizing E.O.) amends section 3(f)(1) of Executive Order 12866 (Regulatory Planning and Review). A Regulatory Impact Analysis (RIA) must be prepared for significant rules with significant effects (\$200 million or more in any 1 year).

Based on our estimates, OMB’s Office of Information and Regulatory Affairs (OIRA) has determined this rulemaking is not significant per section 3(f)(1) as measured by the \$200 million or more in any given year. This is not a major rule as defined at 5 U.S.C. 804(2); it is not economically significant because it does not reach that economic threshold 1 year.

This proposed rule is designed to propose implementation of one, new statutory provision consisting of a new exclusion authority. It is also designed to clarify existing regulatory requirements. The vast majority of providers and the Federal health care programs would be minimally, if at all, impacted by these proposed revisions.

The proposed changes to the exclusion regulations would have little economic impact. On average per year, OIG excludes approximately 3,000 individuals and entities, defends 100 appeals of exclusions, and hears 2 reinstatement denial appeals. Historically, one waiver of exclusion has been requested and granted in any given year. Thus, we believe that any aggregate economic effect of the proposed modifications would be minimal and the likely aggregate economic effect of these proposed modifications to the regulations would be significantly less than the monetary thresholds under Executive Order 12866, as amended by Executive Order 14094, and 5 U.S.C. 804(2).

Regulatory Flexibility Act

The RFA and the Small Business Regulatory Enforcement and Fairness Act of 1996, which amended the RFA, require agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Providers are considered small entities by having revenues of less than \$8.0 million to \$41.5 million in any 1 year. For purposes of the RFA, most physicians and suppliers are considered small entities.

The aggregate economic impact of the exclusion provisions on small entities would be minimal. The rulemaking directly impacts small entities that may be excluded by clarifying how OIG determines exclusion lengths, waivers,

reinstatement, and affirmative exclusion. It also codifies exclusion authorities added to section 1128 of the Act by MSIAA, adding clarity for members of the health care community regarding the scope of OIG’s actions. Because the rulemaking adds transparency to OIG’s process and implements exclusion authorities designed to protect the Federal health care programs and their beneficiaries from untrustworthy individuals and entities, we believe any resulting impact will be positive for the health care community. In summary, this notice of proposed rulemaking will not have a significant impact on the operations of a substantial number of small providers and a regulatory flexibility analysis is not required for this rulemaking.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) generally requires that each agency conduct a cost-benefit analysis, identify and consider a reasonable number of regulatory alternatives, and select the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule before promulgating any proposed or final rule that includes a Federal mandate that may result in expenditures of more than \$100 million (adjusted for inflation) in at least one year by State, local, and Tribal governments, or by the private sector. Each agency must also seek input from State, local, and Tribal governments. The current threshold after adjustment for inflation using the Implicit Price Deflator for the Gross Domestic Product is \$183 million, reported in 2023 dollars. This proposed rule, if finalized, would not result in an unfunded mandate in any year that meets or exceeds this amount.

Executive Order 13132

Executive Order 13132, Federalism, establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirements or costs on State and local governments, preempts State law, or otherwise has federalism implications. In reviewing this rulemaking under the threshold criteria of Executive Order 13132, we have determined that this proposed rule would not significantly affect the rights, roles, or responsibilities of State or local governments.

VII. Paperwork Reduction Act

These proposed changes impose no new information collection and recordkeeping requirements. Consequently, it need not be reviewed

by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

List of Subjects in 42 CFR Parts 1000 and 1001

Administrative practice and procedure, Fraud, Grant programs—health, Health facilities, Health professions, Maternal and child health, Medicaid, Medicare.

For the reasons stated in the preamble, OIG proposes to amend 42 CFR parts 1000 and 1001 as set forth below:

PART 1000—INTRODUCTION; GENERAL DEFINITIONS

- 1. The authority citation to part 1000 continues to read as follows:

Authority: 42 U.S.C. 1320 and 1395hh.

- 2. Revise and republish § 1000.10 to read as follows:

§ 1000.10 General definitions.

In this chapter, unless the context indicates otherwise—

Act means the Social Security Act, and titles referred to are titles of that Act.

Administrator means the Administrator, Centers for Medicare & Medicaid Services (CMS), formerly the Health Care Financing Administration (HCFA).

Agent means any person who has express or implied authority to obligate or act on behalf of an entity.

ALJ means an Administrative Law Judge.

Beneficiary means any individual eligible to have benefits paid to the beneficiary, or on the beneficiary’s behalf, under Medicare or any State health care program.

CFR stands for Code of Federal Regulations.

CMS stands for Centers for Medicare & Medicaid Services, formerly the Health Care Financing Administration (HCFA).

Department means the Department of Health and Human Services (HHS), formerly the Department of Health, Education, and Welfare.

Directly, as used in the definition of “furnished” in this section, means the provision or supply of items and services by individuals or entities (including items and services provided or supplied by them but manufactured, ordered, or prescribed by another individual or entity) who request or receive payment from Medicare, Medicaid, or other Federal health care programs.

ESRD stands for end-stage renal disease.

Exclusion means that items and services furnished, ordered, or prescribed by a specified individual or entity will not be reimbursed under Medicare, Medicaid, or any other Federal health care programs until the individual or entity is reinstated by OIG.

Federal health care program means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the Federal Employees Health Benefits Program), or any State health care program as defined in this section.

FR stands for **Federal Register**.

Furnished refers to items or services provided or supplied, directly or indirectly, by any individual or entity.

HHS stands for the Department of Health and Human Services.

HHA stands for home health agency.

HMO stands for health maintenance organization.

ICF stands for intermediate care facility.

Indirect ownership interest includes an ownership interest through any other entity or entities that ultimately have an ownership interest in the entity at issue. (For example, an individual has a 10-percent ownership interest in the entity at issue if they have a 20-percent ownership interest in a corporation that wholly owns a subsidiary that is a 50-percent owner of the entity at issue.)

Indirectly, as used in the definition of “furnished” in this section, means the provision or supply of items and services manufactured, distributed, supplied, or otherwise provided by individuals or entities that do not directly request or receive payment from Medicare, Medicaid, or other Federal health care programs, but that provide items and services to providers, practitioners, or suppliers who request or receive payment from these programs for such items or services.

Inspector General means the Inspector General for the Department of Health and Human Services.

Knowingly means that a person, with respect to an act, has actual knowledge of the act, acts in deliberate ignorance of the act, or acts in reckless disregard of the act, and no proof of specific intent to defraud is required.

Managing employee means an individual (including a general manager, business manager, administrator, or director) who exercises operational or managerial control over the entity or part thereof or directly or indirectly conducts the day-to-day operations of the entity or part thereof.

Medicaid means medical assistance provided under a State plan approved under Title XIX of the Act.

Medicare means the health insurance program for the aged and disabled under Title XVIII of the Act.

OIG means the Office of Inspector General within HHS.

Ownership interest means an interest in:

- (1) The capital, the stock, or the profits of the entity; or
- (2) Any mortgage, deed of trust, note, or other obligation secured in whole or in part by the property or assets of the entity.

Patient means any individual who is receiving health care items or services, including any item or service provided to meet their physical, mental, or emotional needs or well-being (including a resident receiving care in a facility as described in part 483 of this chapter), whether or not reimbursed under any Federal health care program and regardless of the location in which such item or service is provided.

QIO means a quality improvement organization as that term is used in section 1152 of the Act (42 U.S.C. 1320c–1) and its implementing regulations.

Secretary means the Secretary of the Department or the Secretary’s designees.

SNF stands for skilled nursing facility.

Social Security benefits means monthly cash benefits payable under section 202 or 223 of the Act.

SSA stands for Social Security Administration.

State includes the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

State health care program means:

- (1) A State plan approved under title XIX of the Act (Medicaid);
- (2) Any program receiving funds under title V of the Act or from an allotment to a State under such title (Maternal and Child Health Services Block Grant program);
- (3) Any program receiving funds under subtitle A of title XX of the Act or from any allotment to a State under such subtitle (Block Grants to States for Social Services); or
- (4) A State child health plan approved under title XXI (Children’s Health Insurance Program).

United States means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

U.S.C. stands for United States Code.

PART 1001—PROGRAM INTEGRITY—THE FEDERAL HEALTH CARE PROGRAMS

■ 3. The authority citation to part 1001 continues to read as follows:

Authority: 42 U.S.C. 1302; 1320a–7; 1320a–7b; 1395u(j); 1395u(k); 1395w–104(e)(6); 1395y(d); 1395y(e); 1395cc(b)(2)(D), (E), and (F); 1395hh; 1842(j)(1)(D)(iv), 1842(k)(1), and sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note).

■ 4. Revise the heading to part 1001 as set forth above.

■ 5. Revise and republish subpart A, consisting of §§ 1001.1 and 1001.2 to read as follows:

Subpart A—General Provisions

§ 1001.1 Scope and purpose.

(a) The regulations in this part specify certain bases upon which individuals and entities may, or in some cases must, be excluded from participation in all Federal health care programs. They also state the effect of exclusion, the factors that will be considered in determining the length of any exclusion, the provisions governing notices of exclusions, and the process by which an excluded individual or entity may seek reinstatement into the programs.

(b) The regulations in this part are applicable to and binding on the Office of Inspector General (OIG) in imposing and proposing exclusions, as well as to Administrative Law Judges (ALJs), the Departmental Appeals Board, and Federal courts in reviewing the imposition of exclusions by OIG (and, where applicable, in imposing exclusions proposed by OIG).

§ 1001.2 Definitions.

For purposes of this part:

Convicted means that—

(1) A judgment of conviction has been entered against an individual or entity by a Federal, State, or local court, regardless of whether:

(i) There is a post-trial motion or an appeal pending; or

(ii) The judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;

(2) A Federal, State, or local court has made a finding of guilt against an individual or entity;

(3) A Federal, State, or local court has accepted a plea of guilty or nolo contendere by an individual or entity; or

(4) An individual or entity has entered into participation in a first offender, deferred adjudication, or other program or arrangement where judgment of conviction has been withheld.

HHS means Department of Health and Human Services.

Immediate family member means a person's husband or wife; natural or adoptive parent; child or sibling; stepparent, stepchild, stepbrother, or stepsister; father-, mother-, daughter-, son-, brother-, or sister-in-law; grandparent or grandchild; or spouse of a grandparent or grandchild.

Incarceration means imprisonment or any type of confinement with or without supervised release, including, but not limited to, community confinement, house arrest, and home detention.

Member of household means, with respect to a person, any individual with whom the person is sharing a common abode as part of a single-family unit, including domestic employees and others who live together as a family unit. A roomer or boarder is not considered a member of a household.

Ownership or control interest means, with respect to an entity, a person who:

(1) Has a direct or an indirect ownership interest (or any combination thereof) of 5 percent or more in the entity;

(2) Is the owner of a whole or part interest in any mortgage, deed of trust, note, or other obligation secured (in whole or in part) by the entity or any of the property assets thereof, if such interest is equal to or exceeds 5 percent of the total property and assets of the entity;

(3) Is an officer or a director of the entity;

(4) Is a partner in the entity if the entity is organized as a partnership;

(5) Is an agent of the entity; or

(6) Is a managing employee of the entity.

Professionally recognized standards of health care are statewide or national standards of care, whether in writing or not, that professional peers of the individual or entity whose provision of care is an issue, recognize as applying to those peers practicing or providing care within a State. When the Department has declared a treatment modality not to be safe and effective, practitioners who employ such a treatment modality will be deemed not to meet professionally recognized standards of health care. This definition will not be construed to mean that all other treatments meet professionally recognized standards.

Sole community physician means a physician who is the only physician who provides primary care services to Federal or State health care program beneficiaries within a defined service area.

Sole source of essential specialized services in the community means that an individual or entity—

(1) Is the only practitioner, supplier, or provider furnishing specialized services in an area designated by the Health Resources Services

Administration as a health professional shortage area for that medical specialty, as listed in 42 CFR part 5, appendices B through F;

(2) Is a sole community hospital, as defined in § 412.92 of this title; or

(3) Is the only source of specialized services in a reasonably defined service area where services by a non-specialist could not be substituted for the source without jeopardizing the health or safety of beneficiaries.

State Medicaid Fraud Control Unit means a unit certified by the Secretary as meeting the criteria of 42 U.S.C. 1396b(q) and § 1002.305 of this chapter. ■ 6. Revise and republish subpart B, consisting of §§ 1001.101 and 1001.102, to read as follows:

Subpart B—Mandatory Exclusions

§ 1001.101 Basis for liability.

OIG will exclude any individual or entity that—

(a) Has been convicted of a criminal offense related to the delivery of an item or service under Medicare or a State health care program, including the performance of management or administrative services relating to the delivery of items or services under any such program;

(b) Has been convicted, under Federal or State law, of a criminal offense related to the neglect or abuse of a patient, in connection with the delivery of a health care item or service, including any offense that OIG concludes entailed, or resulted in, neglect or abuse of patients (the delivery of a health care item or service includes the provision of any item or service to an individual to meet the individual's physical, mental, or emotional needs or well-being, whether or not reimbursed under a Federal health care program);

(c) Has been convicted, under Federal or State law, of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct—

(1) In connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of such items or services; or

(2) With respect to any act or omission in a health care program (other than Medicare or a State health care program) operated or financed in whole or in part by any Federal, State, or local government agency; or

(d) Has been convicted, under Federal or State law, of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, as defined under Federal or State law. This applies to any individual or entity that—

(1) Is, or has ever been, a health care practitioner, provider, or supplier, or furnished or furnishes items or services;

(2) Holds, or has held, a direct or an indirect ownership or control interest in an entity that furnished or furnishes items or services or is, or has ever been, an officer, director, agent, or managing employee of such an entity; or

(3) Is, or has ever been, employed in any capacity in the health care industry.

§ 1001.102 Length of exclusion.

(a) No exclusion imposed in accordance with § 1001.101 will be for less than 5 years.

(b) Any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion—

(1) The acts resulting in the conviction, or similar acts, caused, or were intended to cause, a financial loss of \$50,000 or more to a government agency or program or to one or more other entities. (The entire amount of financial loss, including any amounts resulting from similar acts not adjudicated, will be considered regardless of whether full or partial restitution has been made.);

(2) The acts that resulted in the conviction, or similar acts, were committed over a period of 1 year or more;

(3) The acts that resulted in the conviction, or similar acts, had a significant adverse physical, mental, or financial impact on one or more program beneficiaries or other individuals;

(4) In convictions involving patient abuse or neglect, the acts that resulted in the conviction were premeditated, part of a continuing pattern of behavior, or consisted of non-consensual sexual acts;

(5) The sentence imposed by the court included incarceration; or

(6) The convicted individual or entity has other documented instances of criminal, civil, or administrative wrongdoing.

(c) Only if any of the aggravating factors set forth in paragraph (b) of this section justifies an exclusion longer than 5 years, may mitigating factors be considered as a basis for reducing the period of exclusion to no less than 5 years. Only the following factors may be considered mitigating—

(1) The record in the criminal proceedings demonstrates that the court

determined that the individual had a condition before or during the commission of the offense that reduced the individual's culpability; or

(2) The record in the criminal proceedings or a written statement by a government official demonstrates that the individual's or entity's cooperation with Federal or State officials resulted in other individuals or entities being excluded, indicted, or otherwise charged, convicted, or investigated.

(d) In the case of an exclusion under this subpart, an exclusion will be—

(1) For not less than 10 years if the individual has been convicted on one previous occasion of one or more offenses for which an exclusion may be imposed under section 1128(a) of the Act. (The aggravating factors in paragraph (b) of this section can be used to impose a period of time in excess of the 10-year minimum.); or

(2) Permanent if the individual has been convicted on two or more previous occasions of one or more offenses for which an exclusion may be imposed under section 1128(a) of the Act.

Subpart C—Permissive Exclusions

■ 7. Revise and republish §§ 1001.201 through 1001.951 to read as follows:

Sec.

1001.201 Conviction relating to program or health care fraud.

1001.301 Conviction relating to obstruction of an investigation or audit.

1001.401 Conviction relating to controlled substances.

1001.501 License revocation or suspension.

1001.601 Exclusion or suspension under a Federal or State health care program.

1001.701 Excessive claims or furnishing of unnecessary or substandard items and services.

1001.801 Failure of HMOs and CMPs to furnish medically necessary items and services.

1001.901 False or improper claims.

1001.951 Fraud and kickbacks and other prohibited activities.

* * * * *

§ 1001.201 Conviction relating to program or health care fraud.

(a) *Circumstance for exclusion.* OIG may exclude an individual or entity convicted under Federal or State law of—

(1) A misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct—

(i) In connection with the delivery of any health care item or service, including the performance of management or administrative services relating to the delivery of such items or services; or

(ii) With respect to any act or omission in a health care program, other than Medicare or a State health care program, operated or financed in whole or in part by any Federal, State, or local government agency; or

(2) Fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct with respect to any act or omission in a program, other than a health care program, operated or financed in whole or in part by any Federal, State, or local government agency.

(b) *Length of exclusion.* (1) An exclusion imposed in accordance with this section will be for a period of 3 years unless aggravating or mitigating factors listed in paragraphs (b)(2) and (3) of this section form a basis for lengthening or shortening that period.

(2) Any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion—

(i) The acts resulting in the conviction, or similar acts, caused or reasonably could have been expected to cause a financial loss of \$50,000 or more to a government agency or program or to one or more other entities. (The entire amount of financial loss will be considered, including any amounts resulting from similar acts not adjudicated, regardless of whether full or partial restitution has been made.);

(ii) The acts that resulted in the conviction, or similar acts, were committed over a period of 1 year or more;

(iii) The acts that resulted in the conviction, or similar acts, had a significant adverse physical, mental, or financial impact on one or more program beneficiaries or other individuals;

(iv) The sentence imposed by the court included incarceration; or

(v) The individual or entity has other documented instances of criminal, civil, or administrative wrongdoing.

(3) Only the following factors may be considered as mitigating and a basis for reducing the period of exclusion—

(i) The record in the criminal proceedings demonstrates that the court determined that the individual had a condition, before or during the commission of the offense, that reduced the individual's culpability; or

(ii) The record in the criminal proceedings or a written statement by a government official demonstrates that the individual's or entity's cooperation with Federal or State officials resulted in other individuals or entities being excluded, indicted, or otherwise charged, convicted, or investigated.

§ 1001.301 Conviction relating to obstruction of an investigation or audit.

(a) *Circumstance for exclusion.* OIG may exclude an individual or entity that has been convicted, under Federal or State law, in connection with the interference with or obstruction of any investigation or audit related to—

(1) Any offense described in

§ 1001.101 or § 1001.201; or

(2) The use of funds received, directly or indirectly, from any Federal health care program.

(b) *Length of exclusion.* (1) An exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors listed in paragraphs (b)(2) and (3) of this section form the basis for lengthening or shortening that period.

(2) Any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion—

(i) The acts resulting in the conviction, or similar acts, caused, or reasonably could have been expected to cause a financial loss of \$50,000 or more to a government agency or program or to one or more other entities. (The entire amount of financial loss will be considered, including any amounts resulting from similar acts not adjudicated, regardless of whether full or partial restitution has been made.);

(ii) The acts that resulted in the conviction had a significant adverse physical, mental, or financial impact on one or more program beneficiaries or other individuals;

(iii) The sentence imposed by the court included incarceration;

(iv) The individual or entity has other documented instances of criminal, civil, or administrative wrongdoing.

(3) Only the following factors may be considered as mitigating and a basis for reducing the period of exclusion—

(i) The record of the criminal proceedings demonstrates that the court determined that the individual had a condition, before or during the commission of the offense, that reduced the individual's culpability; or

(ii) The record in the criminal proceedings or a written statement by a government official demonstrates that the individual's or entity's cooperation with Federal or State officials resulted in other individuals or entities being excluded, indicted, or otherwise charged, convicted, or investigated.

§ 1001.401 Conviction relating to controlled substances.

(a) *Circumstance for exclusion.* OIG may exclude an individual or entity convicted under Federal or State law of a misdemeanor relating to the unlawful

manufacture, distribution, prescription, or dispensing of a controlled substance, as defined under Federal or State law. This section applies to any individual or entity that—

(1) Is, or has ever been, a health care practitioner, provider, or supplier, or furnished or furnishes items or services;

(2) Holds, or held, a direct or indirect ownership or control interest in an entity that furnished or furnishes items or services or is or has ever been an officer, director, agent, or managing employee of such an entity; or

(3) Is, or has ever been, employed in any capacity in the health care industry.

(b) *Length of exclusion.* (1) An exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors listed in paragraphs (c)(2) and (3) of this section form a basis for lengthening or shortening that period.

(2) Any of the following factors may be considered to be aggravating and to be a basis for lengthening the period of exclusion—

(i) The acts that resulted in the conviction or similar acts were committed over a period of 1 year or more;

(ii) The acts that resulted in the conviction or similar acts had a significant adverse physical, mental, or financial impact on program beneficiaries or other individuals or a Federal health care program;

(iii) The sentence imposed by the court included incarceration; or

(iv) The individual or entity has other documented instances of criminal, civil, or administrative wrongdoing.

(3) Only the following factors may be considered to be mitigating and to be a basis for shortening the period of exclusion—

(i) The record of the criminal proceedings demonstrates that the court determined that the individual had a condition, before or during the commission of the offense, that reduced the individual's culpability; or

(ii) The record in the criminal proceedings or a written statement by a government official demonstrates that the individual's or entity's cooperation with Federal or State officials resulted in other individuals or entities being excluded, indicted, or otherwise charged, convicted, or investigated.

§ 1001.501 License revocation or suspension.

(a) *Circumstance for exclusion.* OIG may exclude an individual or entity that has—

(1) Had a license to provide health care revoked or suspended by any State licensing authority, or has otherwise

lost such a license (including the right to apply for or renew such a license), for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity; or

(2) Has surrendered such a license while a formal disciplinary proceeding concerning the individual's or entity's professional competence, professional performance, or financial integrity was pending before a State licensing authority.

(b) *Length of exclusion.* (1) An exclusion imposed in accordance with this section will not be for a period of time less than the period during which an individual's or entity's license is revoked, suspended, or otherwise not in effect as a result of, or in connection with, a State licensing agency action.

(2) When an individual or entity has been excluded under this section, OIG will consider a request for reinstatement in accordance with § 1001.3001 if:

(i) The individual or entity obtains the license in the State where the license was originally revoked, suspended, surrendered, or otherwise lost; or

(ii) The individual meets the conditions for early reinstatement set forth in paragraph (c) of this section.

(c) *Consideration of early reinstatement.* (1) If an individual or entity that is excluded in accordance with this section fully and accurately discloses the circumstances surrounding the action that formed the basis for the exclusion to a licensing authority of a different State or to a different licensing authority in the same State and that licensing authority grants the individual or entity a new health care license or has decided to take no adverse action as to a currently held health care license, OIG will consider a request for early reinstatement. OIG will consider the following factors in determining whether a request for early reinstatement under this paragraph (c)(1) will be granted:

(i) The circumstances that formed the basis for the exclusion, including whether the circumstances were related to patient abuse or neglect;

(ii) Whether the second licensing authority is in a State that is not the individual's or entity's primary place of practice;

(iii) Documentation from the second licensing authority indicating that it was aware of the circumstances surrounding the action that formed the basis for the exclusion;

(iv) Whether the individual or entity has demonstrated that the individual or entity has satisfactorily resolved any underlying problem that caused or

contributed to the basis for the initial licensing action;

(v) The benefits to the Federal health care programs and program beneficiaries of early reinstatement;

(vi) The risks to the Federal health care programs and program beneficiaries of early reinstatement;

(vii) Any additional or pending license actions in any State;

(viii) Any ongoing investigations involving the individual or entity; and

(ix) All the factors set forth in § 1001.3002(b).

(2) If an exclusion has been imposed under this section and the individual or entity does not have a valid health care license of any kind in any State, that individual or entity may request OIG to consider whether the individual or entity may be eligible for early reinstatement. OIG will consider the following factors in determining whether a request for early reinstatement under this paragraph (c)(2) will be granted:

(i) The length of time the individual or entity has been excluded. OIG will not consider a request for early reinstatement under paragraph (c)(2) of this section if the individual or entity has been excluded for less than 3 years; however, if the action on which the exclusion is based was for a set period longer than 3 years, OIG will not consider a request for early reinstatement at any time prior to the expiration of the period set by the licensing board;

(ii) The circumstances that formed the basis for the exclusion, including whether the circumstances were related to patient abuse or neglect;

(iii) Whether the individual or entity has demonstrated that the individual or entity has satisfactorily resolved any underlying problem that caused or contributed to the basis for the initial licensing action;

(iv) The benefits to the Federal health care programs and program beneficiaries of early reinstatement;

(v) The risks to the Federal health care programs and program beneficiaries of early reinstatement;

(vi) Any additional or pending license actions in any State;

(vii) Any ongoing investigations involving the individual or entity; and

(viii) All the factors set forth in § 1001.3002(b).

(3) Notwithstanding paragraphs (c)(1) and (2) of this section, if an individual's or entity's license revocation or suspension was for reasons related to patient abuse or neglect, OIG will not consider an application for early reinstatement if the individual or entity has been excluded for less than 5 years.

(4) Except for § 1001.3002(a)(1)(i), all provisions of subpart F (§§ 1001.3001 through 1001.3005) apply to early reinstatements under this section.

§ 1001.601 Exclusion or suspension under a Federal or State health care program.

(a) *Circumstance for exclusion.* (1) OIG may exclude an individual or entity suspended or excluded from participation, or otherwise sanctioned, under—

(i) Any Federal program involving the provision of health care; or

(ii) A State health care program, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.

(2) The term “or otherwise sanctioned” in paragraph (a)(1) of this section means all actions that limit the ability of a person to participate in the program at issue regardless of what such an action is called, and includes situations where an individual or entity voluntarily withdraws from a program to avoid a formal sanction.

(b) *Length of exclusion.* (1) An exclusion imposed in accordance with this section will not be for a period of time less than the period during which the individual or entity is excluded or suspended, or otherwise sanctioned, from a Federal or State health care program.

(2) If the individual or entity is eligible to apply for reinstatement in accordance with § 1001.3001, and the sole reason why the State or Federal health care program denied reinstatement to that program is the existing exclusion imposed by OIG as a result of the original State or Federal health care program action, OIG will consider a request for reinstatement.

§ 1001.701 Excessive claims or furnishing of unnecessary or substandard items and services.

(a) *Circumstance for exclusion.* OIG may exclude an individual or entity that has—

(1) Submitted, or caused to be submitted, bills or requests for payments under Medicare or any of the State health care programs containing charges or costs for items or services furnished that are substantially in excess of such individual's or entity's usual charges or costs for such items or services; or

(2) Furnished, or caused to be furnished, to patients (whether or not covered by Medicare or any of the State health care programs) any items or services substantially in excess of the patient's needs, or of a quality that fails to meet professionally recognized standards of health care.

(b) *Sources.* OIG's determination under paragraph (a)(2) of this section—that the items or services furnished were excessive or of unacceptable quality—will be made on the basis of information, including sanction reports, from the following sources:

(1) The QIO for the area served by the individual or entity;

(2) State or local licensing or certification authorities;

(3) Fiscal agents or contractors, or private insurance companies;

(4) State or local professional societies; or

(5) Any other sources deemed appropriate by OIG.

(c) *Exceptions.* An individual or entity will not be excluded for—

(1) Submitting, or causing to be submitted, bills or requests for payment that contain charges or costs substantially in excess of usual charges or costs when such charges or costs are due to unusual circumstances or medical complications requiring additional time, effort, expense or other good cause; or

(2) Furnishing, or causing to be furnished, items or services in excess of the needs of patients, when the items or services were ordered by a physician or other authorized individual, and the individual or entity furnishing the items or services was not in a position to determine medical necessity or to refuse to comply with the order of the physician or other authorized individual.

(d) *Length of exclusion.* (1) An exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors set forth in paragraphs (d)(2) and (3) of this section form a basis for lengthening or shortening the period. In no case may the period be shorter than 1 year for any exclusion taken in accordance with paragraph (a)(2) of this section.

(2) Any of the following factors may be considered aggravating and a basis for lengthening the period of exclusion—

(i) The conduct occurred over a period of 1 year or more;

(ii) The conduct had a significant adverse physical, mental, or financial impact on program beneficiaries or other individuals;

(iii) The individual or entity has other documented instances of criminal, civil, or administrative wrongdoing; or

(iv) The conduct resulted in financial loss to any Federal health care program of \$50,000 or more.

(3) Only the following factor may be considered mitigating and a basis for reducing the period of exclusion:

Whether there were few occurrences of the conduct, and the conduct occurred over a short period of time.

§ 1001.801 Failure of HMOs and CMPs to furnish medically necessary items and services.

(a) *Circumstances for exclusion.* OIG may exclude an entity—

(1) That is a—

(i) Health maintenance organization (HMO), as defined in section 1903(m) of the Act, providing items or services under a State Medicaid Plan;

(ii) Primary care case management system providing services, in accordance with a waiver approved under section 1915(b)(1) of the Act; or

(iii) HMO or competitive medical plan (CMP) providing items or services in accordance with a risk-sharing contract under section 1876 of the Act;

(2) That has failed substantially to provide medically necessary items and services that are required under a plan, waiver or contract described in paragraph (a)(1) of this section to be provided to individuals covered by such plan, waiver or contract; and

(3) Where such failure has adversely affected or has a substantial likelihood of adversely affecting covered individuals.

(b) *Sources.* OIG's determination under paragraph (a)(2) of this section—that the medically necessary items and services required under law or contract were not provided—will be made on the basis of information, including sanction reports, from the following sources:

(1) The QIO or other quality assurance organization under contract with a State Medicaid plan for the area served by the HMO or competitive medical plan;

(2) State or local licensing or certification authorities;

(3) Fiscal agents or contractors, or private insurance companies;

(4) State or local professional societies;

(5) CMS's HMO compliance office; or

(6) Any other sources deemed appropriate by OIG.

(c) *Length of exclusion.* (1) An exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors set forth in paragraphs (c)(2) and (3) of this section form a basis for lengthening or shortening the period.

(2) Any of the following factors may be considered aggravating and a basis for lengthening the period of exclusion—

(i) The entity failed to provide a large number or a variety of items or services;

(ii) The failures occurred over a lengthy period of time;

(iii) The entity's failure to provide a necessary item or service had or could have had a serious adverse effect; or

(iv) The entity has other documented instances of criminal, civil, or administrative wrongdoing.

(3) Only the following factors may be considered as mitigating and a basis for reducing the period of exclusion—

(i) There were few violations and they occurred over a short period of time; or

(ii) The entity took corrective action upon learning of impermissible activities by an employee or contractor.

§ 1001.901 False or improper claims.

(a) *Circumstance for exclusion.* OIG may exclude any individual or entity that it determines has committed an act described in section 1128A of the Act. The imposition of a civil money penalty or assessment is not a prerequisite for an exclusion under this section.

(b) *Length of exclusion.* In determining the length of an exclusion imposed in accordance with this section, OIG will consider the following factors—

(1) The nature and circumstances surrounding the actions that are the basis for liability, including the period of time over which the acts occurred, the number of acts, whether there is evidence of a pattern, and the amount claimed;

(2) The degree of culpability;

(3) Whether the individual or entity has other documented instances of criminal, civil, or administrative wrongdoing (the absence of any such instances is to be considered neutral); or

(4) Other matters as justice may require.

(c) *Limitations.* OIG may not impose an exclusion under this section more than 10 years after the date when an act which is described in section 1128A of the Act occurred.

§ 1001.951 Fraud and kickbacks and other prohibited activities.

(a) *Circumstance for exclusion.* (1) Except as provided for in paragraph (a)(2)(ii) of this section, OIG may exclude any individual or entity that it determines has committed an act described in section 1128B(b) of the Act.

(2) With respect to acts described in section 1128B of the Act, OIG—

(i) May exclude any individual or entity that it determines has knowingly and willfully solicited, received, offered or paid any remuneration in the manner and for the purposes described therein, irrespective of whether the individual or entity may be able to prove that the remuneration was also intended for some other purpose; and

(ii) Will not exclude any individual or entity if that individual or entity can

prove that the remuneration that is the subject of the exclusion is exempted from serving as the basis for an exclusion.

(b) *Length of exclusion.* In determining the length of an exclusion imposed in accordance with this section, OIG may consider the following factors—

(1) The nature and circumstances surrounding the actions that are the basis for liability, including the period of time over which the acts occurred, the number of acts, whether there is evidence of a pattern and the amount claimed;

(2) The degree of culpability;

(3) Whether the individual or entity has other documented instances of criminal, civil, or administrative wrongdoing (the absence of any such instances is to be considered neutral); or

(4) Other matters as justice may require.

(c) *Limitations.* OIG may not impose an exclusion under this section more than 10 years after the date when an act which is described in section 1128B(b) of the Act occurred.

■ 8. Revise and republish §§ 1001.1101 through 1001.1552 to read as follows:

Sec.

*	*	*	*	*
1001.1101	Failure to disclose certain information.			
1001.1201	Failure to provide payment information.			
1001.1301	Failure to grant immediate access.			
1001.1401	Violations of Prospective Payment System corrective action.			
1001.1501	Default of health education loan or scholarship obligations.			
1001.1551	Exclusion of individuals with ownership or control interest in sanctioned entities.			
1001.1552	Making false statements or misrepresentation of material facts.			

§ 1001.1101 Failure to disclose certain information.

(a) *Circumstance for exclusion.* OIG may exclude any entity that did not fully and accurately, or completely, make disclosures as required by section 1124, 1124A or 1126 of the Act, and by part 455, subpart B and part 420, subpart C of this title.

(b) *Length of exclusion.* The following factors will be considered in determining the length of an exclusion under this section—

(1) The number of instances where full and accurate, or complete, disclosure was not made;

(2) The significance of the undisclosed information;

(3) Whether the individual or entity has other documented instances of criminal, civil, or administrative

wrongdoing (the absence of such instances is to be considered neutral);

(4) Any other facts that bear on the nature or seriousness of the conduct; and

(5) The extent to which the entity knew that the disclosures made were not full or accurate.

§ 1001.1201 Failure to provide payment information.

(a) *Circumstance for exclusion.* OIG may exclude any individual or entity that furnishes, orders, refers for furnishing, or certifies the need for items or services for which payment may be made under Medicare or any of the State health care programs and that—

(1) Fails to provide such information as is necessary to determine whether such payments are or were due and the amounts thereof; or

(2) Has refused to permit such examination and duplication of its records as may be necessary to verify such information.

(b) *Length of exclusion.* The following factors will be considered in determining the length of an exclusion under this section—

(1) The number of instances where information was not provided;

(2) The circumstances under which such information was not provided;

(3) The amount of the payments at issue; and

(4) Whether the individual or entity has other documented instances of criminal, civil, or administrative wrongdoing (the absence of such instances is to be considered neutral).

§ 1001.1301 Failure to grant immediate access.

(a) *Circumstance for exclusion.* (1) OIG may exclude any individual or entity that fails to grant immediate access upon reasonable request to—

(i) The Secretary, a State survey agency or other authorized entity for the purpose of determining, in accordance with section 1864(a) of the Act, whether—

(A) An institution is a hospital or skilled nursing facility;

(B) An agency is a home health agency;

(C) An agency is a hospice program;

(D) A facility is a rural health clinic as defined in section 1861(aa)(2) of the Act, or a comprehensive outpatient rehabilitation facility as defined in section 1861(cc)(2) of the Act;

(E) A laboratory is meeting the requirements of section 1861(s) (15) and (16) of the Act, and section 353(f) of the Public Health Service Act;

(F) A clinic, rehabilitation agency or public health agency is meeting the

requirements of section 1861(p)(4) (A) or (B) of the Act;

(G) An ambulatory surgical center is meeting the standards specified under section 1832(a)(2)(F)(i) of the Act;

(H) A portable x ray unit is meeting the requirements of section 1861(s)(3) of the Act;

(I) A screening mammography service is meeting the requirements of section 1834(c)(3) of the Act;

(J) An end-stage renal disease facility is meeting the requirements of section 1881(b) of the Act;

(K) A physical therapist in independent practice is meeting the requirements of section 1861(p) of the Act;

(L) An occupational therapist in independent practice is meeting the requirements of section 1861(g) of the Act;

(M) An organ procurement organization meets the requirements of section 1138(b) of the Act; or

(N) A rural primary care hospital meets the requirements of section 1820(i)(2) of the Act;

(ii) The Secretary, a State survey agency or other authorized entity to perform the reviews and surveys required under State plans in accordance with sections 1902(a)(26) (relating to inpatient mental hospital services), 1902(a)(31) (relating to intermediate care facilities for individuals with intellectual disabilities), 1919(g) (relating to nursing facilities), 1929(i) (relating to providers of home and community care and community care settings), 1902(a)(33), and 1903(g) of the Act;

(iii) OIG for reviewing records, documents, and other material or data in any medium (including electronically stored information and any tangible thing) necessary to OIG's statutory functions; or

(iv) A State Medicaid fraud control unit (MFCU) for the purpose of conducting its activities.

(2) For purposes of paragraphs (a)(1)(i) and (ii) of this section—

(i) *Failure to grant immediate access* means the failure to grant access at the time of a reasonable request unless the requested material does not exist or is not at the location where the request is presented.

(ii) *Reasonable request* means a written request made by a properly identified agent of the Secretary, of a State survey agency, or of another authorized entity, during hours that the facility, agency or institution is open for business.

(iii) The request will include a statement of the authority for the request, the rights of the entity in

responding to the request, the definitions of *reasonable request* and *failure to grant immediate access*, and the penalties for failure to comply, including when the exclusion will take effect.

(3) For purposes of paragraphs (a)(1)(iii) and (iv) of this section—

(i) *Failure to grant immediate access* means the failure to produce or make available for inspection and copying the requested material at the time of a reasonable request unless the requested material does not exist or is not at the location where the request is presented.

(ii) *Reasonable request* means a written request, signed by a designated representative of OIG or a MFCU and made by a properly identified agent of OIG or a MFCU during reasonable business hours, where there is information to suggest that the person has violated statutory or regulatory requirements under titles V, XI, XVIII, XIX, or XX of the Act.

(iii) The request will include a statement of the authority for the request, the person's rights in responding to the request, the definitions of *reasonable request* and *failure to grant immediate access*, and the effective date, length, and scope and effect of the exclusion that would be imposed for failure to comply with the request, and the earliest date that a request for reinstatement would be considered.

(4) Nothing in this section shall in any way limit access otherwise authorized under State or Federal law.

(b) *Length of exclusion.* (1) An exclusion of an individual under this section may be for a period equal to the sum of:

(i) The length of the period during which the immediate access was not granted; and

(ii) An additional period of up to 90 days.

(2) The exclusion of an entity may be for a longer period than the period in which immediate access was not granted based on consideration of the following factors—

(i) The impact of the failure to grant the requested immediate access on Medicare or any of the State health care programs, beneficiaries, or the public;

(ii) The circumstances under which such access was refused;

(iii) The impact of the exclusion on any Federal health care program, beneficiaries, or the public; and

(iv) Whether the entity has other documented instances of criminal, civil, or administrative wrongdoing (the absence of any such instances is to be considered neutral).

(3) For purposes of paragraphs (b)(1) and (2) of this section, the length of the period in which immediate access was not granted will be measured from the time the request is made, or from the time by which access was required to be granted, whichever is later.

(c) The exclusion will be effective as of the date immediate access was not granted.

§ 1001.1401 Violations of Prospective Payment System corrective action.

(a) *Circumstance for exclusion.* OIG may exclude any hospital that CMS determines has failed substantially to comply with a corrective action plan required by CMS under section 1886(f)(2)(B) of the Act.

(b) *Length of exclusion.* The following factors will be considered in determining the length of exclusion under this section—

(1) The impact of the hospital's failure to comply on any Federal health care program, program beneficiaries, or other individuals;

(2) The circumstances under which the failure occurred;

(3) The nature of the failure to comply;

(4) The impact of the exclusion on any Federal health care program, beneficiaries, or the public; and

(5) Whether the hospital has other documented instances of criminal, civil, or administrative wrongdoing (the absence of any such instances is to be considered neutral).

§ 1001.1501 Default of health education loan or scholarship obligations.

(a) *Circumstance for exclusion.* (1) Except as provided in paragraph (a)(4) of this section, OIG may exclude any individual that the administrator of the health education loan, scholarship, or loan repayment program determines is in default on repayments of scholarship obligations or loans, or the obligations of any loan repayment program, in connection with health professions education made or secured in whole or in part by the Secretary.

(2) Before imposing an exclusion in accordance with paragraph (a)(1) of this section, OIG must determine that the administrator of the health education loan, scholarship, or loan repayment program has taken all reasonable administrative steps to secure repayment of the loans or obligations. When an individual has been offered a Medicare offset arrangement as required by section 1892 of the Act, OIG will find that all reasonable steps have been taken.

(3) OIG will take into account access of beneficiaries to physician services for

which payment may be made under the Medicare and Medicaid programs in determining whether to impose an exclusion.

(4) OIG will not exclude a physician who is the sole community physician or the sole source of essential specialized services in a community if a State requests that the physician not be excluded.

(b) *Length of exclusion.* The individual will be excluded until the administrator of the health education loan, scholarship, or loan repayment program notifies OIG that the individual has entered into an agreement with the administrator of the health education loan, scholarship, or loan repayment program to cure the default or that there is no longer an outstanding debt. If the administrator of the health education loan, scholarship, or loan repayment program notifies OIG that the individual has entered into an agreement to cure the default, the individual may be eligible for a stay of the effect of exclusion by OIG for as long as the individual remains in compliance with the terms of the agreement. If the administrator of the health education loan, scholarship, or loan repayment program notifies OIG that there is no longer an outstanding debt, OIG will inform the individual of the individual's right to apply for reinstatement.

§ 1001.1551 Exclusion of individuals with ownership or control interest in sanctioned entities.

(a) *Circumstance for exclusion.* OIG may exclude any individual who—

(1) Has a direct or indirect ownership or control interest in a sanctioned entity, and who knows or should know (as defined in section 1128A(i)(6) of the Act) of the action constituting the basis for the conviction or exclusion set forth in paragraph (b) of this section; or

(2) Is an officer or managing employee (as defined in section 1126(b) of the Act) of such an entity.

(b) For purposes of paragraph (a) of this section, the term “sanctioned entity” means an entity that—

(1) Has been convicted of any offense described in §§ 1001.101 through 1001.401; or

(2) Has been excluded from participation in Medicare or a State health care program.

(c) *Length of exclusion.* (1) If the entity has been excluded, the length of the individual's exclusion will be for the same length as that of the sanctioned entity, regardless of whether the individual terminates the relationship with the sanctioned entity.

(2) If the entity was not excluded, the length of the individual's exclusion will

be determined by considering the factors that would have been considered if the entity had been excluded.

(3) An individual excluded under this section may apply for reinstatement in accordance with the procedures set forth in § 1001.3001.

§ 1001.1552 Making false statements or misrepresentation of material facts.

(a) *Circumstance for exclusion.* OIG may exclude any individual or entity that it determines has knowingly made or caused to be made any false statement, omission, or misrepresentation of a material fact in any application, agreement, bid, or contract to participate or enroll as a provider of services or supplier under a Federal health care program, including Medicare Advantage organizations under Part C of Medicare, prescription drug plan sponsors under Part D of Medicare, Medicaid managed care organizations, and entities that apply to participate as providers of services or suppliers in such managed care organizations and such plans.

(b) *Definition of “material.”* For purposes of this section, the term “material” means having a natural tendency to influence or be capable of influencing the decision to approve or deny the request to participate or enroll as a provider of services or supplier under a Federal health care program.

(c) *Sources.* OIG's determination under paragraph (a) of this section will be made on the basis of information from the following sources:

- (1) CMS;
- (2) Medicaid State agencies;
- (3) Fiscal agents or contractors or private insurance companies;
- (4) Law enforcement agencies;
- (5) State or local licensing or certification authorities;
- (6) State or local professional societies; or
- (7) Any other sources deemed appropriate by OIG.

(d) *Length of exclusion.* In determining the length of an exclusion imposed in accordance with this section, OIG will consider the following factors:

- (1) The nature and circumstances surrounding the false statement;
- (2) Whether and to what extent payments were requested or received from the Federal health care program under the application, agreement, bid, or contract on which the false statement, omission, or misrepresentation was made; and
- (3) Whether the individual or entity has other documented instances of criminal, civil, or administrative wrongdoing (the absence of any such instances is to be considered neutral).

■ 9. Add § 1001.1553 to read as follows:

§ 1001.1553 Knowingly misclassifying covered outpatient drugs.

(a) *Circumstance for exclusion.* OIG may exclude any manufacturer (as defined in section 1927 of the Act), or officer, director, agent, or managing employee of such manufacturer that:

(1) Knowingly misclassifies a covered outpatient drug;

(2) Knowingly fails to correct such misclassification; or

(3) Knowingly provides false information related to drug pricing, drug product information, or data related to drug pricing or drug product information.

(b) This section applies to covered outpatient drugs supplied by manufacturers under agreements under section 1927 of the Act in effect on or after April 18, 2019.

(c) *Length of exclusion.* The following factors will be considered in determining the length of an exclusion under this section:

(1) The nature and circumstances surrounding the actions that are the basis for liability, including the period of time over which the acts occurred, the number of acts, and whether there is evidence of a pattern;

(2) The degree of culpability;

(3) Whether the entity has other documented instances of criminal, civil, or administrative wrongdoing (the absence of any such instances is to be considered neutral); or

(4) Other matters as justice may require.

■ 10. Revise and republish §§ 1001.1601 and 1001.1701 to read as follows:

§ 1001.1601 Violations of the limitations on physician charges.

(a) *Circumstance for exclusion.* (1) OIG may exclude a physician whom it determines—

(i) Is a non-participating physician under section 1842(j) of the Act;

(ii) Furnished services to a beneficiary;

(iii) Knowingly and willfully billed—

(A) On a repeated basis for such services actual charges in excess of the maximum allowable actual charge determined in accordance with section 1842(j)(1)(C) of the Act for the period January 1, 1987 through December 31, 1990; or

(B) Individuals enrolled under part B of title XVIII of the Act during the statutory freeze for actual charges in excess of such physician's actual charges determined in accordance with section 1842(j)(1)(A) of the Act for the period July 1, 1984, to December 31, 1986; and

(iv) Is not the sole community physician or sole source of essential specialized services in the community.

(2) OIG will take into account access of beneficiaries to physicians' services for which Medicare payment may be made in determining whether to impose an exclusion.

(b) *Length of exclusion.* (1) In determining the length of an exclusion in accordance with this section, OIG will consider the following factors—

(i) The number of services for which the physician billed in excess of the maximum allowable charges;

(ii) The number of beneficiaries for whom services were billed in excess of the maximum allowable charges;

(iii) The amount of the charges that were in excess of the maximum allowable charges; and

(iv) Whether the physician has other documented instances of criminal, civil, or administrative wrongdoing (the absence of any such instances is to be considered neutral).

(2) The period of exclusion may not exceed 5 years.

§ 1001.1701 Billing for services of assistant at surgery during cataract operations.

(a) *Circumstance for exclusion.* OIG may exclude a physician whom it determines—

(1) Has knowingly and willfully presented or caused to be presented a claim, or billed an individual enrolled under Part B of the Medicare program (or the individual's representative) for:

(i) Services of an assistant at surgery during a cataract operation; or

(ii) Charges that include a charge for an assistant at surgery during a cataract operation;

(2) Has not obtained prior approval for the use of such assistant from the appropriate Utilization and Quality Control Quality Improvement Organization (QIO) or Medicare carrier; and

(3) Is not the sole community physician or sole source of essential specialized services in the community.

(b) *Access to services.* OIG will take into account access of beneficiaries to physicians' services for which Medicare payment may be made in determining whether to impose an exclusion.

(c) *Length of exclusion.* (1) In determining the length of an exclusion in accordance with this section, OIG will consider the following factors—

(i) The number of instances for which claims were submitted or beneficiaries were billed for unapproved use of assistants during cataract operations;

(ii) The amount of the claims or bills presented;

(iii) The circumstances under which the claims or bills were made, including whether the services were medically necessary;

(iv) Whether approval for the use of an assistant was requested from the QIO or carrier; and

(v) Whether the physician has other documented instances of criminal, civil, or administrative wrongdoing (the absence of any such instances is to be considered neutral).

(2) The period of exclusion may not exceed 5 years.

Subpart D—Waivers and Effect of Exclusion

■ 11. Revise and republish §§ 1001.1801 and 1001.1901 to read as follows:

§ 1001.1801 Waivers of exclusions.

(a) OIG has the authority to grant or deny a request from the administrator of a Federal health care program that an exclusion from that program be waived with respect to an individual or entity, except that no waiver may be granted with respect to an exclusion under § 1001.101(b). The request must be in writing and from an individual directly responsible for administering the Federal health care program.

(b) With respect to exclusions under § 1001.101(a), (c), or (d), a request from a Federal health care program for a waiver of the exclusion will be considered only if the Federal health care program administrator determines that—

(1) The individual or entity is the sole community physician or the sole source of essential specialized services in a community; and

(2) The exclusion would impose a hardship on beneficiaries (as defined in section 1128A(i)(5) of the Act) of that program.

(c) With respect to exclusions imposed under subpart C of this part, a request for waiver will only be granted if OIG determines that imposition of the exclusion would not be in the public interest.

(d) If the basis for the waiver ceases to exist, the waiver will be rescinded.

(e) In the event a waiver is granted, it is applicable only to the program(s) for which waiver is requested.

(f) The decision to grant, deny, or rescind a request for a waiver is not subject to administrative or judicial review.

§ 1001.1901 Scope and effect of exclusion.

(a) *Scope of exclusion.* Exclusions of individuals and entities under this title will be from all Federal health care programs, as defined in § 1000.10 of this chapter.

(b) *Effect of exclusion on excluded individuals and entities.* (1) Unless and until an individual or entity is reinstated into the Federal health care programs in accordance with subpart F of this part, no payment will be made by any Federal health care program for any item or service furnished, on or after the effective date specified in the notice—

(i) By an excluded individual or entity; or

(ii) At the medical direction or on the prescription of a physician or an authorized individual who is excluded when the person furnishing such item or service knew, or had reason to know, of the exclusion.

(2) This section applies regardless of whether an individual or entity has obtained a Federal health care program provider number or equivalent, either as an individual or as a member of a group, prior to being reinstated.

(3) An excluded individual or entity may not take assignment of an enrollee's claim on or after the effective date of exclusion.

(4) An excluded individual or entity that submits, or causes to be submitted, claims for items or services furnished during the exclusion period is subject to civil money penalty liability under section 1128A(a)(1)(D) of the Act and criminal liability under section 1128B(a)(3) of the Act and other provisions. In addition, submitting claims, or causing claims to be submitted or payments to be made, for items or services furnished, ordered, or prescribed, including administrative and management services or salary, may serve as the basis for denying reinstatement to the Federal health care programs.

(c) *Exceptions to paragraph (b)(1) of this section.* (1) If an enrollee of Part B of Medicare submits an otherwise payable claim for items or services furnished by an excluded individual or entity, or under the medical direction or on the prescription of an excluded physician or other authorized individual after the effective date of exclusion, CMS will pay the first claim submitted by the enrollee and immediately notify the enrollee of the exclusion.

(2) CMS will not pay an enrollee for items or services furnished by an excluded individual or entity, or under the medical direction or on the prescription of an excluded physician or other authorized individual more than 15 days after the date on the notice to the enrollee, or after the effective date of the exclusion, whichever is later.

(3) Unless the Secretary determines that the health and safety of

beneficiaries receiving services under any Federal health care program warrants the exclusion taking effect earlier, payment may be made under such program for up to 30 days after the effective date of the exclusion for—

- (i) Inpatient institutional services furnished to an individual who was admitted to an excluded institution before the date of the exclusion;
- (ii) Home health services and hospice care furnished to an individual under a plan of care established before the effective date of the exclusion; and
- (iii) Any health care items that are ordered by a practitioner, provider, or supplier from an excluded manufacturer before the effective date of the exclusion and delivered within 30 days of the effective date of such exclusion.

(4) CMS will not pay any claims submitted by, or for items or services ordered or prescribed by, an excluded provider for dates of service 15 days or more after the notice of the provider's exclusion was mailed to the supplier.

(5)(i) Notwithstanding the other provisions of this section, payment may be made under any Federal health care program for certain emergency items or services furnished by an excluded individual or entity, or at the medical direction or on the prescription of an excluded physician or other authorized individual during the period of exclusion. To be payable, a claim for such emergency items or services must be accompanied by a sworn statement of the person furnishing the items or services specifying the nature of the emergency and why the items or services could not have been furnished by an individual or entity eligible to furnish or order such items or services.

(ii) Notwithstanding paragraph (c)(5)(i) of this section, no claim for emergency items or services will be payable if such items or services were provided by an excluded individual who, through an employment, contractual or any other arrangement, routinely provides emergency health care items or services.

Subpart E—Notice and Appeals

■ 12. Revise and republish § 1001.2001 to read as follows:

§ 1001.2001 Notice of intent to exclude.

(a) Except as provided in paragraph (c) of this section, if OIG proposes to exclude an individual or entity in accordance with subpart B or C of this part, it will send written notice of its intent, the basis for the proposed exclusion, and the potential effect of an exclusion. Within 30 days of receipt of notice, which will be deemed to be 7

days after the date on the notice, the individual or entity may submit documentary evidence and written argument concerning whether the exclusion is warranted and any related issues.

(b) If OIG intends to exclude an individual or entity under the provisions of § 1001.701, § 1001.801, or § 1001.1552, in conjunction with the submission of documentary evidence and written argument, an individual or entity may request an opportunity to present oral argument to an OIG official.

(c) *Exception.* If OIG intends to exclude an individual or entity under the provisions of § 1001.901, § 1001.951, § 1001.1301, § 1001.1401, § 1001.1601, or § 1001.1701, paragraph (a) of this section will not apply.

(d) If an entity has a provider agreement under section 1866 of the Act, and OIG proposes to terminate that agreement in accordance with section 1866(b)(2)(C) of the Act, the notice provided for in paragraph (a) of this section will so state.

■ 13. Revise and republish § 1001.2004 through 1001.2007 to read as follows:

*	*	*	*	*
1001.2004	Notice to State agencies.			
1001.2005	Notice to State licensing agencies.			
1001.2006	Notice to others regarding exclusion.			
1001.2007	Appeal of exclusions.			

§ 1001.2004 Notice to State agencies.

OIG will promptly notify each appropriate State agency administering or supervising the administration of each State health care program of:

- (a) The facts and circumstances of each exclusion; and
- (b) The period for which the State agency is being directed to exclude the individual or entity.

§ 1001.2005 Notice to State licensing agencies.

(a) OIG will promptly notify the appropriate State(s) or local agencies or authorities having responsibility for the licensing or certification of an excluded individual or entity of the facts and circumstances of the exclusion.

(b) OIG will request that appropriate investigations be made and sanctions invoked in accordance with applicable State law and policy, and will request that the State or local agency or authority keep the Secretary and OIG fully and currently informed with respect to any actions taken in response to the request.

§ 1001.2006 Notice to others regarding exclusion.

(a) OIG will give notice of the exclusion and the effective date to the public and others via online publication of the List of Excluded Individuals/Entities (commonly referred to as “the LEIE”).

(b) In the case of an exclusion under § 1001.101, if section 304(a)(5) of the Controlled Substances Act (21 U.S.C. 824(a)(5)) applies, OIG will give notice to the Attorney General of the United States of the facts and circumstances of the exclusion and the length of the exclusion.

§ 1001.2007 Appeal of exclusions.

(a)(1) Except as provided in § 1001.2003, an individual or entity excluded under this part may file a request for a hearing before an ALJ only on the issues of whether:

- (i) The basis for the imposition of the exclusion exists; and
- (ii) The length of exclusion is unreasonable.

(2) When OIG imposes an exclusion under subpart B of this part for a period of 5 years, paragraph (a)(1)(ii) of this section will not apply.

(3) The request for a hearing shall contain the information set forth in § 1005.2(d) of this chapter.

(b) The excluded individual or entity has 60 days from the receipt of notice of exclusion provided for in § 1001.2002 to file a request for a hearing.

(c) The standard of proof at a hearing is preponderance of the evidence.

(d) When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by a Federal, State, or local court, a determination by another government agency, or any other prior determination where the facts were adjudicated and a final decision was made, the basis for the underlying conviction, civil judgment, or determination is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

(e) The procedures in part 1005 of this chapter will apply to the appeal.

■ 14. Revise and republish subpart F to read as follows:

Subpart F—Reinstatement Into the Programs

Sec.	
1001.3001	Timing and method of request for reinstatement.
1001.3002	Basis for reinstatement.
1001.3003	Approval of request for reinstatement.
1001.3004	Denial of request for reinstatement.

1001.3005 Withdrawal of exclusion for reversed or vacated decisions.

Subpart F—Reinstatement Into the Programs

§ 1001.3001 Timing and method of request for reinstatement.

(a)(1) Except as provided in paragraph (a)(2) of this section or in § 1001.501(b)(2), § 1001.501(c), or § 1001.601(b)(2), an excluded individual or entity (other than those excluded in accordance with §§ 1001.1001 and 1001.1501) may submit a written request for reinstatement to OIG only after the date specified in the notice of exclusion. Obtaining a Federal health care program provider number or equivalent does not reinstate eligibility.

(2) An entity excluded under § 1001.1001 may apply for reinstatement prior to the date specified in the notice of exclusion by submitting a written request for reinstatement that includes documentation demonstrating that the standards set forth in § 1001.3002(c) have been met.

(b) Upon receipt of a written request, OIG will require the requestor to furnish specific information and authorization to obtain information from private health insurers, peer review bodies, probation officers, professional associates, investigative agencies, and such others as may be necessary to determine whether reinstatement should be granted.

(c) Failure to furnish the required information or authorization will result in the continuation of the exclusion.

(d) If a period of exclusion is reduced on appeal (regardless of whether further appeal is pending), the individual or entity may request reinstatement once the reduced exclusion period expires.

§ 1001.3002 Basis for reinstatement.

(a) OIG will authorize reinstatement if it determines that—

(1) The period of exclusion has expired;

(2) There are reasonable assurances that the types of actions that formed the basis for the original exclusion have not recurred and will not recur; and

(3) There is no additional basis under sections 1128(a) or (b) or 1128A of the Act for continuation of the exclusion.

(b) In making the reinstatement determination described in paragraph (a) of this section, OIG will consider—

(1) Conduct of the individual or entity occurring prior to the date of the notice of exclusion, if not known to OIG at the time of the exclusion;

(2) Conduct of the individual or entity after the date of the notice of exclusion;

(3) Whether all fines and all debts due and owing (including overpayments) to

any Federal, State, or local government that relate to any Federal health care program have been paid or satisfactory arrangements have been made to fulfill obligations;

(4) Whether CMS has determined that the individual or entity complies with, or has made satisfactory arrangements to fulfill, all the applicable conditions of participation or supplier conditions for coverage under the statutes and regulations;

(5) Whether the individual or entity has, during the period of exclusion, submitted claims, or caused claims to be submitted or payment to be made by any Federal health care program, for items or services the excluded party furnished, ordered, or prescribed, including health care administrative services. This section applies regardless of whether an individual or entity has obtained a Federal health care program provider number or equivalent, either as an individual or as a member of a group, prior to being reinstated; and

(c) If OIG determines that the criteria in paragraphs (a)(2) and (3) of this section have been met, an entity excluded in accordance with § 1001.1001 will be reinstated upon a determination by OIG that the individual whose conviction, exclusion, or civil money penalty was the basis for the entity's exclusion—

(1) Has properly reduced the individual's ownership or control interest in the entity below 5 percent;

(2) Is no longer an officer, director, agent, or managing employee of the entity; or

(3) Has been reinstated in accordance with paragraph (a) of this section or § 1001.3005.

(d) Reinstatement will not be effective until OIG grants the request and provides notice under § 1001.3003(a). Reinstatement will be effective as provided in the notice.

(e) A determination with respect to reinstatement is not appealable or reviewable except as provided in § 1001.3004.

(f) An ALJ may not require reinstatement of an individual or entity in accordance with this chapter.

§ 1001.3003 Approval of request for reinstatement.

(a) If OIG grants a request for reinstatement, OIG will—

(1) Give written notice to the excluded individual or entity specifying the date of reinstatement;

(2) Notify each appropriate State agency administering or supervising the administration of each State health care program (and, in the case of an exclusion effected pursuant to

§ 1001.101 and to which 21 U.S.C. 824(a)(5) may apply, the Attorney General) of the date of the individual's or entity's reinstatement; and

(3) Notify the public and others through posting of reinstatement information on OIG's website.

(b) An action taken by OIG under this section will not require a Federal health care program to reinstate the individual or entity if such program has imposed an action under its own authority.

§ 1001.3004 Denial of request for reinstatement.

(a) If a request for reinstatement is denied, OIG will give written notice to the requesting individual or entity that the request for reinstatement has been denied and the basis for the denial. Within 30 days of the date on the notice, the excluded individual or entity may submit a written request to appeal the denial of the individual's or entity's reinstatement. The individual or entity will have 30 days from the date of the written request to appeal to submit:

(1) Any written argument or additional evidence the individual or entity has regarding the basis for the denial of reinstatement; or

(2) A written request to present oral argument or any additional evidence to an OIG official regarding the basis for the denial of reinstatement.

(b) After evaluating any written argument or additional evidence submitted by the excluded individual or entity or any oral argument and additional evidence presented to an OIG official, OIG will send written notice either confirming the denial and indicating that a subsequent request for reinstatement will not be considered until at least 1 year after the date of denial, or approving the request consistent with the procedures set forth in § 1001.3003(a).

(c) The decision to deny reinstatement will not be subject to administrative or judicial review.

§ 1001.3005 Withdrawal of exclusion for reversed or vacated decisions.

(a) An exclusion will be withdrawn and an individual or entity will be reinstated into all Federal health care programs retroactive to the effective date of the exclusion when such exclusion is based on—

(1) A conviction that is reversed or vacated on appeal;

(2) An action by another agency, such as a State agency or licensing board, that is reversed or vacated on appeal; or

(3) An OIG exclusion action that is reversed or vacated at any stage of an individual's or entity's administrative appeal process.

(b) If an individual or entity is reinstated in accordance with paragraph (a) of this section, the Federal health care programs will make payment for services covered under such programs that were furnished or performed during the period of exclusion.

(c) OIG will give notice of a reinstatement under this section in accordance with § 1001.3003(a).

(d) An action taken by OIG under this section will not require a Federal health care program to reinstate the individual or entity if such program has imposed an exclusion under its own authority.

(e) If an action which results in the retroactive reinstatement of an individual or entity is subsequently overturned, OIG may reimpose the exclusion for the initial period of time,

less the period of time that was served prior to the reinstatement of the individual or entity.

Xavier Becerra,

Secretary.

[FR Doc. 2024–26804 Filed 11–29–24; 8:45 am]

BILLING CODE P

Notices

Federal Register

Vol. 89, No. 231

Monday, December 2, 2024

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–FTPP–24–0063]

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval, from the Office of Management and Budget, for an extension of and revision to the currently approved information collection in support of the reporting and recordkeeping requirements under the Packers and Stockyards Act of 1921, as amended and supplemented (P&S Act). This approval is required under the PRA.

DATES: Comments on this notice must be received by January 31, 2025 to be assured of consideration

ADDRESSES: Interested persons are invited to submit comments concerning this notice online using the electronic process available at <https://www.regulations.gov>. Comments may also be submitted to Brett Offutt, Chief Legal Officer/Policy Advisor, Packers and Stockyards Division, Rm. 2507, 1400 Independence Ave. SW, Washington, DC 20250–3601. All comments should reference docket number AMS–FTPP–24–0063 and note the date and page number of this issue of the **Federal Register**. All comments submitted in response to this notice, including any personal information provided, will be posted without change at <https://www.regulations.gov> and become a matter of public record.

FOR FURTHER INFORMATION CONTACT:

Contact Amy R. Blechinger, Acting Enforcement Branch Chief, Packers and Stockyards Division, USDA AMS Fair Trade Practices Program, 1400 Independence Ave. SW, Washington, DC 20250; Phone: (202) 720–5877, or Email: amy.r.blechinger@usda.gov.

SUPPLEMENTARY INFORMATION:

Title: Regulations and Related Reporting and Recording Requirements—Packers and Stockyards Division

OMB Number: 0581–0308.

Expiration Date of Approval: January 31, 2025.

Type of Request: Extension and revision of a currently approved information collection.

Abstract: The P&S Act and the regulations issued under the P&S Act authorize the collection of information for the purpose of enforcing the P&S Act and regulations and for conducting studies requested by Congress. Through the forms in this information collection, the Fair Trade Practices Program (FTPP), Packers and Stockyards Division (PSD) gathers information that keeps PSD current on the ownership and operations of regulated entities which permit PSD oversight of the regulated entities. For example, PSD gathers information regarding the number of head of livestock purchased and the cost of the livestock to determine if the entity is adequately bonded to protect the livestock sellers. The information regarding the amount of livestock purchased is also consolidated for public reporting in PSD's annual report. Other financial information is gathered to determine if the regulated entities are operating while solvent as required by the P&S Act. This information collection is necessary for PSD to monitor and examine financial, competitive, and trade practices in the livestock, meat packing and poultry industries. The purpose of this notice is to solicit comments from the public concerning PSD's information collection.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1.73 hours per response.

Respondents: Livestock auction markets, livestock dealers, packer buyers, meat packers, and live poultry dealers.

Estimated Number of Respondents: 14,129.

Estimated Total Annual Responses: Less than 1.8 hours.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden hours on Respondents: 49,339.

Comments: Comments are invited on:

(1) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (2) the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2024–28211 Filed 11–29–24; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic,

mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by January 2, 2025 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Food Delivery Portal (FDP) Data Collection.

OMB Control Number: 0584–0401.

Summary of Collection: This is a revision of a currently approved information collection that was formerly titled “The Integrity Profile (TIP) Data Collection.” Under the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) program regulations at 7 CFR 246.12(j)(5), WIC State agencies administering the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) are required by 7 CFR 246.12(j)(5) to submit to FNS an annual summary of the results of their vendor monitoring efforts in order to provide Congress, senior FNS officials, as well as the public, assurance that every reasonable effort is being made to ensure integrity in the WIC Program. The number of WIC State agencies in fiscal year 2023 is 89. This includes 50 geographic State agencies, 33 State agencies operated by Indian Tribal Organizations, the District of Columbia, Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Virgin Islands. All WIC State agencies use the web-based system called Food Delivery Portal (FDP).

FDP is a robust data collection system which aligns with current security protocols and compliance guidance, supports data storage and web components, ensures cost effectiveness, allows for data-driven decision-making, has enhanced FNS reporting

capabilities, reduces grantee burden through automated calculations and consolidated reporting, and adds data validation features to reduce reporting errors.

Need and Use of the Information:

This is a mandatory collection, and the respondents are WIC State agencies. FNS uses the data for Federal oversight of the WIC Program and to ensure compliance with WIC Program regulations. Specifically, FNS uses the data in FDP to ensure that WIC State agencies are providing appropriate vendor training, consistently monitoring vendors for compliance with Program rules, conducting the required ratio of compliance investigations, and are applying the correct sanctions for any patterns of violations identified. FNS works with State agencies to address any discrepancies or anomalies in the data. Final WIC State agency data is aggregated by FNS at the national level, to generate nationwide reports and trend analysis. Additionally, FNS uses this data to provide information on WIC State agency vendor management and vendor compliance to stakeholders, including Congress, USDA’s Office of the Inspector General (OIG), outside auditors, researchers, and the public.

Description of Respondents: State, Local, or Tribal Government.

Number of Respondents: 356.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 3,576.

Rachelle Ragland-Greene,

Departmental Information Collection Clearance Officer.

[FR Doc. 2024–28095 Filed 11–29–24; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Tribal Advisory Committee

AGENCY: Office of Tribal Relations, U.S. Department of Agriculture.

ACTION: Notice of public, hybrid meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Department of Agriculture (USDA) and the Federal Advisory Committee Act (FACA), the Office of Tribal Relations is announcing a meeting of the Tribal Advisory Committee. The Committee is authorized under the Agriculture Improvement Act of 2018 (the 2018 Farm Bill) and operates in compliance with the Federal Advisory Committee Act. The purpose of the Committee is to provide advice and guidance to USDA

on matters related to Tribal and Indian affairs.

DATES: In person meetings with virtual webinar and call-in options will take place at the Palm’s Casino Resort on Tuesday, December 10th, 2024, from 1 p.m. to approximately 5 p.m. Pacific standard time (PST) in Room Madison C/D and Wednesday, December 11th, 2024, from 9 a.m. to approximately 5 p.m. in the Kaos room. This venue is located at 4321 W Flamingo Rd., Las Vegas, NV 89103. Meeting room updates will be posted on <https://www.usda.gov/tribalrelations/advisory-committee>.

ADDRESSES:

Webinar Participation Information: Registration to attend this meeting, including to provide oral public comments, is available at https://www.zoomgov.com/webinar/register/WN_3wk0eEvGSduYZUL767g0hg.

Public Comments: The public may file written comments to the Tribal Advisory Committee by Thursday, December 5, 2024, via email at Tribal.Relations@usda.gov. Additional comments will be included in the public record.

Members of the public are invited to join the Tribal Advisory Committee meeting to listen to deliberations each day and will be invited to give oral comments to the Committee from 1:15 p.m. to 2:45 p.m. PST on Tuesday, December 10th. Members of the public who request to give oral comments to the Committee must arrive by 1:00 p.m. and will be given no more than five (5) minutes to provide their comment.

FOR FURTHER INFORMATION CONTACT:

General information about the Committee can be found at <https://www.usda.gov/tribalrelations/advisory-committee>. Josiah Griffin, Designated Federal Officer, by phone at 202–205–2249 or via email at Josiah.Griffin@usda.gov. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: This meeting will be the fourth convening of the Tribal Advisory Committee. An agenda and more information for this meeting will be available at <https://www.usda.gov/tribalrelations/advisory-committee>.

The Secretary established the Committee pursuant to section 12303 of the Agriculture Improvement Act of 2018 (7 U.S.C. 6921(b)). The Committee is managed in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C.

10. Under the law, the Secretary of Agriculture appointed three members, and the Chair and Ranking Members of the House Committee on Agriculture and the Senate Committees on Indian Affairs and Agriculture, Nutrition, and Forestry appointed the remaining eight members. In addition to providing recommendations to the Secretary, the Tribal Advisory Committee is required to submit report(s) to the three Congressional Committees listed above.

Availability of Materials for the Meeting: All written public comments will be compiled into a binder and will be made available for review at the meeting. Duplicate comments from multiple individuals will appear as one comment, with a notation that multiple copies of the comment were received. Please visit <https://www.usda.gov/tribalrelations/advisory-committee> to learn more about the agenda for or reports resulting from this meeting.

Be advised that anyone calling into the Zoom teleconference system or participating in-person that is interested in providing public comment will be asked to provide their name, title, and Tribal or organizational affiliations. Callers may expect to incur charges for calls they initiate over wireless lines, and the USDA will not refund any incurred charges.

The USDA prohibits discrimination in all its programs and activities 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, audiotope, 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.

Equal opportunity practices, in accordance with USDA policies, will be followed in all membership appointments to the Committee. To ensure that the recommendations of the Committee have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable,

individuals with demonstrated ability to represent the many communities, identities, races, ethnicities, backgrounds, abilities, cultures, and beliefs of the American people, including underserved communities. USDA is an equal opportunity provider, employer, and lender.

Dated: November 22, 2024.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2024-28096 Filed 11-29-24; 8:45 am]

BILLING CODE 3410-AG-P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Rural Housing Service

Rural Business-Cooperative Service

[Docket No. RUS-24-AGENCY-0035]

Notice of Adoption of Department of Energy Categorical Exclusions Under the National Environmental Policy Act

AGENCY: Rural Utilities Service, Rural Housing Service and Rural Business-Cooperative Service, Rural Development, USDA.

ACTION: Notice.

SUMMARY: Rural Development (RD), a mission area within the United States Department of Agriculture (USDA) announces its adoption of seven Categorical Exclusions (CEs) from the United States Department of Energy (DOE) under the National Environmental Policy Act (NEPA) to use in RD programs and funding opportunities. This notice describes the categories of proposed actions for which RD intends to use the DOE CEs and describes the consultation between the agencies.

DATES: This action is effective upon publication.

FOR FURTHER INFORMATION CONTACT:

Alan Hachey, Environmental Protection Specialist, Environmental and Historic Preservation Division, Rural Utilities Service, 1400 Independence Avenue SW, Mail Stop 1548, Room 4004, Phone: (202) 205-5381; Email: alan.hachey@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

RD's mission is to increase economic opportunity and improve the quality of life for all rural Americans. This mission is met by providing loans, grants, loan guarantees, and technical assistance through a multitude of programs aimed at creating and

improving infrastructure, businesses, and housing throughout rural America. RD is divided into three agencies, the Rural Utilities Service, Rural Business-Cooperative Service, and Rural Housing Service, each with unique programs that play an important role in helping RD reach its goals.

RD's programs must comply with NEPA, 42 U.S.C. 4321-4347, which requires Federal agencies to consider the environmental effects of their proposed actions in their decision-making processes and inform and engage the public in those processes. Congress enacted NEPA to establish a national policy for the environment, provide for the establishment of the Council on Environmental Quality (CEQ), and for other purposes as detailed on [NEPA.gov](https://www.ceq.doe.gov) ([ceq.doe.gov](https://www.ceq.doe.gov)). CEQ issued regulations implementing NEPA, 40 CFR parts 1500 through 1508 (CEQ regulations).

To comply with NEPA, agencies determine the appropriate level of review of any major Federal action—an environmental impact statement (EIS), environmental assessment (EA), or CE. It is the agency's responsibility, in accordance with NEPA and the CEQ regulations, to prepare documentation that supports their level of review.

Section 109 of NEPA, enacted as part of the Fiscal Responsibility Act of 2023, allows a Federal agency to adopt and use another agency's CEs for a category of proposed agency actions (42 U.S.C. 4336c). To use another agency's CEs under section 109, the adopting agency must identify the relevant CEs listed in another agency's ("establishing agency") NEPA procedures that cover the adopting agency's category of proposed actions or related actions; consult with the establishing agency to ensure that the proposed adoption of the CE to a category of actions is appropriate; identify to the public the CE that the adopting agency plans to use for its proposed actions; and document adoption of the CE (40 CFR 1501.4(e)(2024)). This notice documents RD's adoption of seven DOE CEs under Section 109 of NEPA for future use in RD programs and funding opportunities.

II. Identification of the Categorical Exclusions and Additional Conditions for Application

RD provides loans, grants and technical assistance to build critical infrastructure like electric, broadband, water systems, and hospitals. The programs expand access to electric, telecommunications, and transportation infrastructure, and support business growth, healthcare, education, housing, and other community essentials.

RD has identified the following CEs for adoption, which are listed in DOE's NEPA procedures as CEs B4.1, B4.4, B4.8, B4.13, B4.14, B5.1, and B5.16 of 10 CFR part 1021, subpart D, Appendix B. The final rule establishing or revising CEs B4.13, B4.14, and B5.16 was published by DOE on April 30, 2024 (89 FR 34074–01). The DOE text of each CE has been included in quotations following each identified CE. RD intends to apply these CEs to projects undertaken directly by RD, requiring an approval by RD, or financed in whole or in part through Federal funds made available by RD programs.

RD will review each action and require the preparation of an environmental review document to ensure the following: (1) Consistency with the DOE's NEPA procedures at 10 CFR 1021 Subpart D, Appendix B which require an evaluation of "integral elements" to confirm the proposal will have no significant impacts on the resources identified in DOE environmental procedures; (2) Compliance with RD's NEPA procedures at 7 CFR 1970.52 which address extraordinary circumstances; and (3) Confirmation that the action has not been segmented as required by DOE's NEPA procedures at 10 CFR 1021.410(b)(3). The evaluation of integral elements and segmentation is further described in this section. The evaluation of extraordinary circumstances is further described in Section III.

B4.1 Contracts, Policies, and Marketing and Allocation Plans for Electric Power

"Establishment and implementation of contracts, policies, and marketing and allocation plans related to electric power acquisition that involve only the use of the existing transmission system and existing generation resources operating within their normal operating limits."

RD intends to apply this CE in a manner consistent with DOE's application—to the same types of actions (e.g., the implementation of or amendments to Power Purchase Agreements (PPAs) entered into by DOE). An example of a project type where this CE could be applied by RD includes, but is not limited to, the implementation of PPAs proposed for funding through the Empowering Rural America Program (NewERA) Program.

B4.4 Power Marketing Services and Activities

"Power marketing services and power management activities (including, but not limited to, storage, load shaping and

balancing, seasonal exchanges, and other similar activities), provided that the operations of generating projects would remain within normal operating limits. (See B4.14 of this appendix for energy storage systems.)"

RD intends to apply this CE in a manner consistent with DOE's application—to the same types of actions (e.g., advanced metering infrastructure, distribution automation, energy storage systems, load control). An example of a project type where this CE could be applied by RD includes, but is not limited to, the funding of grid modernization infrastructure through the Electric Infrastructure Loan & Loan Guarantee, NewERA, or Powering Affordable Clean Energy (PACE) Programs to integrate renewable energy generation projects.

B4.8 Electricity Transmission Agreements

"New electricity transmission agreements, and modifications to existing transmission arrangements, to use a transmission facility of one system to transfer power of and for another system, provided that no new generation projects would be involved and no physical changes in the transmission system would be made beyond the previously disturbed or developed facility area."

RD intends to apply this CE in a manner consistent with DOE's application—to the same types of actions. (e.g., new electricity transmission agreements or modifications to existing agreements). An example of a project type where this CE could be applied by RD includes, but is not limited to, modifications to existing agreements that enable the transmission of power from renewable energy projects proposed for funding through the Electric Infrastructure Loan & Loan Guarantee, NewERA, or PACE Programs.

B4.13 Upgrading and Rebuilding Existing Powerlines and Related Provisions

"Upgrading or rebuilding existing electric powerlines, which may involve relocations of small segments of the powerlines within an existing powerline right-of-way or within otherwise previously disturbed or developed lands (as discussed at 10 CFR 1021.410(g)(1)). Upgrading or rebuilding existing electric powerlines also may involve widening an existing powerline right-of-way to meet current electrical standards if the widening remains within previously disturbed or developed lands and only extends into a small area beyond such lands as needed to comply with

applicable electrical standards. Covered actions would be in accordance with applicable requirements, including the integral elements listed at the start of appendix B of this part; and would incorporate appropriate design and construction standards, control technologies, and best management practices. This categorical exclusion does not apply to underwater powerlines. As used in this categorical exclusion, "small" has the meaning discussed at 10 CFR 1021.410(g)(2)."

The terms "small" and "small-scale" are defined in 10 CFR 1021.410(g)(2), and RD agrees to apply the adopted CEs in a manner consistent with DOE's definitions.

RD intends to apply this CE in a manner consistent with DOE's application—to the same types of actions (upgrading or rebuilding powerlines located in existing rights of way or within otherwise previously disturbed or developed lands). An example of a project type where this CE could be applied by RD includes, but is not limited to, the upgrading or rebuilding of an existing overhead or underground powerline relocating within an existing utility or transportation right-of-way or within otherwise previously disturbed or developed lands proposed for funding through the Electric Infrastructure Loan & Loan Guarantee Program. RD would not apply this CE to underwater powerline projects.

B4.14 Construction and Operation of Electrochemical-Battery or Flywheel Energy Storage Systems

"Construction, operation, upgrade, or decommissioning of an electrochemical-battery or flywheel energy storage system within a previously disturbed or developed area or within a small (as discussed at 10 CFR 1021.410(g)(2)) area contiguous to a previously disturbed or developed area. Covered actions would be in accordance with applicable requirements (such as land use and zoning requirements) in the proposed project area and the integral elements listed at the start of appendix B of this part, and would incorporate appropriate safety standards (including the current National Fire Protection Association 855, Standard for the Installation of Stationary Energy Storage Systems), design and construction standards, control technologies, and best management practices."

RD does not have an existing CE that addresses certain energy storage systems. Adoption of this CE would benefit RD by covering applications with these types of energy storage systems. RD intends to apply this CE in

a manner consistent with DOE's application—to the same types of actions (energy storage systems located within a previously disturbed or developed area or within a small area contiguous to a previously disturbed or developed area). An example of a project type where this CE could be applied by RD includes, but is not limited to, the construction of battery energy storage systems within or adjacent to existing substation sites funded through the Electric Infrastructure Loan & Loan Guarantee, NewERA or PACE Programs.

B5.1 Actions To Conserve Energy or Water

“(a) Actions to conserve energy or water, demonstrate potential energy or water conservation, and promote energy efficiency that would not have the potential to cause significant changes in the indoor or outdoor concentrations of potentially harmful substances. These actions may involve financial and technical assistance to individuals (such as builders, owners, consultants, manufacturers, and designers), organizations (such as utilities), and governments (such as state, local, and tribal). Covered actions include, but are not limited to weatherization (such as insulation and replacing windows and doors); programmed lowering of thermostat settings; placement of timers on hot water heaters; installation or replacement of energy efficient lighting, low-flow plumbing fixtures (such as faucets, toilets, and showerheads), heating, ventilation, and air conditioning systems, and appliances; installation of drip-irrigation systems; improvements in generator efficiency and appliance efficiency ratings; efficiency improvements for vehicles and transportation (such as fleet changeout); transportation management systems (such as traffic signal control systems, car navigation, speed cameras, and automatic plate number recognition); development of energy-efficient manufacturing, industrial, or building practices; and small-scale energy efficiency and conservation research and development and small-scale pilot projects. Covered actions include building renovations or new structures, provided that they occur in a previously disturbed or developed area. Covered actions could involve commercial, residential, agricultural, academic, institutional, or industrial sectors. Covered actions do not include rulemakings, standard-settings, or proposed DOE legislation, except for those actions listed in B5.1(b) of this appendix.

(b) Covered actions include rulemakings that establish energy conservation standards for consumer products and industrial equipment, provided that the actions would not: (1) Have the potential to cause a significant change in manufacturing infrastructure (such as construction of new manufacturing plants with considerable associated ground disturbance); (2) involve significant unresolved conflicts concerning alternative uses of available resources (such as rare or limited raw materials); (3) have the potential to result in a significant increase in the disposal of materials posing significant risks to human health and the environment (such as RCRA hazardous wastes); or (4) have the potential to cause a significant increase in energy consumption in a state or region.”

RD intends to apply this CE in a manner consistent with DOE's application—to the same types of actions. (e.g., providing financial assistance to organizations such as utility cooperatives). An example of a project type where this CE could be applied by RD to similar project types such as energy efficiency proposals that are funded through the Rural Energy for America (REAP) Program.

B5.16 Solar Photovoltaic (PV) Systems and Related Provisions

“The installation, modification, operation, or decommissioning of commercially available solar photovoltaic systems: (1) Located on a building or other structure (such as rooftop, parking lot or facility, or mounted to signage, lighting, gates, or fences); or (2) Located within a previously disturbed or developed area. (b) Covered actions would be in accordance with applicable requirements (such as land use and zoning requirements) in the proposed project area and the integral elements listed at the start of appendix B of this part and would be consistent with applicable plans for the management of wildlife and habitat, including plans to maintain habitat connectivity, and incorporate appropriate control technologies and best management practices.”

RD intends to apply this CE in a manner consistent with DOE's application—to the same types of actions (solar photovoltaic systems located in previously disturbed or developed areas). An example of a project type where this CE could be applied by RD includes, but is not limited to, the construction of a ground mount solar photovoltaic system within a previously disturbed or developed area being funded through the

Infrastructure Loan & Loan Guarantee, NewERA, or PACE Programs. Adoption of this CE by RD would provide significant flexibility to approve solar photovoltaic projects without a predetermined size limit for projects proposed in previously disturbed or developed areas so long as applicable conditions are met. In its environmental review, RD will document how the application of this CE would be consistent with applicable plans for the management of wildlife and habitat, including plans to maintain habitat connectivity, and incorporate appropriate control technologies and best management practices.

Additional conditions applicable to DOE's CEs: DOE defines “Previously disturbed or developed area” as “land that has been changed such that its functioning ecological processes have been and remain altered by human activity,” and further clarifies that “[t]he phrase encompasses areas that have been transformed from natural cover to non-native species or a managed state, including, but not limited to, utility and electric power transmission corridors and rights-of-way, and other areas where active utilities and currently used roads are readily available.” 10 CFR 1021.410(g)(1). DOE's definition of “Previously disturbed or developed area” is substantially the same as the definition RD uses. RD defines “[p]reviously disturbed or developed area” as “land that has been changed such that its functioning ecological processes have been and remain altered by human activity,” which “encompasses areas that have been transformed from natural cover to non-native species or a managed state, including, but not limited to, utility and electric power transmission corridors and rights-of-way, and other areas where active utilities and currently used roads are readily available.” 7 CFR 1970.6(a).

The DOE CEs include additional conditions referred to as integral elements (10 CFR part 1021 subpart D, Appendix B). In order to apply the CEs, the action must be one that would not:

(1) Threaten a violation of applicable statutory, regulatory, or permit requirements for environment, safety, and health, or similar requirements of USDA or Executive Orders;

(2) Require siting and construction or major expansion of waste storage, disposal, recovery, or treatment facilities (including incinerators), but the proposal may include categorically excluded waste storage, disposal, recovery, or treatment actions or facilities;

(3) Disturb hazardous substances, pollutants, contaminants, or Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—excluded petroleum and natural gas products that preexist in the environment such that there would be uncontrolled or unpermitted releases;

(4) Have the potential to cause significant impacts on environmentally sensitive resources. An environmentally sensitive resource is typically a resource that has been identified as needing protection through Executive Order, statute, or regulation by Federal, state, or local government, or a federally recognized Indian tribe. An action may be categorically excluded if, although sensitive resources are present, the action would not have the potential to cause significant impacts on those resources (such as construction of a building with its foundation well above a sole-source aquifer or upland surface soil removal on a site that has wetlands). Environmentally sensitive resources include, but are not limited to:

(i) Property (such as sites, buildings, structures, and objects) of historic, archeological, or architectural significance designated by a Federal, state, or local government, federally recognized Indian tribe, or Native Hawaiian organization, or property determined to be eligible for listing on the National Register of Historic Places;

(ii) Federally listed threatened or endangered species or their habitat (including critical habitat) or Federally-proposed or candidate species or their habitat (Endangered Species Act); state-listed or state-proposed endangered or threatened species or their habitat; Federally-protected marine mammals and Essential Fish Habitat (Marine Mammal Protection Act; Magnuson-Stevens Fishery Conservation and Management Act); and otherwise Federally-protected species (such as the Bald and Golden Eagle Protection Act or the Migratory Bird Treaty Act);

(iii) Floodplains and wetlands;

(iv) Areas having a special designation such as Federally- and state-designated wilderness areas, national parks, national monuments, national natural landmarks, wild and scenic rivers, state and Federal wildlife refuges, scenic areas (such as National Scenic and Historic Trails or National Scenic Areas), and marine sanctuaries;

(v) Prime or unique farmland, or other farmland of statewide or local importance, as defined at 7 CFR 658.2(a), “Farmland Protection Policy Act: Definitions,” or its successor;

(vi) Special sources of water (such as sole-source aquifers, wellhead

protection areas, and other water sources that are vital in a region); and

(vii) Tundra, coral reefs, or rain forests; or

(5) Involve genetically engineered organisms, synthetic biology, governmentally designated noxious weeds, or invasive species, unless the proposed activity would be contained or confined in a manner designed and operated to prevent unauthorized release into the environment and conducted in accordance with applicable requirements, such as those of the Department of Agriculture, the Environmental Protection Agency, and the National Institutes of Health.

The CEs being adopted will be used to determine whether each proposal, individually or cumulatively, will have a significant effect on the human environment. RD will ensure in its review of each action that: it has not been segmented as required by DOE regulations at 10 CFR 1021.410(b)(3); it has been reviewed for integral elements; and that RD is applying the appropriate level of environmental review to the action as required by the CEQ regulations at 40 CFR 1501.3.

III. Consideration of Extraordinary Circumstances

RD’s implementing procedures for extraordinary circumstances at 7 CFR 1970.52 will be used when evaluating projects where the adopted CEs will be applied because both agencies define extraordinary circumstances very closely (see 10 CFR 1021.410(b)(2)). RD procedures for extraordinary circumstances also direct the agency to consider “characteristics of the geographic area affected by the proposal,” and include a list of specific “[s]ignificant adverse environmental effects that the Agency considers to be extraordinary circumstances.” Because RD’s definition of extraordinary circumstances includes DOE’s definition in its entirety, but also includes additional details that address considerations relevant to RD’s programs, RD will rely on the language found in RD’s implementing procedures. RD’s regulations include the same factors as DOE’s regulations, and DOE also requires an evaluation for the integral elements defined in 10 CFR part 1021 Subpart D, Appendix B.

IV. Consultation With DOE and Determination of Appropriateness

RD and DOE consulted on the appropriateness of RD’s adoption of the CEs in February, April, October, and November of 2024. RD and DOE’s consultation included a review of DOE’s experience developing and applying the

CEs, the types of actions for which RD plans to utilize the CEs, and consideration of extraordinary circumstances. These RD actions are similar to the type of projects that DOE undertakes or funds and therefore the effects of RD projects will be similar to the effects of DOE projects, which are not significant, absent the existence of extraordinary circumstances that could involve potentially significant effects. Therefore, RD has determined that its proposed use of the CEs as described in this notice would be appropriate.

V. Notice to the Public and Documentation of Adoption

This notice serves to identify to the public and document RD’s adoption of DOE’s CEs, per 40 CFR 1501.4(e)(3) for contracts, policies, and marketing and allocation plans for electric power; power marketing services and activities; electricity transmission agreements; upgrading and rebuilding of existing powerlines, construction and operation of electrochemical-battery or flywheel energy storage systems; actions to conserve energy or water; and solar photovoltaic systems. The notice identifies the types of actions to which RD will apply the CEs, as well as the considerations that RD will use in determining whether an action is within the scope of the CEs.

Issued under authority delegated in 7 CFR 2.17.

Basil I. Gooden,

Under Secretary for Rural Development, U.S. Department of Agriculture.

[FR Doc. 2024–27790 Filed 11–29–24; 8:45 am]

BILLING CODE 3410–XY–P

INTERNATIONAL BROADCASTING ADVISORY BOARD

Sunshine Act Meetings

TIME AND DATE: December 11, 2024; 9:00 a.m.–12:30 p.m. Local Time.

PLACE: On December 11, 2024, the Board will meet at: Radio Free Europe/ Radio Liberty Headquarters, Vinohradská 159a, 100 00 Prague 10.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: The International Broadcasting Advisory Board (Board) will conduct a meeting closed to the public at the date and time listed above. Board Members (membership includes Chair Kenneth Jarin, Luis Botello, Jamie Fly, Michelle Giuda, Kathleen Matthews, Under Secretary Lee Satterfield (Secretary of State’s Representative)), Chief Executive Officer of the U.S. Agency for Global

Media (USAGM), the USAGM General Counsel and Acting Board Secretary to the Board, the Secretariat to the Board, and recording secretaries will attend the closed meeting. Certain USAGM staff members who may be called on to brief or support the Board also may attend.

The USAGM General Counsel and Board Secretary has certified that, in his opinion, exemptions set forth in the Government in the Sunshine Act, in particular 5 U.S.C. 552b(c)(2), (6), and (9)(B), permit closure of this meeting.

The entirety of the Board's membership approved the closing of this meeting.

The purpose for closing the meeting is so that the IBAB may decide on hiring certain entity heads. The closed meeting also will focus on discussing the development of internal rules and practices to govern Board processes and functions. This includes developing processes or rules relating to IBAB, USAGM, and the USAGM entities. Publicizing these deliberations would frustrate the implementation of the very items they will be proposing. [This related to (2), (6) and (9).]

In the event that the time, date, or location of this meeting changes, IBAB will post an announcement of the change, along with the new time, date, and/or place of the meeting on its website at <https://www.ibab.gov>.

Although a separate federal entity, USAGM prepared this notice and will continue to support the Board in accordance with 22 U.S.C. 6205(g).

CONTACT PERSON FOR MORE INFORMATION: Persons interested in obtaining more information should contact USAGM's Executive Director Oanh Tran at (202) 920-2583.

Authority: 5 U.S.C. 552b, 22 U.S.C. 6205(e)(3)(C).

Dated: November 27, 2024.

Meredith L. Meads,

Executive Assistant, USAGM.

[FR Doc. 2024-28366 Filed 11-27-24; 4:15 pm]

BILLING CODE 8610-01-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 2171]

Reorganization of Foreign-Trade Zone 123 Under Alternative Site Framework; Denver, Colorado

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones (FTZ) Act provides for “. . . the establishment . . . of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,” and authorizes the Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board adopted the alternative site framework (ASF) (15 CFR 400.2(c)) as an option for the establishment or reorganization of zones;

Whereas, the World Trade Center Denver, grantee of Foreign-Trade Zone 123, submitted an application to the Board (FTZ Docket B-16-2024, docketed April 18, 2024) for authority to reorganize under the ASF with a service area of Adams, Arapahoe, Broomfield, Denver, Douglas, Elbert, and Morgan Counties and a portion of Larimer and Weld Counties, Colorado, in and adjacent to the Denver Customs and Border Protection port of entry, FTZ 123's existing Sites 3 and 4 would be categorized as magnet sites, and existing Site 7 would be categorized as a usage-driven site;

Whereas, notice inviting public comment was given in the **Federal Register** (89 FR 31132-31133, April 24, 2024) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiners' report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied;

Now, therefore, the Board hereby orders:

The application to reorganize FTZ 123 under the ASF is approved, subject to the FTZ Act and the Board's regulations, including section 400.13, to the Board's standard 2,000-acre activation limit for the zone, to an ASF sunset provision for magnet sites that would terminate authority for Sites 3 and 4 if not activated within five years from the month of approval, and to an ASF sunset provision for usage-driven sites that would terminate authority for Site 7 if no foreign-status merchandise is admitted for a *bona fide* customs purpose within three years from the month of approval.

Dated: November 25, 2024.

Dawn Shackleford,

Executive Director of Trade Agreements Policy & Negotiations, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2024-28157 Filed 11-29-24; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[C-570-091]

Certain Steel Wheels 12 to 16.5 Inches in Diameter From the People's Republic of China: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order; 2024

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) finds that revocation of the countervailing duty (CVD) order on certain steel wheels 12 to 16.5 inches in diameter (steel wheels) from the People's Republic of China (China) would be likely to lead to continuation or recurrence of countervailable subsidies at the levels indicated in the “Final Results of the Sunset Review” section of this notice.

DATES: Applicable December 2, 2024.

FOR FURTHER INFORMATION CONTACT: Peter Zukowski, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-0189.

SUPPLEMENTARY INFORMATION:

Background

On September 3, 2019, Commerce published the *Order* on steel wheels from China.¹ On August 1, 2024, Commerce published the notice of initiation of the first sunset review of the *Order*, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).² On August 16, 2024, Commerce received a notice of intent to participate from Dexstar Wheel Division of Americana Development Inc. (the domestic interested party), within the deadline specified in 19 CFR 351.218(d)(1)(i).³ The domestic interested party claimed interested party status under section 771(9)(C) of the Act as a U.S. producer engaged in the production of steel wheels in the United States.

On August 30, 2024, Commerce received an adequate substantive response from the domestic interested party within the 30-day deadline

¹ See *Certain Steel Trailer Wheels 12 to 16.5 Inches from the People's Republic of China: Antidumping Duty and Countervailing Duty Orders*, 84 FR 45952 (September 3, 2019) (*Order*).

² See *Initiation of Five-Year (Sunset) Reviews*, 89 FR 62717 (August 1, 2024).

³ See Domestic Interested Party's Letter, “Petitioner's Notice of Intent to Participate in the First Five-Year Review,” dated August 16, 2024.

specified in 19 CFR 351.218(d)(3)(i).⁴ Commerce did not receive a substantive response from any government or respondent interested party to this proceeding. On September 24, 2024, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from any respondent interested party.⁵ As a result, Commerce conducted an expedited (120-day) sunset review of the *Order*, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(B)(2) and (C)(2).

Scope of the Order

The merchandise covered by this *Order* is certain on-the-road steel wheels, discs, and rims for tubeless tires with a nominal wheel diameter of 12 inches to 16.5 inches, regardless of width. For a complete description of the scope of the *Order*, see the Issues and Decision Memorandum.⁶

Analysis of Comments Received

A complete discussion of all issues raised in this sunset review, including the likelihood of continuation or recurrence of subsidization in the event of revocation of the *Order* and the countervailable subsidy rates likely to prevail if the *Order* were to be revoked, is provided in the Issues and Decision Memorandum. A list of the topics discussed in the Issues and Decision Memorandum is attached as an appendix to this notice. 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), which is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Final Results of Sunset Review

Pursuant to sections 751(c) and 752(b) of the Act, we determine that revocation of the *Order* would be likely to lead to continuation or recurrence of countervailable subsidies at the

following net countervailable subsidy rates:

Producers/exporters	Subsidy rate (percent <i>ad valorem</i>)
Xingmin Intelligent Transportation Systems (Group) ⁷	386.45
Zhejiang Jingsu Company Limited ⁸	388.31
All Others	387.38

Administrative Protective Order (APO)

This notice serves as the only reminder to parties subject to an APO of their responsibility concerning the disposition 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 notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

Commerce is issuing and publishing these final results and this notice in accordance with sections 751(c), 752(b), and 777(i)(1) of the Act, and 19 CFR 351.218.

Dated: November 25, 2024.

Abdelali Elouaradia,

Deputy 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. History of the *Order*
- V. Legal Framework
- VI. Discussion of the Issues
 1. Likelihood of Continuation or Recurrence of a Countervailable Subsidy Likely to Prevail
 2. Net Countervailable Subsidy Rates
 3. Nature of the Subsidies
- VII. Final Results of Sunset Review

⁷ Commerce assigned Xingmin Intelligent Transportation Systems (Group)'s rate to each of the entities for which it provided an initial questionnaire response in the investigation: Sino-Tex (Longkou) Wheel Manufacturers Inc.; Tangshan Xingmin Wheel Co., Ltd.; and Xianning Xingmin Wheel Co., Ltd.

⁸ Commerce assigned Zhejiang Jingu Company Limited's rate to each of the entities named as cross-owned in its affiliation questionnaire response in the investigation: Shanghai Yata Industry Company Limited; Shangdong Jingu Auto Parts Co., Ltd.; An'Gang Jingu (Hangzhou) Metal Materials Co., Ltd.; Zhejiang Wheel World Co., Ltd.; and Hangzhou Jingu New Energy Development Co. Ltd. Zhejiang Jingu's rate has also been assigned to Zhejiang Jingu Automobile Components, which was the prior name of Zhejiang Jingu.

VIII. Recommendation

[FR Doc. 2024–28173 Filed 11–29–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–108]

Ceramic Tile from the People's Republic of China: Rescission of Antidumping Duty Administrative Review; 2023–2024

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is rescinding the administrative review of the antidumping duty (AD) order on ceramic tile from the People's Republic of China (China) for the period of review (POR) June 1, 2023, through May 31, 2024.

DATES: Applicable December 2, 2024.

FOR FURTHER INFORMATION CONTACT:

Mark Flessner, 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) 482–6312.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2020, Commerce published in the **Federal Register** the AD order on ceramic tile from China.¹ On June 3, 2024, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the *Order*.² On June 28, 2024, Commerce received a timely request from interested party importer Akua BPAC, LLC (Akua), in accordance with 19 CFR 351.213(b)(1), to conduct an administrative review of the *Order* for two companies, Cayenne Corporation Ltd. (Cayenne), and Foshan Qiangshengda Building Material Co. Ltd. (Foshan Qiangshengda).³

On July 29, 2024, Commerce published in the **Federal Register** a notice of initiation of administrative review with respect to imports of

¹ See *Ceramic Tile from the People's Republic of China: Antidumping Duty Order*, 85 FR 33089 (June 1, 2020) (the *Order*); see also *Ceramic Tile from the People's Republic of China: Notice of Correction to the Antidumping Duty Order*, 85 FR 35905 (June 12, 2020).

² See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review and Join Annual Inquiry Service List*, 89 FR 47518 (June 3, 2024).

³ See Akua's Letter, "Request for Administrative Review," dated June 28, 2024.

⁴ See Domestic Interested Party's Letter, "Petitioner's Substantive Response to the Notice of Initiation," dated August 30, 2024.

⁵ See Memorandum, "Sunset Reviews Initiated on August 1, 2024," dated September 24, 2024.

⁶ See Memorandum, "Issues and Decision Memorandum for the Final Results of the Expedited First Sunset Review of the Countervailing Duty Order on Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People's Republic of China; 2024," dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

ceramic tile manufactured or exported by Cayenne and Foshan Qiangshengda, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.221(c)(1)(i).⁴ On August 5, 2024, we placed on the record U.S. Customs and Border Protection (CBP) data for entries of ceramic tile from China during the POR, showing no reviewable POR entries, and invited interested parties to comment.⁵ On August 12, 2024, the Coalition for Fair Trade in Ceramic Tile (petitioner) submitted comments to Commerce regarding the CBP data, requesting that Commerce rescind the administrative review.⁶

Additionally, on August 20, 2024, Commerce notified all interested parties of its intent to rescind this administrative review in full because there were no reviewable, suspended entries of subject merchandise by the company listed in the *Initiation Notice* during the POR and invited interested parties to comment.⁷ On August 27, 2024, the petitioner submitted comments to Commerce regarding the intent to rescind the instant review, again requesting that Commerce rescind the review.⁸

Rescission of Review

Pursuant to 19 CFR 351.213(d)(3), it is Commerce's practice to rescind an administrative review of an AD order when there are no reviewable entries of subject merchandise during the POR for which liquidation is suspended.⁹ Normally, upon completion of an administrative review, the suspended entries are liquidated at the AD assessment rate calculated for the review period.¹⁰ Therefore, for an administrative review to be conducted, there must be a reviewable, suspended entry that Commerce can instruct CBP

to liquidate at the AD assessment rate calculated for the review period.¹¹ As noted above, there were no entries of subject merchandise for the companies listed in the *Initiation Notice* during the POR. Accordingly, in the absence of suspended entries of subject merchandise during the POR, we are hereby rescinding this administrative review, in its entirety, in accordance with 19 CFR 351.213(d)(3).

Assessment

Commerce will instruct CBP to assess antidumping duties on all appropriate entries. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of this rescission notice in the **Federal Register**.

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: November 25, 2024.

Scot Fullerton,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2024–28156 Filed 11–29–24; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–844]

Steel Concrete Reinforcing Bar From Mexico: Preliminary Results and Rescission, in Part, of Antidumping Duty Administrative Review; 2022–2023

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily finds that Deacero S.A.P.I. de C.V. (Deacero) and I.N.G.E.T.E.K.N.O.S. Estructurales, S.A. de C.V. (Ingetek) (collectively, Deacero Group); and TA 2000 S.A. de C.V. (TA 2000) sold steel concrete reinforcing bar (rebar) from Mexico at less than normal value during the period of review (POR), November 1, 2022, through October 31, 2023. Additionally, Commerce is rescinding this administrative review with respect to certain companies. We invite interested parties to comment on these preliminary results.

DATES: Applicable December 2, 2024.

FOR FURTHER INFORMATION CONTACT: Kyle Clahane or T.J. Worthington, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5449 or (202) 482–4567, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 6, 2014, Commerce published in the **Federal Register** the antidumping duty (AD) order on rebar from Mexico.¹ On November 2, 2023, we published in the **Federal Register** a notice of opportunity to request an administrative review of the Order.² On December 29, 2023, pursuant to section

⁴ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 89 FR 60871 (July 29, 2024) (*Initiation Notice*).

⁵ See Memorandum, “U.S. Customs and Border Protection Data,” dated August 5, 2024.

⁶ See Petitioner’s Letter, “Comments on U.S. Customs and Border Protection Data,” dated August 12, 2024.

⁷ See Memorandum, “Notice of Intent to Rescind Review,” dated August 20, 2024.

⁸ See Petitioner’s Letter, “Petitioner’s Comments on Notice of Intent to Rescind Review,” dated August 27, 2024.

⁹ See, e.g., *Diocetyl Terephthalate from the Republic of Korea: Rescission of Antidumping Administrative Review; 2021–2022*, 88 FR 24758 (April 24, 2023); see also *Certain Carbon and Alloy Steel Cut- to Length Plate from the Federal Republic of Germany: Rescission of Antidumping Administrative Review; 2020–2021*, 88 FR 4157 (January 24, 2023), and *Lightweight Thermal Paper From Japan: Rescission of Antidumping Administrative Review; 2022–2023*, 89 FR 18373 (March 13, 2024).

¹⁰ See 19 CFR 351.212(b)(1).

¹¹ See, e.g., *Shanghai Sunbeauty Trading Co. v. United States*, 380 F. Supp. 3d 1328, 1335–36 (CIT 2019), at 12 (referring to section 751(a) of the Act, the CIT held: “While the statute does not explicitly require that an entry be suspended as a prerequisite for establishing entitlement to a review, it does explicitly state the determined rate will be used as the liquidation rate for the reviewed entries. This result can only obtain if the liquidation of entries has been suspended. . . .”; see also *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2018–2019*, 86 FR 36102, and accompanying Issues and Decision Memorandum at Comment 4; and *Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation: Notice of Rescission of Antidumping Duty Administrative Review*, 77 FR 65532 (October 29, 2012) (noting that “for an administrative review to be conducted, there must be a reviewable, suspended entry to be liquidated at the newly calculated assessment rate”).

¹ See *Steel Concrete Reinforcing Bar from Mexico: Antidumping Duty Order*, 79 FR 65925 (November 6, 2014) (Order).

² See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review and Join Annual Inquiry Service List*, 88 FR 75270 (November 2, 2023).

751(a)(1) of the Tariff Act of 1930, as amended (the Act), Commerce initiated an administrative review of the *Order* covering eleven companies.³ On July 22, 2024, Commerce tolled certain deadlines in this administrative proceeding by seven days.⁴ On July 29, 2024, Commerce extended the deadline for the preliminary results until November 22, 2024.⁵

For a complete description of the events that followed the initiation of this review, see the Preliminary Decision Memorandum.⁶ A list of topics discussed in the Preliminary Decision Memorandum is attached as Appendix I to this notice. The Preliminary 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 Preliminary Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Scope of the Order

The product covered by this *Order* is rebar from Mexico. For a full description of the scope of the *Order*, see the Preliminary Decision Memorandum.

Rescission of Review, In Part

As noted above, we initiated this review with respect to 11 companies.⁷

³ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 88 FR 90168 (December 29, 2023) (*Initiation Notice*).

⁴ See Memorandum, "Tolling of Deadlines for Antidumping and Countervailing Duty Proceedings," dated July 22, 2024.

⁵ See Memorandum, "Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review," dated July 29, 2024.

⁶ See Memorandum, "Decision Memorandum for the Preliminary Results of the Administrative Review of the Antidumping Duty Order: Steel Concrete Reinforcing Bar from Mexico; 2022–2023," dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

⁷ See *Initiation Notice*, 88 FR at 90170–90171. Commerce previously found Deacero and Ingetek to be affiliated, and we continue to treat them as a single entity. See *Steel Concrete Reinforcing Bar from Mexico: Final Results of Antidumping Duty Administrative Review; 2020–2021*, 88 FR 37849 (June 9, 2023) (*Rebar from Mexico AR 2020–2021 Final*), and accompanying Issues and Decision Memorandum (IDM) at Comment 3. Therefore, they were listed together in the *Initiation Notice*. Separately, Commerce has previously collapsed Grupo Simec S.A.B. de C.V.; Aceros Especiales Simec Tlaxcala, S.A. de C.V.; Fundiciones de Acero Estructurales, S.A. de C.V.; Grupo Chant, S.A.P.I. de C.V.; Operadora de Perfiles Sigosa, S.A. de C.V.; Orge S.A. de C.V.; Perfiles Comerciales Sigosa, S.A. de C.V.; Siderurgicos Noroeste, S.A. de C.V.; Simec Internacional 6 S.A. de C.V.; Simec Internacional 7, S.A. de C.V.; and Simec Internacional, S.A. de C.V.

During the course of the review, we selected two mandatory respondents, which included three of the named companies.⁸ As a consequence, there are eight companies upon which a review was requested and which were not selected for individual examination.

Commerce received a timely withdrawal request within 90 days of the date of publication of the *Initiation Notice* with respect to Gerdau Corsa S.A.P.I. de C.V. (Gerdau Corsa).⁹ No other party requested a review of this company. As a result, Commerce is rescinding this review, in part, with respect to Gerdau Corsa in accordance with 19 CFR 351.213(d)(1).¹⁰

In addition, pursuant to 19 CFR 351.213(d)(3), Commerce will rescind an administrative review when there are no reviewable suspended entries. Based on our analysis of U.S. Customs and Border Protection (CBP) information, eight companies listed in the *Initiation Notice* had no entries of subject merchandise during the POR, including one of which had all its requests for review timely withdrawn (*i.e.*, Gerdau Corsa) and seven that remain subject to a review request. On March 26, 2024, we notified parties of our intent to rescind this administrative review with respect to the companies that had no reviewable suspended entries during the POR.¹¹ No party to the proceeding provided comments on our Intent to Rescind Memorandum. As a result, we are rescinding this review, in part, with respect to the remaining seven companies which had no entries in the POR.¹² Accordingly, the companies that

into the single entity "Grupo Simec." Therefore, they were listed together in the *Initiation Notice*. See *Rebar from Mexico AR 2020–2021 Final IDM* at Comment 3; see also *Steel Concrete Reinforcing Bar from Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2016–2017*, 83 FR 63622 (December 11, 2018), and accompanying memorandum, "Affiliation and Collapsing Memorandum for the Grupo Simec," dated December 3, 2018, unchanged in *Steel Concrete Reinforcing Bar from Mexico: Final Results of Antidumping Duty Administrative Review; 2016–2017*, 84 FR 35599 (July 24, 2019).

⁸ See Memorandum, "Respondent Selection," dated March 1, 2024. As discussed below in the "Preliminary Successor-in-Interest Determination" section below, Commerce has preliminarily determined that TA 2000 is the successor-in-interest to Talleres y Aceros S.A. de C.V. (TYASA).

⁹ See Gerdau Corsa's Letter, "Withdrawal of Request for Administrative Review," dated January 25, 2024.

¹⁰ See Appendix II.

¹¹ See Memorandum, "Notice of Intent to Rescind Review, In Part," dated March 26, 2024 (Intent to Rescind Memorandum).

¹² See Appendix II. As explained above, in accordance with 19 CFR 351.213(d)(1), Commerce is also rescinding this review, in part, with respect to Gerdau Corsa based on receiving a timely withdrawal request.

remain subject to the instant review are Deacero Group and TA 2000.

Preliminary Successor-in-Interest Determination

Commerce initiated this administrative review with respect to eleven companies, including TA 2000 and TYASA.¹³ TA 2000 reported that the company was formerly named TYASA, and continues to market and sell merchandise under the TYASA brand name.¹⁴ We requested additional information, which TA 2000 submitted in response to a supplemental questionnaire.¹⁵ We have analyzed record information regarding changes in TYASA's management, manufacturing facilities, customers, and suppliers, and preliminarily determine that TA 2000 is the successor-in-interest to TYASA. Accordingly, we have treated TYASA and TA 2000 as the same company in our analysis in this review. See the Preliminary Decision Memorandum for further information. Should our preliminary successor-in-interest determination remain unchanged in the final results of review, we will instruct CBP to apply the assessment rates that we calculated for TA 2000 to POR entries of subject merchandise from both TA 2000 and TYASA.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Act. Export price was calculated in accordance with section 772 of the Act. Normal value was calculated in accordance with section 773 of the Act. For a full description of the methodology underlying our conclusions, see the Preliminary Decision Memorandum.

Preliminary Results of Review

As a result of this review, we preliminarily determine the following estimated weighted-average dumping margins exist for the period November 1, 2022, through October 31, 2023:

Producer/exporter	Weighted-average dumping margin (percent)
Deacero S.A.P.I. de C.V./ I.N.G.E.T.E.K.N.O.S. Estructurales S.A.	8.88
TA 2000 S.A. de C.V. ¹⁶	22.27

¹³ See *Initiation Notice*, 88 FR at 90171.

¹⁴ See Preliminary Decision Memorandum (citing TA 2000's Letter, "Section A Response," dated April 25, 2024, at 1).

¹⁵ See Preliminary Decision Memorandum (citing Commerce's Letter, "Supplemental Questionnaire for TA 2000," dated August 21, 2024, and TA 2000's Letter, "Supplemental Response," dated September 23, 2024).

Disclosure and Public Comment

Commerce intends to disclose the calculations performed in connection with these preliminary results to interested parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).¹⁷

Interested parties may submit case briefs no later than 30 days after the date of publication of this notice.¹⁸ Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than five days after the date for filing case briefs.¹⁹ Interested parties who submit case or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and, (2) a table of authorities.²⁰

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their briefs that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.²¹ Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the public executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the public executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).²²

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, using Enforcement and Compliance's ACCESS system within 30

days of publication of this notice. Requests should contain (1) the party's name, address, and telephone number; (2) the number of participants and whether any participant is a foreign national; and (3) a list of the issues to be discussed. Issues raised in the hearing will be limited to those raised in the case and rebuttal briefs. If a request for a hearing is made, we will inform parties of the scheduled date and location for the hearing at a time to be determined.²³ Parties should confirm by telephone the date, time, and location of the hearing no fewer than two days before the scheduled date. Parties are reminded that all briefs and hearing requests must be filed electronically using ACCESS and received successfully in their entirety by 5:00 p.m. Eastern Time on the due date.

Unless the deadline is extended pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2), Commerce will issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their case briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by this review and for future deposits of estimated duties, where applicable.²⁴ Commerce intends to issue assessment instructions to CBP no earlier than 41 days after the date of publication of the final results of this review in the **Federal Register**, in accordance with 19 CFR 356.8(a).

If the respective weighted-average dumping margins are above *de minimis* (i.e., 0.50 percent) in the final results of this review, we will calculate importer-specific *ad valorem* AD assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1).²⁵ If the respondent has not reported entered values, we will calculate a per-unit

assessment rate for each importer by dividing the total amount of dumping calculated for the examined sales made to that importer by the total quantity associated with those sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is above *de minimis* (i.e., 0.50 percent). Where either the respondent's weighted-average dumping margin is zero or *de minimis*, or an importer-specific assessment rate is zero or *de minimis*, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

In accordance with Commerce's "automatic assessment" practice, for entries of subject merchandise during the POR produced by the respondents for which they did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate entries not reviewed at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

For the companies for which the administrative review is rescinded, antidumping duties shall be assessed at a rate equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the notice of the final results of the administrative review for all shipments of rebar from Mexico entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results, as provided by section 751(a)(2) of the Act: (1) the cash deposit rate for each company listed above will be equal to the dumping margins established in the final results of this review, except if the ultimate rate is *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rates will be zero; (2) for merchandise exported by producers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the producer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer is, then the cash deposit rate will be the rate

¹⁶ As discussed in further detail in the Preliminary Decision Memorandum, we preliminarily determine that TA 2000 is the successor-in-interest to Talleres y Aceros S.A. de C.V.

¹⁷ See 19 CFR 351.224(b).

¹⁸ See 19 CFR 351.309(c)(1)(ii).

¹⁹ See 19 CFR 351.309(d); see also *Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings*, 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Procedures*).

²⁰ See 19 CFR 351.309(c)(2) and (d)(2).

²¹ We use the term "issue" here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

²² See *APO and Service Procedures*.

²³ See 19 CFR 351.310.

²⁴ See section 751(a)(2)(C) of the Act.

²⁵ In these preliminary results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012).

established for the most recently completed segment of the proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 20.58 percent, the all-others rate established in the AD investigation.²⁶ These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, 19 CFR 351.213(h)(2) and 351.221(b)(4).

Dated: November 22, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the *Order*
- IV. Rescission of Review, In Part
- V. Preliminary Successor-in-Interest Determination
- VI. Affiliation and Single Entity Treatment
- VII. Discussion of the Methodology
- VIII. Currency Conversion
- IX. Recommendation

Appendix II

Companies Rescinded From Administrative Review

1. Compania Siderurgica del Pacifico S.A. de C.V.
2. Gerdau Corsa, S.A.P.I. de C.V.
3. Grupo Acerero S.A. de C.V.
4. Grupo Simec S.A.B. de C.V.; Aceros Especiales Simec Tlaxcala, S.A. de C.V.; Fundiciones de Acero Estructurales, S.A. de C.V.; Grupo Chant, S.A.P.I. de C.V.; Operadora de Perfiles Sigosa, S.A. de C.V.; Orge S.A. de C.V.; Perfiles Comerciales Sigosa, S.A. de C.V.; Siderurgicos Noroeste, S.A. de C.V.; Simec International 6 S.A. de C.V.; Simec International 7, S.A. de C.V.; Simec International, S.A. de C.V.
5. RRLC S.A.P.I. de C.V.
6. Sidertul S.A. de C.V.

7. Siderurgica del Occidente y Pacifico S.A. de C.V.

8. Simec International 9 S.A. de C.V.

[FR Doc. 2024–28154 Filed 11–29–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–090]

Certain Steel Wheels 12 to 16.5 Inches in Diameter From the People's Republic of China: Final Results of the Expedited First Sunset Review of the Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of this expedited sunset review, the U.S. Department of Commerce (Commerce) finds that revocation of the antidumping duty (AD) order on certain steel wheels 12 to 16.5 inches in diameter (steel wheels) from the People's Republic of China (China) would be likely to lead to continuation or recurrence of dumping at the levels indicated in the “Final Results of Sunset Review” section of this notice.

DATES: Applicable December 2, 2024.

FOR FURTHER INFORMATION CONTACT: Kate Fracke, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3299.

SUPPLEMENTARY INFORMATION:

Background

On September 3, 2019, Commerce published the AD order on steel wheels from China.¹ On August 1, 2024, Commerce published the notice of initiation of the first sunset review of the *Order*, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).²

On August 16, 2024, Commerce received a notice of intent to participate in this review from the Dexstar Wheel Division of Americana Development (Dexstar) within the deadline specified in 19 CFR 351.218(d)(1)(i).³ Dexstar claimed interested party status under section 771(9)(c) of the Act and 19 CFR

351.102(b)(17) as a producer of a domestic like product in the United States.⁴ On August 30, 2024, Commerce received an adequate substantive response from Dexstar.⁵ We received no substantive responses from any other interested parties, nor was a hearing requested.

On September 24, 2024, Commerce notified the U.S. International Trade Commission (ITC) that it did not receive an adequate substantive response from respondent interested parties.⁶ As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted an expedited (120-day) sunset review of the *Order*.

Scope of the Order

The scope of the *Order* covers certain steel trailer wheels with a nominal wheel diameter of 12 to 16.5 inches, regardless of width. For a full description of the scope, *see* the Issues and Decision Memorandum.⁷

Analysis of Comments Received

A complete discussion of all issues raised in this sunset review is contained in the accompanying Issues and Decision Memorandum.⁸ A list of topics discussed in the Issues and Decision Memorandum is included as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <http://access.trade.gov/public/FRNoticesListLayout.aspx>.

Final Results of Sunset Review

Pursuant to sections 751(c)(1), and 752(c)(1) and (3) of the Act, Commerce determines that revocation of the *Order* would be likely to lead to the continuation or recurrence of dumping and that the magnitude of the dumping

⁴ *Id.*

⁵ *See* Dexstar's Letter, “Petitioner's Substantive Response to the Notice of Initiation,” dated August 30, 2024.

⁶ *See* Commerce's Letter, “Sunset Reviews Initiated on August 1, 2024,” dated September 24, 2024.

⁷ *See* Memorandum, “Issues and Decision Memorandum for the Final Results of the Expedited First Sunset Review of the Antidumping Duty Order on Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People's Republic of China,” dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

⁸ *See* Issues and Decision Memorandum.

²⁶ *See Order*, 79 FR at 65926.

¹ *See Certain Steel Trailer Wheels 12 to 16.5 Inches from the People's Republic of China: Antidumping Duty and Countervailing Duty Orders*, 84 FR 45952 (September 3, 2019) (*Order*).

² *See Initiation of Five-Year (Sunset) Review*, 89 FR 62717 (August 1, 2024).

³ *See* Dexstar's Letter, “Notice of Intent to Participate in the First Five-Year Review,” dated August 16, 2024.

likely to prevail would be margins up to 44.35 percent.⁹

Administrative Protective Order (APO)

This notice serves as the only reminder to interested parties subject to an APO of their responsibility concerning the return/destruction or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act, and 19 CFR 351.218.

Dated: November 25, 2024.
Abdelali Elouaradia,
Deputy 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. History of the Order
- V. Legal Framework
- VI. Discussion of the Issues
 - 1. Likelihood of Continuation or Recurrence of Dumping
 - 2. Magnitude of the Margins Likely to Prevail
- VII. Final Results of Sunset Review
- VIII. Recommendation

[FR Doc. 2024–28174 Filed 11–29–24; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE
International Trade Administration
[C–533–884]

Glycine From India: Final Results of the Countervailing Duty Administrative Review; 2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.
SUMMARY: The U.S. Department of Commerce (Commerce) determines that countervailable subsidies were provided to Kumar Industries, India (Kumar), a producer and exporter of glycine from India during the period of review (POR) January 1, 2022, through December 31, 2022.

DATES: Applicable December 2, 2024.
FOR FURTHER INFORMATION CONTACT: Scarlet Jaldin or Amber Hodak 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) 482–4275 or (202) 482–8034, respectively.

SUPPLEMENTARY INFORMATION:
Background

On July 5, 2024, Commerce published the *Preliminary Results* of this administrative review.¹ On July 22, 2024, Commerce tolled certain deadlines in this administrative proceeding by seven days.² On November 12, 2024, Commerce extended the deadline for these final results to November 19, 2024.³ On November 18, 2024, Commerce further extended the deadline for these final results by an additional three days, to November 22, 2024.⁴ We received timely filed case and rebuttal briefs from Deer Park Glycine, LLC (the petitioner) and Kumar.⁵ For a complete description of the events that occurred since the *Preliminary Results*, see the Issues and Decision Memorandum.⁶

Scope of the Order⁷
The merchandise covered by the Order is glycine from India. For a complete description of the scope of the Order, see the Issues and Decision Memorandum.⁸

Analysis of Comments Received
All issues raised in the parties’ briefs are addressed in the Issues and Decision Memorandum. A list of the issues

¹ See *Glycine from India: Preliminary Results and Partial Rescission of the Countervailing Duty Administrative Review; 2022*, 89 FR 55550 (July 5, 2024) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).
² See Memorandum, “Tolling of Deadlines for Antidumping and Countervailing Duty Proceedings,” dated July 22, 2024.
³ See Memorandum, “Extension of Deadline for Final Results of Countervailing Duty Administrative Review,” dated November 12, 2024.
⁴ See Memorandum, “Extension of Deadline for Final Results of Countervailing Duty Administrative Review,” dated November 18, 2024.
⁵ See Petitioner’s Letter, “Case Brief of Deer Park Glycine, LLC,” dated August 5, 2024; see also Kumar’s Letter, “Rebuttal Brief,” dated August 12, 2024.
⁶ See Memorandum, “Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Glycine from India; 2022,” dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).
⁷ See *Glycine from India and the People’s Republic of China: Countervailing Duty Orders*, 84 FR 29173 (June 21, 2019) (*Order*).
⁸ *Id.* at 2.

addressed is attached as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance’s Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Changes Since the Preliminary Results

Based on the arguments raised and a review of the record and all supporting documentation, we made certain changes to the *Preliminary Results*. For a full description of these revisions, see the Issues and Decision Memorandum.

Methodology
Commerce conducted this administrative review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found to be countervailable, Commerce finds that there is a subsidy, *i.e.*, a financial contribution by an “authority” that gives rise to a benefit to the recipient, and that the subsidy is specific.⁹ For a full description of the methodology underlying our conclusions, including any determination that relied upon the use of adverse facts available pursuant to section 776(a) and (b) of the Act, see the accompanying Issues and Decision Memorandum.

Final Results of Review
Commerce determines that the following countervailable subsidy rate exists for the period January 1, 2022, through December 31, 2022:¹⁰

Company	Subsidy rate (percent <i>ad valorem</i>)
Kumar Industries, India; Advance Chemical Corporation; Rexusize Rasayan Industries; Reliance Corporation	6.03

Disclosure
Commerce intends to disclose its calculations and analysis performed to

⁹ See sections 771(5)(B) and (D) of the Act regarding financial contribution; see also section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.
¹⁰ As discussed in the *Preliminary Results* and Issues and Decision Memorandum, Commerce has found the following companies to be cross-owned with Kumar Industries, India: Advance Chemical Corporation, Rexusize Rasayan Industries, and Reliance Corporation.

⁹ *Id.*

interested parties for these final results within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of the notice of final results in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to sections 751(a)(1) and (a)(2)(C) of the act and 19 CFR 351.212(b)(2), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries for the above-listed companies at the applicable *ad valorem* assessment rates. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for statutory injunction has expired (*i.e.*, within 90 days of publication).

Cash Deposit Requirements

In accordance with section 751(a)(1) of the Act, Commerce intends to instruct CBP to collect cash deposits of estimated countervailing duties for each of the companies listed above on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. For all non-reviewed firms, we will instruct CBP to continue to collect cash deposits of estimated countervailing duties at the all-others rate or the most recent company-specific rate applicable to the company, as appropriate. These cash deposit instructions, effective upon publication of these final results, shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as a final reminder to parties subject to an

administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

Commerce is issuing the final results and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: November 22, 2024.

Abdelali Elouaradia,

Deputy 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. Subsidies Valuation Information
- V. Analysis of Programs
- VI. Changes Since the *Preliminary Results*
- VII. Discussion of the Issues
 - Comment 1: Whether Commerce Should Apply Adverse Facts Available (AFA) to Kumar
 - Comment 2: Whether Kumar Violated 18 U.S.C. 1001
- VIII. Recommendation

[FR Doc. 2024–28150 Filed 11–29–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-Year (Sunset) Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: In accordance with the Tariff Act of 1930, as amended (the Act), the U.S. Department of Commerce (Commerce) is automatically initiating the five-year reviews (Sunset Reviews) of the antidumping and countervailing duty (AD/CVD) order(s) and suspended investigation(s) listed below. The U.S. International Trade Commission (ITC) is publishing concurrently with this notice its notice of *Institution of Five-Year Reviews* which covers the same order(s) and suspended investigation(s).

DATES: Applicable December 2, 2024.

FOR FURTHER INFORMATION CONTACT:

Commerce official identified in the *Initiation of Review* section below at AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230. For information from the ITC, contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

SUPPLEMENTARY INFORMATION:

Background

Commerce's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year (Sunset) Reviews of Antidumping and Countervailing Duty Orders*, 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to Commerce's conduct of Sunset Reviews is set forth in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012).

Initiation of Review

In accordance with section 751(c) of the Act and 19 CFR 351.218(c), we are initiating the Sunset Reviews of the following antidumping and countervailing duty order(s) and suspended investigation(s):

DOC case No.	ITC case No.	Country	Product	Commerce contact
A–570–097	731–TA–1429	China	Polyester Textured Yarn (1st Review)	Mary Kolberg, (202) 482–1785.
A–533–885	731–TA–1430	India	Polyester Textured Yarn (1st Review)	Mary Kolberg, (202) 482–1785.
C–570–098	701–TA–612	China	Polyester Textured Yarn Mary Kolberg (1st Review).	Mary Kolberg, (202) 482–1785.
C–533–886	701–TA–613	India	Polyester Textured Yarn (1st Review)	Mary Kolberg, (202) 482–1785.

Filing Information

As a courtesy, we are making information related to sunset proceedings, including copies of the

pertinent statute and Commerce's regulations, Commerce's schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the

public on Commerce's website at the following address: <https://enforcement.trade.gov/sunset/>. All submissions in these Sunset Reviews must be filed in accordance with Commerce's

regulations regarding format, translation, and service of documents. These rules, including electronic filing requirements via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS), can be found at 19 CFR 351.303.

In accordance with section 782(b) of the Act, any party submitting factual information in an AD/CVD proceeding must certify to the accuracy and completeness of that information. Parties must use the certification formats provided in 19 CFR 351.303(g). Commerce intends to reject factual submissions if the submitting party does not comply with applicable revised certification requirements.

Letters of Appearance and Administrative Protective Orders

Pursuant to 19 CFR 351.103(d), Commerce will maintain and make available a public service list for these proceedings. Parties wishing to participate in any of these five-year reviews must file letters of appearance as discussed at 19 CFR 351.103(d). To facilitate the timely preparation of the public service list, it is requested that those seeking recognition as interested parties to a proceeding submit an entry of appearance within 10 days of the publication of the Notice of Initiation. Because deadlines in Sunset Reviews can be very short, we urge interested parties who want access to proprietary information under administrative protective order (APO) to file an APO application immediately following publication in the **Federal Register** of this notice of initiation. Commerce's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.¹

Information Required From Interested Parties

Domestic interested parties, as defined in sections 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b), wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The required

contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with Commerce's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, Commerce will automatically revoke the order without further review.²

If we receive an order-specific notice of intent to participate from a domestic interested party, Commerce's regulations provide that *all parties* wishing to participate in a Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that Commerce's information requirements are distinct from the ITC's information requirements. Consult Commerce's regulations for information regarding Commerce's conduct of Sunset Reviews. Consult Commerce's regulations at 19 CFR part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at Commerce.

Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).³ An electronically filed document must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time on the day on which it is due.

In prior proceedings we have encouraged interested parties to provide an executive summary of their comments, including footnotes. In these sunset reviews, we request that interested parties provide at the beginning of their comments, an executive summary for each issue raised in their comments. Further, we request that interested parties limit their public executive summary of each issue to no more than 450 words, not including citations. We intend to use the public executive summaries as the basis of the comment summaries included in the decision memorandum that will accompany the notice to be published in the **Federal Register**. Finally, we request that interested parties include footnotes

for relevant citations in the public executive summary of each issue.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218(c).

Dated: November 26, 2024.

Scot Fullerton,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2024–28262 Filed 11–29–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–928]

Ceramic Tile From India: Preliminary Negative Determination of Sales at Less Than Fair Value and Postponement of Final Determination

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that ceramic tile from India is not being, or is not likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is April 1, 2023, through March 31, 2024. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable December 2, 2024.

FOR FURTHER INFORMATION CONTACT: Fred Baker or Theodora Mattei, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2924 or (202) 482–4834, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on May 16, 2024.¹ On July 22, 2024, Commerce tolled certain deadlines in this administrative proceeding by seven days.² On September 19, 2024, Commerce postponed the preliminary

¹ See *Ceramic Tile from India: Initiation of Less-Than-Fair-Value Investigation*, 89 FR 42836 (May 16, 2024) (Initiation Notice).

² See Memorandum, “Tolling of Deadlines for Antidumping and Countervailing Duty Proceedings,” dated July 22, 2024.

¹ See *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19*, 85 FR 41363 (July 10, 2020).

² See 19 CFR 351.218(d)(1)(iii).

³ See *Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings; Final Rule*, 88 FR 67069 (September 29, 2023).

determination of this investigation until November 22, 2024.³

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.⁴ A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary 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 Preliminary Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Scope of the Investigation

The product covered by this investigation is ceramic tile from India. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,⁵ in the *Initiation Notice*, Commerce set aside a period of time for parties to raise issues regarding product coverage (*i.e.*, scope).⁶ Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice*, as well as additional language proposed by Commerce. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum.⁷ Commerce is not modifying the scope language as it appeared in the *Initiation Notice*. In the Preliminary Scope Decision Memorandum, Commerce established deadlines for parties to submit scope case and rebuttal briefs as

well as a deadline to request a hearing on issues raised in the scope briefs.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce calculated export price in accordance with section 772(a) of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

Preliminary Determination

For the period April 1, 2023, through March 31, 2024, Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Weighted-average dumping margin (percent)
Antiqua Minerals/Antiqua Ceramic Pvt. Ltd./Shivam Enterprise/Antiek Vitri-fied LLP/Antique Non Woven Pvt. Ltd. (collectively, Antiqua Group) ⁸	0.00
Win-Tel Ceramic Pvt.Ltd./Theos Tiles LLP (collectively Win-Tel Group) ⁹	0.00

Consistent with section 733(b)(3) of the Act, Commerce disregards de minimis rates. Accordingly, Commerce preliminarily determines that Antiqua Group and Win-Tel Group, the two individually examined respondents, have not made sales of subject merchandise at LTFV.

Consistent with section 733(d) of the Act, Commerce has not calculated an estimated weighted-average dumping margin for all other producers and exporters because it has not made an affirmative preliminary determination of sales at LTFV.

Suspension of Liquidation

Because Commerce has made a negative preliminary determination of sales at LTFV with regard to subject merchandise, Commerce will not direct U.S. Customs and Border Protection to suspend liquidation or to require a cash deposit of estimated antidumping duties for entries of ceramic tile from India.

Disclosure

Commerce intends to disclose its calculations and analysis performed in

connection with this preliminary determination to interested parties within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Consistent with 19 CFR 351.224(e), Commerce will analyze and, if appropriate, correct any timely allegations of significant ministerial errors by amending the preliminary determination. However, consistent with 19 CFR 351.224(d), Commerce will not consider incomplete allegations that do not address the significance standard under 19 CFR 351.224(g) following the preliminary determination. Instead, Commerce will address such allegations in the final determination together with issues raised in the case briefs or other written comments.

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination for Antiqua Group and Win-Tel Group.

Public Comment

Case briefs or other written comments on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation.¹⁰ Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.¹¹ Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.¹²

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this investigation, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.¹³ Further, we request that

³ See *Ceramic Tile from India: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigation*, 89 FR 76794 (September 19, 2024).

⁴ See Memorandum, "Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Ceramic Tile from India," dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

⁵ See *Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27323 (May 19, 1997).

⁶ See *Initiation Notice*.

⁷ See Memorandum, "Antidumping Duty Investigation and Countervailing Duty Investigation of Ceramic Tile from India: Preliminary Scope Decision Memorandum," dated concurrently with this notice (Preliminary Scope Decision Memorandum).

⁸ Commerce preliminarily determines that Antiqua Minerals, Antiqua Ceramic Pvt. Ltd., Shivam Enterprise, Antiek Vitri-fied LLP, and Antique Non Woven Pvt. Ltd., are a single entity. See Preliminary Decision Memorandum.

⁹ Commerce preliminarily determines that Win-Tel Ceramics Pvt. Ltd. and Theos Tiles LLP are a single entity. See Preliminary Decision Memorandum.

¹⁰ See 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

¹¹ See 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings*, 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

¹² See 19 CFR 351.309(c)(2) and (d)(2).

¹³ We use the term "issue" here to describe an argument that Commerce would normally address

interested parties limit their public, executive summary of each issue to no more than 450 words, not including citations. We intend to use the public, executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this investigation. We request that interested parties include footnotes for relevant citations in the public, executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).¹⁴

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce will inform parties of the time and date for the hearing.

Postponement of Final Determination

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination in the **Federal Register** if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner.

On November 1, 2024, pursuant to 19 CFR 351.210(e), the petitioner¹⁵ requested that Commerce postpone the final determination.¹⁶ In accordance with section 735(a)(2)(B) of the Act and 19 CFR 351.210(b)(2)(i), because: (1) the preliminary determination is negative; (2) the petitioner has requested the postponement of the final determination; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination.

in a comment of the Issues and Decision Memorandum.

¹⁴ See *APO and Service Final Rule*.

¹⁵ The petitioner is the Coalition for Fair Trade in Ceramic Tile.

¹⁶ See Petitioners' Letter, "Request for Postponement of {Commerce}'s Final Determinations," dated November 1, 2024.

Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

U.S. International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine 75 days after the final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This preliminary determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act, and 19 CFR 351.205(c).

Dated: November 22, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation is ceramic flooring tile, wall tile, paving tile, hearth tile, porcelain tile, mosaic tile, flags, decorative tile, finishing tile, and the like (hereinafter ceramic tile). Ceramic tiles are articles containing a mixture of minerals including clay (generally hydrous silicates of alumina or magnesium) that are fired so the raw materials are fused to produce a tile that is less than 3.2 cm in thickness, exclusive of decorative features. All ceramic tile is subject to the scope regardless of end use, surface area, and weight, regardless of whether the tile is glazed or unglazed, regardless of the water absorption coefficient by weight, regardless of the extent of vitrification, and regardless of whether or not the tile is on a backing. Subject merchandise includes ceramic tile "slabs" or "panels" (tiles that are larger than 1 meter² (11 ft²)).

Subject merchandise includes ceramic tile that undergoes minor processing in a third country prior to importation into the United States. Similarly, subject merchandise includes ceramic tile produced that undergoes minor processing after importation into the United States. Such minor processing includes, but is not limited to, one or more of the following: beveling, cutting, trimming, staining, painting, polishing, finishing, additional firing, affixing a decorative surface to the tile, or any other processing that would otherwise not remove the merchandise from the scope of the investigation if performed in the country of manufacture of the in-scope product.

Subject merchandise is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under the following subheadings of heading 6907: 6907.21.1005, 6907.21.1011, 6907.21.1051, 6907.21.2000,

6907.21.3000, 6907.21.4000, 6907.21.9011, 6907.21.9051, 6907.22.1005, 6907.22.1011, 6907.22.1051, 6907.22.2000, 6907.22.3000, 6907.22.4000, 6907.22.9011, 6907.22.9051, 6907.23.1005, 6907.23.1011, 6907.23.1051, 6907.23.2000, 6907.23.3000, 6907.23.4000, 6907.23.9011, 6907.23.9051, 6907.30.1011, 6907.30.1051, 6907.30.2000, 6907.30.3000, 6907.30.4000, 6907.30.9011, 6907.30.9051, 6907.40.1005, 6907.40.1011, 6907.40.1051, 6907.40.2000, 6907.40.3000, 6907.40.4000, 6907.40.9011, and 6907.40.9051. Subject merchandise may also enter under subheadings of headings 6913, 6914, and 6905: 6913.90.2000, 6914.10.8000, 6914.90.8000, 6905.10.0000, and 6905.90.0050. The HTSUS subheadings are provided for convenience and customs purposes only. The written description of the scope of the investigation is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Period of Investigation
- IV. Affiliation and Single Entity Treatment
- V. Discussion of the Methodology
- VI. Currency Conversion
- VII. Recommendation

[FR Doc. 2024–28158 Filed 11–29–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XE486]

Fishing Capacity Reduction Program for the Pacific Coast Groundfish Fishery

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

ACTION: Notice of fee rate adjustment.

SUMMARY: NMFS issues this notice to decrease the fee rate to 2.25 percent for the Pacific Coast Groundfish fee-share fishery to repay the \$28,428,718.88 Groundfish sub-loan of the \$35,662,471 reduction loan that financed the Pacific Coast Groundfish fishing capacity reduction program.

DATES: The fee rate decrease for the Pacific Coast Groundfish fishery will begin on landings starting on January 1, 2025. The first due date for fee payments with the decreased rate will be February 14, 2025.

ADDRESSES: Send questions about this notice to William Fritz, Financial Assistance Specialist, Financial Services Division, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3282.

FOR FURTHER INFORMATION CONTACT:
William Fritz, (301) 427-8078.

SUPPLEMENTARY INFORMATION:

I. Background

Sections 312(b) through (e) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a (b) through (e)) generally authorizes fishing capacity reduction programs. In particular, section 312(d) authorizes industry fee systems for repaying reduction loans that finance reduction programs. Subpart L of 50 CFR part 600 is the framework rule generally implementing section 312(b) through (e). Sections 1111 and 1112 of the Merchant Marine Act, 1936 (46 App. U.S.C. 1279f and 1279g) generally authorizes reduction loans.

Enacted on February 20, 2003, section 212 of division B, title II, of Public Law 108-7 (section 212) specifically authorizes a fishing capacity reduction program for that portion of the limited entry trawl fishery under the Pacific Coast Groundfish Fishery Management Plan whose permits, excluding those registered to whiting catcher-processors, are endorsed for trawl gear operation (reduction fishery).

The reduction program's objective was to reduce the number of vessels and permits endorsed for the operation of groundfish trawl gear. The program also involved corollary fishing capacity reduction in the California, Oregon, and Washington fisheries for Dungeness crab and pink shrimp and the sub-loans for these State fisheries have all been repaid.

NMFS proposed the implementing notice on May 28, 2003 (68 FR 31653) and published the final notice on July 18, 2003 (68 FR 42613). NMFS allocated a \$28,428,719 reduction loan to the groundfish fishery. The allocation became a reduction loan repayable by fees from the groundfish fishery.

NMFS published in the **Federal Register** on July 13, 2005 (70 FR 40225), the final rule to implement the industry fee system for repaying the program's reduction loan. The regulations implementing the program are located at 50 CFR part 600 subpart M. On August 8, 2005, NMFS published in the **Federal Register** (70 FR 45695) a notice of the fee effective date and established September 8, 2005 as the effective date when fee collection and loan repayment began.

II. Purpose

The purpose of this notice is to adjust, in accordance with the framework rule's § 600.1013(b), the fee rate for the groundfish fishery. Section 600.1013(b) directs NMFS to recalculate the fee rate

that will be reasonably necessary to ensure reduction loan repayment within the specified 30-year term. NMFS has determined that the current fee rate of 3.5 percent for the groundfish fishery is projected to collect more than the annual amortization amount needed for 2025. Therefore, NMFS is decreasing the fee rate to 2.25 percent for all landings beginning January 1, 2025.

Fish buyers may continue to disburse collected fee deposits to NMFS by using <https://www.pay.gov> or by mailing payments to our lockbox. Our lockbox's address is: "NMFS Pacific Coast Groundfish Buyback Loan, P.O. Box 979008, St. Louis, MO 63197-9000. Fish buyers must include the fee collection report with the fee payment. Fish buyers using <https://www.pay.gov> will find an electronic fee collection report form. Fish buyers not using <https://www.pay.gov> may also access the NMFS website for a copy of the fee collection report at: <https://www.fisheries.noaa.gov/national/funding-and-financial-services/pacific-coast-groundfish-buyback>.

III. Notice

The new 2.25 percent fee rate for the groundfish fishery will begin for all landings starting January 1, 2025. From and after this date, all groundfish program fish sellers paying fees shall begin paying groundfish program fees at the revised rate. The first due date for fee payments with the decreased rate will be February 14, 2025.

Fee collection and submission shall follow previously established methods in § 600.1013 of the framework rule and in the final fee rule published in the **Federal Register** on July 13, 2005 (70 FR 40225).

Authority: The authority for this action is Pub. L. 107 206, Pub. L. 108 7, 16 U.S.C. 1861a (b) through (e), and 50 CFR 600.1000 *et seq.*

Dated: November 22, 2024.

Brian T. Pawlak,

Chief Financial Officer/Chief Administrative Officer, Director, Office of Management and Budget, NOAA Fisheries.

[FR Doc. 2024-28144 Filed 11-29-24; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XE485]

Fishing Capacity Reduction Program for the Longline Catcher Processor Subsector of the Bering Sea and Aleutian Islands Non-Pollock Groundfish Fishery

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

ACTION: Notice of fee rate adjustment.

SUMMARY: NMFS issues this notice to inform the public that there will be a decrease of the fee rate required to repay the reduction loan financing the non-pollock groundfish fishing capacity reduction program. Effective January 1, 2025, NMFS is decreasing the Loan A fee rate to \$0.016 per pound to ensure timely repayment of the loan. The fee rate for Loan B will remain unchanged at \$0.001 per pound. The decreased fee rate is due to a recalculation based on the required amortization target and projected non-pollock groundfish Total Allowable Catch (TAC) for 2025, as well as a temporary adjustment related to 2024 Season B.

DATES: The non-pollock groundfish program fee rate decrease will begin with landings on January 1, 2025. The first due date for fee payments with the decreased rate will be February 15, 2025.

ADDRESSES: Send questions about this notice to William Fritz, Financial Assistance Specialist, Financial Services Division, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3282.

FOR FURTHER INFORMATION CONTACT:
William Fritz, (301) 427-8078.

SUPPLEMENTARY INFORMATION:

Background

Sections 312(b)–(e) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861 *et seq.*) generally authorizes fishing capacity reduction programs. In particular, section 312(d) authorizes industry fee systems for repaying reduction loans which finance reduction program costs. Subpart L of 50 CFR part 600 is the framework rule generally implementing section 312(b)–(e). Sections 1111 and 1112 of the Merchant Marine Act, 1936 (46 App. U.S.C. 1279f and 1279g) generally authorize reduction loans.

Enacted on December 8, 2004, section 219, Title II, of FY 2005 Appropriations

Act, Public Law 104–447 (Act) authorizes a fishing capacity reduction program implementing capacity reduction plans submitted to NMFS by catcher processor subsectors of the Bering Sea and Aleutian Islands (BSAI) non-pollock groundfish fishery (reduction fishery) as set forth in the Act.

The longline catcher processor subsector (Longline Subsector) is among the catcher processor subsectors eligible to submit to NMFS a capacity reduction plan under the terms of the Act. The longline subsector non-pollock groundfish reduction program's objective was to reduce the number of vessels and permits endorsed for longline subsector of the non-pollock groundfish fishery. All post-reduction fish landings from the reduction fishery are subject to the longline subsector non-pollock groundfish program's fee.

NMFS proposed the implementing notice on August 11, 2006 (71 FR 46364), and published the final notice on September 29, 2006 (71 FR 57696). NMFS allocated the \$35,000,000 reduction loan (A Loan) to the reduction fishery and this loan is repayable by fees from the fishery.

On September 24, 2007, NMFS published in the **Federal Register** (72 FR 54219), the final rule to implement the industry fee system for repaying the non-pollock groundfish program's reduction loan and established October 24, 2007, as the effective date when fee collection and loan repayment began. The regulations implementing the program are located at § 600.1012.

NMFS published a final rule to implement a second \$2,700,000 reduction loan (B Loan) for this fishery in the **Federal Register** on September 24, 2012 (77 FR 58775). The loan was disbursed December 18, 2012 with fee collection of \$0.001 per pound to begin January 1, 2013. This fee is in addition to the A Loan fee.

Purpose

The purpose of this notice is to adjust the fee rate for the reduction fishery in accordance with the framework rule's § 600.1013(b). Section 600.1013(b) directs NMFS to recalculate the fee rate that will be reasonably necessary to ensure reduction loan repayment within the specified 30 year term.

NMFS has determined for the reduction fishery that the current fee rate of Loan A, \$0.020 per pound, is more than that needed to service the loan in 2025. Therefore, NMFS is decreasing the Loan A fee rate to \$0.016 per pound. NMFS has determined \$0.017 per pound is sufficient to ensure timely loan repayment, with an

additional temporary \$0.001 per pound adjustment related to the 2024 Season B rate having been set at \$0.020 per pound rather than \$0.019 per pound. The fee rate for Loan B will remain \$0.001 per pound.

Subsector members may continue to use *Pay.gov* to disburse collected fee deposits at: <https://www.pay.gov/paygov/>.

Please visit the NMFS website for additional information at: <https://www.fisheries.noaa.gov/national/funding-and-financial-services/longline-catcher-processor-subsector-bering-sea-and-aleutian-islands-non-pollock>.

Notice

The new fee rate for the non-pollock groundfish fishery will begin on January 1, 2025.

From and after this date, all subsector members paying fees on the non-pollock groundfish fishery shall begin paying non-pollock groundfish fishery program fees at the revised rate.

Fee collection and submission shall follow previously established methods in § 600.1013 of the framework rule and in the final fee rule published in the **Federal Register** on September 24, 2007 (72 FR 54219).

Authority: 16 U.S.C. 1861 *et seq.*; Pub. L. 108–447.

Dated: November 26, 2024.

Brian T. Pawlak,

Chief Financial Officer/Chief Administrative Officer, Director, Office of Management and Budget, National Marine Fisheries Service.

[FR Doc. 2024–28163 Filed 11–29–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XE341]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Maryland Offshore Wind Project Offshore of Maryland

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

ACTION: Notice; issuance of Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) as amended, and implementing regulations, notification is hereby given that a Letter of Authorization (LOA) has been issued to US Wind, Inc. (US Wind), for the taking of marine

mammals incidental to the construction of the Maryland Offshore Wind Project (hereafter known as the “Project”).

DATES: The LOA is effective from January 1, 2025 through December 31, 2029.

ADDRESSES: The LOA and supporting documentation are available online at: <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Jessica Taylor, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made, regulations are promulgated (when applicable), and public notice and an opportunity for public comment are provided.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). If such findings are made, NMFS must prescribe the permissible methods of taking; “other means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to as “mitigation”); and requirements pertaining to the monitoring and reporting of such takings. The MMPA defines “take” to mean harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal (16 U.S.C. 1362(13); 50 CFR 216.103). Level A harassment is defined as any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild (16 U.S.C. 1362(18); 50 CFR 216.3). Level A harassment is defined as any act of

pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild (16 U.S.C. 1362(18); 50 CFR 216.3). Level B harassment is defined as any act of pursuit, torment, or annoyance which has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (16 U.S.C. 1362(18); 50 CFR 216.3). Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I authorize NMFS to propose and, if appropriate, promulgate regulations and issue associated LOA(s). NMFS promulgated regulations on October 23, 2024 (89 FR 84676) for the taking of marine mammals incidental to the construction of the Maryland Offshore Wind Project offshore of Maryland. The LOA authorizes US Wind, and those persons it authorizes or funds to conduct activities on its behalf, to take marine mammals incidental to specified activities during the construction of the Project and requires them to implement mitigation, monitoring, and reporting requirements.

Summary of Request

On October 23, 2024, NMFS promulgated a final rule (89 FR 84674) responding to a request from US Wind for authorization to take marine mammals (19 species comprising 20 stocks) by Level B harassment (all 20 stocks) and by Level A harassment (5 stocks of the 20 stocks) incidental to construction activities occurring in Federal and State waters off of Maryland, specifically within and around the Bureau of Ocean Energy Management (BOEM) Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS) Lease Area OCS-A 0490 (collectively, "Lease Area") and along two export cable routes to sea-to-shore transition points (collectively referred to as the "Project Area"), over the course of 5 years (January 1, 2025 through December 31, 2029). The final rule included the following specified activities: the installation of up to 114 wind turbine generators (WTGs) on monopile foundations using impact pile driving; the installation of 4 offshore substations (OSSs) on jacket foundations consisting of post-piled pin piles using impact pile driving; the installation of one meteorological tower (Met Tower) on pin piles using impact pile driving; installation and subsequent removal of gravity cells to connect the offshore export cables to onshore facilities

within Delaware Seashore State Park; high-resolution geophysical (HRG) marine site characterization surveys using active acoustic sources; fishery and ecological monitoring surveys; the placement of scour protection; the installation of the export cable routes from OSSs to shore-based converter stations and inter-array cables between turbines by trenching, laying, and burial activities; vessel transit within the specified geographical region to transport crew, supplies, and materials; and WTG operation.

Marine mammals exposed to elevated noise levels during foundation impact pile driving may be taken by Level A harassment, and marine mammals exposed to elevated noise levels during impact pile driving and HRG site characterization surveys may be taken by Level B harassment. No mortality or serious injury of any marine mammal is anticipated or authorized. The number of takes, by species, authorized may be found in table 1 in the LOA, which is available at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>.

Authorization

In accordance with the final rule (89 FR 84674, October 23, 2024; see 50 CFR 217.306), NMFS has issued a LOA to US Wind authorizing the take, by harassment, of marine mammals incidental to specified activities within the specified geographical region. As previously stated, no mortality or serious injury of any marine mammal species is anticipated or authorized. The incidental takes authorized herein are the same as those analyzed and authorized in the final rule (89 FR 84674, October 23, 2024). Takes of marine mammals will be minimized through the following planned mitigation and monitoring measures, as applicable for each specified activity: (1) implementation of seasonal pile driving work restrictions; (2) use of multiple NMFS-approved Protected Species Observers (PSOs) to visually observe for marine mammals (with any detection within specifically designated zones triggering a delay or shutdown, as applicable); (3) use of NMFS-approved passive acoustic monitoring (PAM) operators to acoustically detect marine mammals, with a focus on detecting baleen whales (with any detection within designated zones triggering a delay or shutdown, as applicable); (4) implementation of clearance and shutdown zones; (5) use of soft-start upon commencement of impact pile driving and ramp-up of acoustic sources during HRG surveys; (6) use of noise

attenuation technology during foundation pile driving; (7) use of situational awareness monitoring for marine mammal presence; (8) use of sound field verification monitoring; (9) use of PAM within the vessel transit corridor for Project vessels to travel over 10 knots (11.5 miles per hour); and (10) implementation of several vessel strike avoidance measures to avoid vessel strikes, including but not limited to, vessel separation zones between marine mammals and project vessels. Additionally, NMFS may modify the LOA's mitigation, monitoring, or reporting measures, based on new information. US Wind is also required to submit reports, as specified in the final rule.

Based on the findings discussed in the preamble of the final rule, NMFS has determined that the take authorized in the LOA is of small numbers, will have a negligible impact on marine mammal stocks, will not have an unmitigable adverse impact on the availability of the affected marine mammal stock for subsistence uses, and the mitigation measures provide a means of affecting the least practicable adverse impact on the affected stocks and their habitat.

Dated: November 26, 2024.

Kimberly Damon-Randall,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

[FR Doc. 2024-28215 Filed 11-29-24; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Draft Revised Management Plan for the Narragansett Bay National Estuarine Research Reserve

AGENCY: Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Request for comments.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) is soliciting comments from the public regarding a proposed revision of the management plan for the Narragansett Bay National Estuarine Research Reserve (NBNERR). A management plan provides a framework to guide a reserve's programs, track progress toward meeting its goals, and identify potential opportunities or changes in direction. It is also used to guide programmatic evaluations. Management plan revisions are required at least every

five years. This draft, revised management plan is intended to replace the NBNERR management plan approved in 2010.

DATES: Comments must be received at the appropriate address (see **ADDRESSES**) on or before January 2, 2025.

ADDRESSES: The draft revised management plan can be downloaded or viewed at: http://nbnerr.org/wp-content/uploads/2024/08/NBNERR-ManagementPlan_DRAFT-PublicComment.pdf. It is also available by sending a written request to the point of contact identified below (see **FOR FURTHER INFORMATION CONTACT**).

You may submit comments by email to claudia.mazur@noaa.gov. Include "Comments on draft Narragansett Bay National Estuarine Research Reserve Management Plan" in the subject line of the message. NOAA will accept anonymous comments; however, the written comments NOAA receives are considered part of the public record, and the entirety of the comment, including the name of the commenter, email address, attachments, and other supporting materials, will be publicly accessible. Sensitive, personally identifiable information, such as account numbers and Social Security numbers, should not be included. Comments that are not related to the management plan for NBNERR, or that contain profanity, vulgarity, threats, or other inappropriate language, will not be considered.

FOR FURTHER INFORMATION CONTACT:

Claudia Mazur, claudia.mazur@noaa.gov, or Betsy Nicholson, betsy.nicholson@noaa.gov, (617-894-0197) of NOAA's Office for Coastal Management.

SUPPLEMENTARY INFORMATION: Pursuant to 15 CFR 921.33(c), Rhode Island must revise the management plan for NBNERR at least every five years. If approved by NOAA, the revised management plan will replace the plan previously approved in 2010.

Management plans outline a reserve's strategic goals and objectives; administrative structure; programs for conducting research and monitoring, education, and training; resource protection, restoration, and manipulation plans; public access and visitor use plans; consideration for future land acquisition; and facility development to support reserve operations. In particular, this draft revised plan for NBNERR provides information on new staff positions and new staff hired, and describes the reserve's updated position within the Rhode Island Department of Environmental Management.

Since the last management plan, NBNERR has secured a land acquisition and expanded its boundary.

Additionally, the updated plan describes strategic goals and objectives and identifies topic areas where additional planning will be conducted to identify and develop new goals and objectives over the next five years. The revised management plan, once approved, would serve as the guiding document for the reserve for the next five years.

NOAA's Office for Coastal Management analyzes the environmental impacts of the proposed approval of this management plan in accordance with the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321 *et seq.*, and the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA (40 CFR 1500-1508 (2022)). The public is invited to comment on the draft revised management plan. NOAA will take these comments into consideration when deciding whether to approve the revised management plan in whole or in part.

Authority: 16 U.S.C. 1451 *et seq.*; 15 CFR 921.33.

Keelin S. Kuipers,

Deputy Director, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2024-28208 Filed 11-29-24; 8:45 am]

BILLING CODE 3510-08-P

DEPARTMENT OF EDUCATION

[Docket No.: ED-2024-SCC-0111]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Carl D. Perkins Career and Technical Education Act State Plan Guide

AGENCY: Office of Career, Technical, and Adult Education (OCTAE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before January 2, 2025.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of

publication of this notice. Click on this link www.reginfo.gov/public/do/PRAMain to access the site. Find this information collection request (ICR) by selecting "Department of Education" under "Currently Under Review," then check the "Only Show ICR for Public Comment" checkbox. Reginfo.gov provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the "View Information Collection (IC) List" link. Supporting statements and other supporting documentation may be found by clicking on the "View Supporting Statement and Other Documents" link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Braden Goetz, (202) 245-7405.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Carl D. Perkins Career and Technical Education Act State Plan Guide.

OMB Control Number: 1830-0029.

Type of Review: Revision of a currently approved ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 54.

Total Estimated Number of Annual Burden Hours: 1,026.

Abstract: This information collection is used by the Department to request State Plans and annual revisions under the Carl D. Perkins Career and Technical Education Act of 2006. We are proposing to revise the ICR to provide data specifications for the numerators and denominators used to calculate the law's performance indicators so that they are measured in a manner that is consistent with the statute, reduce the collection of potentially duplicative information, give States more time to report education and employment outcomes to improve the accuracy and completeness of these data, and to

improve the consistency of performance data reported by States.

Dated: November 26, 2024.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2024–28204 Filed 11–29–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Record of Decision for the Long-Term Management and Storage of Elemental Mercury and Designation of a Long-Term Management and Storage Facility

AGENCY: Office of Environmental Management, U.S. Department of Energy.

ACTION: Record of decision and facility designation.

SUMMARY: The U.S. Department of Energy (DOE) is issuing this Record of Decision (ROD) for the long-term management and storage of elemental mercury to meet the purpose and need for agency action, which is to fulfill DOE's statutory responsibility for long-term management and storage of elemental mercury generated within the United States as required by the *Mercury Export Ban Act of 2008* and the *Frank R. Lautenberg Chemical Safety for the 21st Century Act* (together referred to herein as MEBA).

ADDRESSES: For copies of this ROD/MEBA Designation or the Mercury Storage SEIS–II, please contact Timothy Herald at U.S. Department of Energy, Office of Environmental Management, Office of Waste and Materials Management (EM–4.2), 1000 Independence Avenue SW, Washington, DC, 20585 or via email, Timothy.Herald@em.doe.gov. Electronic files can be accessed at <https://www.energy.gov/nepa/listings/records-decision-rod>.

FOR FURTHER INFORMATION CONTACT: For further information on the management and storage of elemental mercury, please contact Timothy Herald at Timothy.Herald@em.doe.gov or visit <https://www.energy.gov/em/long-term-management-and-storage-elemental-mercury>; by telephone: 240–243–8753. For general information on the Office of Environmental Management's *National Environmental Policy Act of 1969* (NEPA) process, please contact Bill Ostrum, NEPA Compliance Officer for the Office of Environmental Management, via email William.Ostrum@hq.doe.gov.

SUPPLEMENTARY INFORMATION: This ROD is issued for the *Long-Term Management and Storage of Elemental Mercury Supplemental Environmental Impact Statement* (DOE/EIS–0423–S2) (Mercury Storage SEIS–II), which evaluates the storage of up to 7,000 metric tons (7,700 tons) of elemental mercury in one or more existing facilities at alternative locations including a government facility at the Hawthorne Army Depot near Hawthorne, Nevada, and seven commercial candidate locations: Waste Control Specialists, LLC (WCS) near Andrews, Texas; Bethlehem Apparatus Company in Bethlehem, Pennsylvania; Perma-Fix Diversified Scientific Services, Inc., in Kingston, Tennessee; Veolia Environmental Services in Gum Springs, Arkansas; and Clean Harbors Environmental Services, with three alternative facilities in Pecatonica, Illinois; Greenbrier, Tennessee; and Tooele, Utah. This ROD announces DOE's decision to select WCS from its preferred alternative of selecting one or more of the existing commercial facilities evaluated in the SEIS–II. DOE is also issuing this document to designate a facility of the DOE for the long-term management and storage of elemental mercury generated within the United States in accordance with MEBA. In addition to the analysis in the Mercury Storage SEIS–II, DOE based its MEBA facility designation decision on a combination of factors including schedule, permitting, policy and technical considerations, as well as cost information (including information gained during an independent and competitive procurement process). DOE designates WCS as that facility in accordance with MEBA.

A. Background

The *Mercury Export Ban Act of 2008* (Pub. L. 110–414) and the 2016 *Frank R. Lautenberg Chemical Safety for the 21st Century Act* (Pub. L. 114–182) (together referred to herein as MEBA), address, among other things, the export and long-term management and storage of elemental mercury. MEBA prohibits the export of elemental mercury from the United States (U.S.) (with certain essential use exemptions). MEBA also directs the Secretary of the U.S. Department of Energy (DOE) to designate a facility or facilities of DOE for the long-term management and storage of elemental mercury generated within the U.S. (42 U.S.C. 6939f(a)(1)). MEBA further provides the Secretary of Energy with the authority to establish such terms, conditions, and procedures as are necessary to carry out this long-term management and storage function

(42 U.S.C. 6939f(f)). Consistent with these statutory provisions, and based on longstanding authorities and practice, DOE construes the term “facility of DOE” to include a facility leased from a commercial entity or another Federal agency over which DOE provides an appropriate level of responsibility and control.¹

The primary sources of elemental mercury in the United States include mercury generated as a byproduct of the gold-mining process and mercury reclaimed from recycling and waste-recovery activities. In addition, the DOE National Nuclear Security Administration (NNSA) stores at the Oak Ridge Reservation in Tennessee approximately 1,200 metric tons (1,300 tons) of elemental mercury that was acquired in support of NNSA's mission. As identified in the Mercury Storage SEIS–II, this NNSA elemental mercury is included in the SEIS–II (for analytical purposes), even though it is currently designated as a commodity and not waste.

In 2011, DOE prepared the *Final Long-Term Management and Storage of Elemental Mercury Supplemental Environmental Impact Statement* (DOE/EIS–0423) (2011 Mercury Storage EIS) to evaluate seven candidate locations for a facility for management and storage of elemental mercury, as well as a No-Action Alternative. The locations included use of existing facilities, new facility construction, or both. The candidate locations evaluated in 2011 were the DOE Grand Junction Disposal site near Grand Junction, Colorado (new construction); DOE Hanford Site near Richland, Washington (new construction); Hawthorne Army Depot (HWAD) near Hawthorne, Nevada (modification of existing facilities); DOE Idaho National Laboratory near Idaho Falls, Idaho (new construction and modification of an existing facility); Kansas City Plant in Kansas City, Missouri (existing facility); DOE Savannah River Site near Aiken, South Carolina (new construction); and the Waste Control Specialists LLC (WCS) site near Andrews, Texas (new construction and an existing facility).

In 2013, DOE prepared the *Final Long-Term Management and Storage of Elemental Mercury Supplemental Environmental Impact Statement* (DOE/EIS–0423–S1) (2013 Mercury Storage SEIS) to evaluate three additional alternative locations, all in the vicinity of the Waste Isolation Pilot Plant near

¹ DOE has further analyzed the meaning of “facility or facilities of the [DOE]” in a memo entitled *The Meaning of “Facility or Facilities of the Department of Energy”* in the Mercury Export Ban Act of 2008, in the Administrative Record.

Carlsbad, New Mexico (all new construction). The 2013 Mercury Storage SEIS also updated some of the relevant analyses for alternatives presented in the 2011 Mercury Storage EIS.

For the 2011 Mercury Storage EIS and the 2013 Mercury Storage SEIS, DOE estimated that up to approximately 10,000 metric tons (11,000 tons) of elemental mercury would need to be managed and stored at the DOE-designated facility during a 40-year period assumed for analysis purposes. In the 2011 Mercury Storage EIS and the 2013 Mercury Storage SEIS, DOE identified WCS as the preferred alternative.

On December 6, 2019, DOE issued a Record of Decision (ROD) to document its designation of the WCS site near Andrews, Texas, for the management and storage of up to 6,800 metric tons (7,480 tons) of elemental mercury in leased portions of existing buildings at the WCS site (84 FR 66890). The ROD was supported by DOE's *Supplement Analysis of the Final Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS-0423-SA-1), which evaluated changes in environmental conditions at WCS that had occurred since the initial analyses were completed in 2011 and 2013 and determined that the long-term management and storage of up to 6,800 metric tons of elemental mercury in existing buildings at the WCS site would not constitute a substantial change from the proposal evaluated in the 2011 Mercury Storage EIS and updated in the 2013 Mercury Storage SEIS. On December 23, 2019, DOE published a rule adding 10 CFR part 955, which established the fee for long-term management and storage of elemental mercury (84 FR 70402) (Fee Rule).

Two domestic generators of elemental mercury subsequently filed complaints in U.S. District Court challenging, among other things, the validity of the Fee Rule and the designation of WCS (*Coeur Rochester, Inc. v. Brouillette et al.*, Case No. 1:19-cv-03860-RJL [D.D.C. filed December 31, 2019] and *Nevada Gold Mines LLC v. Brouillette et al.*, Case No. 1:20-cv-00141-RJL [D.D.C. filed January 17, 2020]). As part of a settlement agreement, DOE withdrew the designation of WCS in an amended ROD on October 6, 2020 (85 FR 63105) and subsequently removed Part 955 (89 FR 33203).

On May 24, 2021, DOE issued a Notice of Intent in the **Federal Register** (86 FR 27838) notifying the public of DOE's intent to prepare a second *Long-*

Term Management and Storage of Elemental Mercury Supplemental Environmental Impact Statement (DOE/EIS-0423-S2) (Mercury Storage SEIS-II).

On July 8, 2022, DOE published a Notice of Availability (NOA) in the **Federal Register** (87 FR 40830) of the Draft Mercury Storage SEIS-II, inviting public comment during the 45-day public comment period and announcing two virtual public hearings. The U.S. Environmental Protection Agency (EPA) published an NOA in the **Federal Register** on the same day, which officially began the 45-day comment period on the Draft Mercury Storage SEIS-II (87 FR 40838). In response to a request from the public, DOE extended the public comment period on the Draft Mercury Storage SEIS-II and issued a **Federal Register** notice on August 12, 2022 (87 FR 49817), announcing a 15-day extension. The public comment period ended on September 6, 2022.

The Draft Mercury Storage SEIS-II evaluated the management and storage of up to 7,000 metric tons (7,700 tons) of elemental mercury in one or more permitted, existing facilities at alternative locations including HWAD, a government facility near Hawthorne, Nevada, and seven commercial candidate locations: WCS; Bethlehem Apparatus Company in Bethlehem, Pennsylvania; Perma-Fix Diversified Scientific Services, Inc., in Kingston, Tennessee; Veolia Environmental Services in Gum Springs, Arkansas; and Clean Harbors Environmental Services, with three alternative facilities in Pecatonica, Illinois; Greenbrier, Tennessee; and Tooele, Utah. In the Draft Mercury Storage SEIS-II, DOE identified its preferred alternative to select one or more of the existing commercial facilities for long-term management and storage of elemental mercury.

On February 9, 2024, EPA published in the **Federal Register** an NOA for the Final Mercury Storage SEIS-II (89 FR 9147). The Final Mercury Storage SEIS-II addressed comments received on the Draft Mercury Storage SEIS-II. Consistent with the Draft Mercury Storage SEIS-II, DOE identified its preferred alternative to select one or more of the existing commercial facilities for future designation as the long-term elemental mercury management and storage facility.

In parallel with the NEPA process, DOE conducted a competitive procurement action to identify a company that could provide (1) leased space for the long-term management and storage of elemental mercury generated in the United States and (2) the

associated services necessary for the long-term management and storage of elemental mercury. Information gained during the procurement action has informed the MEBA designation of the long-term elemental mercury management and storage facility.

B. Purpose and Need for Agency Action

MEBA prohibits the export of elemental mercury from the United States (subject to certain essential use exemptions) and, as of October 14, 2008, prohibits a Federal agency from conveying, selling, or distributing to any other Federal agency, any state or local government agency, or any private individual or entity any elemental mercury under the control or jurisdiction of the Federal agency (with certain limited exceptions).

Section 5 of MEBA (42 U.S.C. 6939f(a)(1)) directs the Secretary of Energy to designate a facility or facilities of the DOE for the purpose of long-term management and storage of elemental mercury generated within the United States. In the Mercury Storage SEIS-II (Section 2.1.2), DOE estimated the storage capacity needed for the 40-year period used for analysis to be up to 7,000 metric tons (7,700 tons) of elemental mercury. Because the statutory milestone date for the designated facility to become operational (January 1, 2019, see 42 U.S.C. 6939f(a)(2)) has passed, DOE also identified a need to designate a facility and begin accepting elemental mercury as soon as practicable.

C. Proposed Action

As identified in the Mercury Storage SEIS-II, DOE proposed to designate one or more facilities for the long-term management and storage of elemental mercury in accordance with MEBA.

D. Alternatives

As described in Section 2.8 of the Mercury Storage SEIS-II, DOE considered but dismissed the following from detailed analysis:

- Storage-related alternatives and certain transportation methods eliminated in the 2011 Mercury Storage SEIS,
- Treatment and disposal options,
- Commercial facilities described in Section 2.2 of the Mercury Storage SEIS-II,
- Sites within the DOE complex that met its objective criteria for consideration as a reasonable alternative, but as described in Section 2.2.4 of the Mercury Storage SEIS-II, no reasonable alternatives were identified, and
- Construction of a new facility.

While previously addressed in the 2011 EIS and 2013 SEIS, new facility construction was an alternative that was considered but dismissed from further analysis in the Mercury Storage SEIS–II based on intervening developments. The primary reasons that new construction was not considered to be a reasonable alternative in the SEIS–II include:

(1) Construction of a new facility generally would not meet the purpose and need for agency action because schedule delays associated with new construction would further exacerbate the missed statutory deadline for the DOE-designated management and storage facility to be operational by January 1, 2019. When compared to using existing facilities, DOE estimates that construction of a new facility would add at least five years to the time needed for the facility to be ready for the long-term management and storage of elemental mercury, delaying DOE's receipt of elemental mercury even further beyond the deadline prescribed by Congress and subjecting DOE to additional financial liabilities under 42 U.S.C. 6939f(b)(1)(B)(iv), and

(2) In 2020, a petition was filed with EPA for a site-specific Determination of Equivalent Treatment that would convert elemental mercury to a stabilized mercury compound for land disposal at a permitted disposal facility in Beatty, Nevada. If approved, this approach could offer a permanent disposal solution for elemental mercury in the U.S. EPA's review of the petition was ongoing during preparation of the Mercury Storage SEIS–II and no decision on the petition has been issued. However, DOE believes there is a realistic possibility that an approved treatment and disposal method for elemental mercury will be available within 10 years. If such a treatment and disposal method were to become available, it would likely decrease both the length of time the designated MEBA facility would need to store elemental mercury and the quantity of mercury to be stored there at any given time. Use of an existing facility allows for greater managerial flexibility to accommodate a shorter storage duration and associated lower projected inventory of elemental mercury.

In addition to the No-Action Alternative, the Mercury Storage SEIS–II identified and evaluated the potential environmental impacts associated with implementation of the Proposed Action in existing facilities at the following reasonable alternative locations:

- Hawthorne Army Depot in Hawthorne, Nevada;
- WCS in Andrews County, Texas;

- Bethlehem Apparatus in Bethlehem, Pennsylvania;
- Perma-Fix Diversified Scientific Services, Inc., in Kingston, Tennessee;
- Veolia Environmental Services in Gum Springs, Arkansas; and
- Clean Harbors Environmental Services (facilities in Pecatonica, Illinois; Greenbrier, Tennessee; and Tooele, Utah).

In 2022, DOE issued a Request for Proposals which initiated a competitive procurement process soliciting bids from commercial facilities for long-term management and storage of elemental mercury.² DOE received two proposals. One of the proposals was subsequently withdrawn by the submitting entity. While DOE, in the Mercury Storage SEIS–II, analyzed all of the existing facilities listed above, after the solicitation, there were only two viable action alternatives—one commercial option—WCS and one non-commercial option—HWAD.

Section E describes, generally, the potential environmental impacts of all of the action alternatives. As reflected in the Mercury Storage SEIS–II, the impacts for the facilities are generally comparable. Where differences are notable, these are noted in Section E. Section E also includes additional information for WCS, as the selected alternative, to provide further comparative context.

E. Potential Environmental Impacts

As noted in the Mercury Storage SEIS–II, quantitative evaluation of potential environmental consequences under the No-Action Alternative would be highly speculative. The SEIS–II qualitatively evaluates the potential environmental consequences of the various options that are available to entities under the No-Action Alternative (e.g., continued accumulation, storage at a permitted facility, or treatment and disposal in Canada). It is possible that some land, or land with more- or less-sensitive resources than those analyzed under the action alternatives, could be affected. Environmental consequences to land use and ownership, visual, geology, soils, ecological, and cultural and paleontological resource areas are dependent on the affected environment disturbed and amount of land disturbance that might occur. Potential environmental consequences to water resources would depend on the specific location and proximity to surface waterbodies and groundwater aquifers

and the current use of these water resources. If elemental mercury were transported to a RCRA-permitted storage facility or to a treatment facility, the potential transportation-related consequences would not be markedly different than those predicted for the action alternatives.

Under the No-Action Alternative, the management and storage of elemental mercury may or may not be conducted in accordance with RCRA regulations. For example, long-term accumulation at ore processor sites has not necessarily been permitted for long-term storage. As such, there could be a heightened risk of facility accidents and inconsistent management and storage of elemental mercury containers. This could lead to potentially greater environmental consequences associated with air quality, occupational and public health and safety, and ecological resources. In contrast, if much of the excess elemental mercury remained at the generating facilities and was not transferred to a DOE long-term storage facility, it is reasonable to expect that environmental consequences associated with transportation would be somewhat less than those predicted to occur under the action alternatives. Although, these transportation consequences would eventually be realized if the accumulated elemental mercury were eventually shipped offsite for storage, treatment, or disposal. If elemental mercury was transported to a RCRA-permitted treatment facility and then on to Canada for land disposal, transportation impacts would be similar to those predicted under the action alternatives. There would be no environmental consequences under the No-Action Alternative related to DOE storage at any of the candidate sites because a DOE elemental mercury storage facility(ies) would not be operated.

For the Proposed Action, the Mercury Storage SEIS–II evaluated the use of existing facilities at each of the alternative site locations for long-term management and storage of elemental mercury. In addition to operations of the facilities for long-term management and storage of elemental mercury, the analysis also included the assessment of potential impacts from the transportation of the elemental mercury from its origin sites to the long-term management and storage locations via truck. The analysis of potential environmental impacts included an evaluation of the following environmental resource areas: land use and ownership, and visual resources; geology and soils; water resources; air quality and noise; ecological resources;

² Elemental Mercury Long-Term Management and Storage Request for Proposal 89303320REM000081 (March 24, 2022), as amended (Request for Proposal).

cultural resources; site infrastructure; waste management; occupational and public health and safety; ecological risk; socioeconomic; and environmental justice.

Land use and ownership, and visual resources. No impacts on land use or visual resources would be expected for any of the alternative sites. If DOE were to designate an action alternative(s), it would obtain a leasehold interest or other form of property interest in that facility and would ensure that any such interest would afford DOE an appropriate level of responsibility and control over the facility. Such responsibility and control would include exercising the authority necessary to ensure that the facility is managed and operated in compliance with MEBA and other applicable legal requirements and through contractual provisions.

Additional time would be required to implement the HWAD alternative because of preparatory activities that would be required, including modifications or upgrades of multiple buildings, real estate transactions, and regulatory permitting that would not be required for the existing, permitted commercial facilities. DOE estimates the time required to complete the activities to allow receipt of elemental mercury at HWAD for long-term management and storage would be at least five years from the date that DOE designated HWAD for such use. Whereas, WCS would be capable of expeditiously accepting elemental mercury for long-term management and storage.

Geology, soils, and geologic hazards. Except for the HWAD site, no impacts to geology and soils are expected because no new construction or soil disturbance would be required. At HWAD, external modifications would require trenching for installation of needed utilities and other systems and services, resulting in negligible-to-minor impacts to previously disturbed, surrounding soils. This would also include the upgrade or addition of access roads to the modified buildings at HWAD. The area surrounding HWAD is one of high seismic activity. As discussed in the 2011 Mercury Storage EIS, while the Hawthorne, Nevada, area has historically experienced numerous earthquakes and significant ground shaking, no depot facilities have suffered damage due to earthquakes over the 60-plus years of operations. Updated USGS earthquake hazard data recharacterize the PGA at HWAD as 0.62 g (USGS 2021b). This is the upper end of the range for the sites evaluated in the Mercury Storage SEIS-II (0.05–0.62 g). There would be no new construction at

the WCS site and no additional impacts to geology and soils. The seismicity of the WCS region is on the lower end of the range of the alternative sites evaluated in the Mercury Storage SEIS-II.

Water resources. Storage of elemental mercury at any of the alternative sites would increase water use for sanitary purposes by up to 16,000 gallons per year. The increased water use would directly correlate to the number of additional personnel required during operations. No impacts to groundwater or surface water would be expected. None of the alternative sites are located within a designated 100-year regulated floodplain. The use of structural controls at the WCS Container Storage Building, such as concrete sealed floors and containment berms inside the building, would prevent release of mercury outside of the building and thus protect surface water and groundwater from potential impacts.

Air quality and noise. Impacts to air quality at each alternative site would be negligible. The transportation of elemental mercury from existing storage sites and generators over a 40-year period would release relatively small quantities of air pollutants and greenhouse gases (GHGs). The Mercury Storage SEIS-II also evaluated the social cost associated with these GHG emissions. An average of 13 truck trips per year would be required to transport the 7,000 metric tons of elemental mercury to a storage location(s). Total GHG emissions in carbon dioxide equivalent for the 40-year analysis period would be between 592 tons and 4,312 tons dependent on the facility location and whether or not pre-storage treatment³ is undertaken. The GHGs associated with WCS would be between 1,161 tons and 3,477 tons. Noise created by mercury storage operations, including transportation, would be indiscernible from existing noise levels.

Ecological resources. No impacts on terrestrial resources, aquatic resources, wetlands, and threatened or endangered and other protected species would be expected for any of the alternative sites because of the use of existing buildings, which would require minimal-to-no external modifications. Because no external modifications would be expected at WCS, there would be no impacts to terrestrial, aquatic, or threatened or endangered species.

³ The Mercury Storage SEIS-II evaluates transportation related impacts if elemental mercury is transported for pre-storage treatment and then transported to the designated management and storage facility, as well as impacts if the elemental mercury is only transported to the designated facility.

Cultural resources. Except for HWAD, there are no known prehistoric or historic cultural resources at any of the alternative site locations, and any potential unknown sites would not be impacted since elemental mercury storage would occur within existing structures with no new construction or surface disturbance planned. At HWAD, the Group 110 design storehouses that are proposed for elemental mercury storage are historic architectural properties that are part of a larger historic district, as are many of the structures at HWAD. None of the Group 110 structures would be impacted under the Proposed Action other than by proposed building modifications. These modifications would be coordinated with the Nevada State Historic Preservation Office (SHPO). If HWAD were considered for designation, DOE would further consult with the Nevada SHPO on the proposed storage building modifications to determine the potential impacts on those structures eligible for listing on the *National Register of Historic Places* and potential mitigation measures, as appropriate. The consultation process would need to be completed prior to construction activities involving the facilities at HWAD.⁴ Therefore, the key activities related to cultural resources that would need to be completed prior to any construction activities at HWAD would include: (1) designation of HWAD for long-term management and storage of elemental mercury, (2) detailed design of all modifications to specific HWAD buildings and infrastructure, and (3) closure of the consultation process with the Nevada SHPO. Because WCS would use an existing, permitted building and not require any external modifications, there would be no impacts to cultural resources.

Site infrastructure. The frequency of elemental mercury shipments is projected to be small (average of 13 per year) compared with baseline truck traffic; therefore, existing road systems would be adequate for supporting the transfer of elemental mercury. All of the alternative sites have sufficient utility capacity to support elemental mercury storage. Because most of the sites are existing, permitted, operating facilities, the incremental increase in utility requirements would be small. At HWAD, additional utility services would have to be extended to the designated storage buildings, as needed, including electricity, heating, water, and

⁴ The consultation process under Section 106 of the *National Historic Preservation Act* can be found at: <https://www.ecfr.gov/current/title-36/chapter-VIII/part-800/subpart-B>.

communications even though the service capacity on site is sufficient. Additionally, access roads would have to be upgraded and/or constructed, as appropriate. The average of approximately 13 shipments per year of elemental mercury would represent an increase of about 0.5 percent to current shipments to the WCS site and there would be no appreciable increase in utility use at WCS.

Waste management. The operation of an elemental mercury storage facility would be expected to generate a quantity of hazardous waste that is commensurate with the amount of elemental mercury stored at the facility. The estimate of hazardous waste generation was based on the analysis in the 2011 Mercury Storage EIS, which assumed some degree of repackaging of potential leaking containers as well as a larger amount (10,000 MT) of elemental mercury. This is an extremely conservative estimate and is bounding for any of the alternative sites because the elemental mercury containers would not be routinely opened at the storage facility, leaking containers are expected to be a rare event, and the projected maximum storage capacity is now 7,000 MT. Assuming a capacity of 7,000 metric tons of elemental mercury, the Mercury Storage SEIS-II conservatively estimated that up to 637, 55-gallon drums of hazardous waste could be generated over the 40-year analytical period (about 16, 55-gallon drums per year). Approximately 16,000 gallons of sanitary wastewater would be expected to be generated per year from elemental mercury management and storage operations. Considering that WCS likely would not increase staff to support this effort, there would be no, or limited, increase in sanitary wastewater impacts for the Proposed Action.

Occupational and public health and safety. The Mercury Storage SEIS-II presented potential impacts for normal operations, facility accidents, and transportation. Normal operations would involve the receipt and long-term management and storage of elemental mercury. Exposures could arise during normal operating conditions from small amounts of mercury vapor accumulating in the storage areas. The estimated consequences to involved workers, noninvolved workers, or members of the public are anticipated to be negligible. Facility accidents could include elemental mercury spills inside or outside the storage building. The SEIS-II concluded that the potential risks (considering accident probability and potential consequences) to workers and the offsite public would range between negligible and low for these spills. The

highest potential consequences would be associated with the beyond-design-basis earthquake that, theoretically, could cause a total building collapse. In this extremely unlikely event, members of the public around the Bethlehem Apparatus and Clean Harbors Greenbrier sites could be within 330 feet of the storage buildings and could be exposed to potentially lethal concentrations. However, the probability of a beyond-design-basis earthquake in these areas is extremely unlikely, as the peak ground acceleration (g) for Bethlehem, Pennsylvania, and Greenbrier, Tennessee, is only 0.10 g and 0.14 g, respectively, indicating areas of relatively low seismic activity. Additionally, these members of the public likely would evacuate from the area immediately, resulting in a reduction of the potential severity level to the low range. Residents and other members of the public at other alternative sites would be farther away from the facilities and not subject to the higher potential consequences of a beyond-design-basis earthquake. As mentioned above for geology and soils, the seismicity of the region around WCS is even lower (0.08 g) and a beyond-design-basis earthquake that resulted in the collapse of the Container Storage Building is even more unlikely. Additionally, the closest public access to the WCS site is about 0.62 miles and accident risks to members of the public would be negligible-to-low.

For transportation health and safety, the transportation risks under all alternative sites are a function of the number of miles driven and the nature of the accident (fire or no fire). The various potential accident scenarios evaluated in the Mercury Storage SEIS-II would result in risks that range from negligible to low. Transportation of 7,000 MT of elemental mercury over 40 years to WCS would require about 627,000 miles of truck shipments. Compared to other alternatives, this is near the middle of the range (315,118 to 1,079,301 miles).

Ecological risks. Consequences, and hence risks, would be negligible to all ecological receptors except if there were a fire that accompanied an accident. Without fire, the primary risk is inhalation of mercury vapor, which is an insignificant pathway for exposure to ecological receptors. Some ecological receptors (e.g., sediment-dwelling biota, soil invertebrates, American robin, river otter, and plants) could have low risks under some specific accident scenarios with a fire. Under a very specific scenario involving a fire, coincident with rain, sediment-dwelling biota

could be subject to moderate risks. These risks are a function of the total shipment miles and therefore, the ecological risks from transportation of elemental mercury to WCS would be mid-range for all alternatives evaluated in the Mercury Storage SEIS-II.

Socioeconomics. There would be negligible impacts on socioeconomic conditions, including overall employment population trends, available housing, and other community services in the regions of influence associated with all alternative sites, including WCS.

Environmental justice. While there may be individual minority or low-income families living relatively near some of the alternative site locations, the sites are (or would be, in the case of HWAD) permitted by their respective states under RCRA for the storage of hazardous waste. The Proposed Action would not increase the human health risk beyond that approved as part of the RCRA permitting process. Implementing the Proposed Action would result in negligible offsite human health and ecological risks from mercury emissions during normal operations and most accidents. Potentially high mercury concentrations could occur in the event of a beyond-design-basis earthquake for some sites (Bethlehem Apparatus and Clean Harbors Greenbrier). Considering the probability of such an event, the potential risks associated with this extremely unlikely scenario are considered low. Implementing the Proposed Action at WCS would result in negligible offsite human health and ecological risks to both individuals and communities from mercury emissions during normal operations and accidents. Therefore, there would be no disproportionate and adverse effects on communities with environmental justice concerns under the Proposed Action at WCS.

Cumulative impacts. Considering the negligible-to-low potential impacts of the Proposed Action, the potential contribution of the Proposed Action to the cumulative impacts to the region of each alternative site was shown to be negligible, including WCS. Cumulative impacts for the WCS Region of Influence, including potential interim storage of up to 40,000 MTUs (metric tons of uranium) of commercial spent nuclear fuel, were determined to be either small or moderate for the following resource areas: land use, geology and soils, groundwater, air quality, noise, and visual resources.

F. Environmentally Preferable Alternative

Under the Proposed Action, the potential impacts of continuing to operate the existing, permitted, commercial storage facilities would be similar regardless of the location. Transportation of mercury to any of the existing facilities would be comparable, resulting in negligible-to-low human health risks from transportation accidents. Greenhouse gas emissions from transportation of mercury would be relatively low for all of the alternatives. However, the emissions are lower for HWAD than most of the commercial alternatives, if no pre-storage treatment is assumed. If there were pre-storage treatment, then the emissions for HWAD are larger than most of the commercial alternatives. For HWAD, required modifications to the Group 110 design storehouses and the new or upgraded infrastructure at the site would result in higher potential impacts than at existing, permitted, commercial storage facilities. These modifications would also require consultation with the Nevada SHPO prior to any construction actions because the proposed buildings are potentially eligible for listing on the *National Register of Historic Places*. Therefore, management and storage of elemental mercury at an existing, permitted, commercial storage facility would be the environmentally preferable alternative.

Under the No-Action Alternative, DOE would not consolidate, manage, and store elemental mercury. However, the No-Action Alternative could include transportation to and from various locations, as described in Section 4.2.9.4 of the Mercury Storage SEIS–II, and therefore would not be significantly different than the transportation impacts under the action alternatives. Under the No-Action Alternative, mercury could be stored indefinitely at multiple non-DOE locations (some of which are currently not permitted); therefore, an impact of the No-Action Alternative, other than DOE being non-compliant with Federal statutes, would be widely dispersed storage of mercury in uncertain conditions. Taking this into consideration, the No-Action Alternative would not be the environmentally preferable alternative.

G. Comments Received on the Final Mercury Storage SEIS–II

During the development of the Final SEIS–II, DOE considered the alternatives, information, analyses, and objections submitted by Federal, State,

Tribal, and local governments and public commenters.

DOE received comment letters from Coeur and from the Environmental Protection Agency after publishing the Final Mercury Storage SEIS–II. DOE considered these comments in preparation of this ROD.

H. NEPA Decision

This NEPA decision is consistent with the preferred alternative, which is to designate one or more of the existing commercial facilities evaluated in the Final Mercury Storage SEIS–II. As identified in Section E, Potential Environmental Impacts, the impacts presented in the Mercury Storage SEIS–II for the WCS site were the same or lower than most of the other existing, permitted, commercial storage facility sites analyzed in the SEIS–II. The environmental impacts are generally expected to be less than those at the HWAD site, and designation of the WCS site is expected to allow for the long-term management and storage of elemental mercury years earlier than if HWAD were utilized. The No Action Alternative would not fulfill DOE's statutory obligations.

Based on consideration of the analysis in the Mercury Storage SEIS–II as well as other considerations detailed below in Section J, DOE has decided to select WCS for designation as the facility for long-term management and storage of elemental mercury. The additional basis for the MEBA designation decision is included in Section J, below.

I. Mitigation

The Mercury Storage SEIS–II determined that potential environmental impacts associated with DOE's long-term management and storage of 7,000 metric tons (7,700 tons) of elemental mercury would generally be negligible-to-low and that the storage and management of elemental mercury would be subject to regulatory oversight by permitting agencies, including compliance with RCRA. Many features of WCS are designed to meet applicable permitting standards or to otherwise avoid harm to the environment. The WCS storage facility is located on a 13,500-acre tract of private land with no human residents within 3.4 miles. SEIS–II (Sections 3.3.1.1, 3.3.11). The facility design includes concrete sealed floors with a reinforced concrete foundation, and bermed container storage areas that provide protection from the external environment and isolation from other storage areas in the event of a leaking source. SEIS–II (Sections 4.4.3.1, 2.3.2). WCS also features numerous safety and accident

response systems, including a fire suppression system, an exhaust-fan-ventilated storage area, a mercury vapor monitor, and a full emergency response organization that includes capabilities for radiological, hazardous materials, fire, and medical incidents. SEIS–II (Sections 2.3.2; 3.3.9.2). Based upon the limited potential for adverse environmental impacts identified in the SEIS–II, the robust design and accident response features of WCS, terms and conditions of the proposed contract (see Section J), and applicable regulatory and statutory requirements, the selected alternative incorporates all practicable means to avoid or minimize environmental harm.

J. Designation Decision Under MEBA

As explained in more detail above, the alternatives analyzed in detail in the SEIS–II included an existing Federal facility (HWAD) and commercial facilities at various locations (WCS; Bethlehem Apparatus; Perma-Fix Diversified Scientific Services; Veolia Environmental Services; and Clean Harbors Environmental Services).

During the NEPA process, DOE also considered and dismissed numerous other alternatives. The alternative of constructing a new facility was dismissed from detailed analysis in the SEIS–II because it would add at least five years to the timeline for DOE's designated MEBA facility to become operational and ready to receive elemental mercury, when compared to the designation of an existing, permitted facility. New construction would also introduce uncertainty in the timeline for having a fully operational MEBA facility, as schedule delays in the construction and/or RCRA permitting process or other issues outside DOE's control might prevent a newly constructed facility from becoming operational for significantly more than five years. A newly constructed facility would therefore not meet DOE's need to begin accepting elemental mercury as soon as practicable. DOE also considered the possibility of repurposing an existing facility on DOE property. However, DOE was unable to identify any such facility that met certain minimum criteria for future use as the designated MEBA facility.⁵

⁵ These criteria included that the facility: must not create a significant conflict with any existing DOE site mission and not interfere with future mission compatibility; must be suitable for mercury storage with the capability and flexibility for operational expansion, if necessary; must be capable of complying with RCRA permitting requirements, including siting requirements; must have supporting infrastructure and a capability or potential capability for flooring that would support mercury loadings; must be compatible with local

In parallel with the most recent NEPA evaluation, DOE conducted an independent and competitive procurement process to evaluate a contractor(s) that could provide DOE both a leasehold interest in, and the services associated with, a long-term elemental mercury management and storage facility (LTEMFSF) meeting DOE specifications and subject to DOE's technical direction. As part of that process, a Request for Information/Sources Sought notice was published on October 14, 2020, a synopsis was posted September 21, 2021, and the Request for Proposals (RFP) was issued March 24, 2022. Two timely proposals were received by the due date of June 1, 2022. One of the proposals was later withdrawn, but through this procurement process, DOE identified one commercial facility that responded to the RFP. DOE evaluated its response and determined that it met the lowest evaluated price and met or exceeded the acceptability standards for non-cost factors in accordance with 48 CFR 15.101–2. The facility was WCS. The owners of the other facilities analyzed as commercial alternatives in the SEIS–II did not compete in the procurement process.

DOE hereby designates as the LTEMFSF pursuant to MEBA, WCS in Andrews County, Texas. In addition to the reasons discussed previously under Section H, NEPA Decision, the decision to designate WCS as the LTEMFSF is based on the following considerations.

First, of the alternatives evaluated, the designation of WCS allows for the most expeditious and certain timeline for DOE to have an LTEMFSF operational and ready to accept elemental mercury, consistent with MEBA's fundamental objective of providing a safe option for storing domestic elemental mercury at a facility or facilities of the DOE. Congress initially charged DOE to designate a LTEMFSF that would be operational by January 1, 2013, and later extended that deadline to January 1, 2019. Public Law 110–414, 122 Stat. 4344 (Oct. 14, 2008); Public Law 114–182, 130 Stat. 478 (June 22, 2016). Although those milestone dates have passed, Congress has not extended the date by which the LTEMFSF must be operational. DOE therefore identified a need to designate an LTEMFSF facility and begin accepting elemental mercury as soon as practicable. WCS is an established, existing, permitted waste facility

capable of expeditiously accepting elemental mercury for long-term management and storage. In contrast, selecting HWAD, a facility that requires significant modifications and development processes, time-consuming real estate transactions, and a waste permit, or constructing a new facility, would both (1) extend the timeline for having an operational storage facility, and (2) create additional uncertainty in that timeline. In a best-case scenario, selecting HWAD or constructing a new facility would likely result in elemental mercury continuing to be stored for at least five years longer in widely dispersed storage locations in uncertain conditions instead of in a DOE-controlled LTEMFSF.

Furthermore, issues outside DOE's control could arise during the planning, budgeting, construction, and/or permitting processes that prevent HWAD or a new facility from becoming fully operational for much longer than five years. For example, due to statutory prohibitions on the use of Department of Defense (“DoD”) installations for the storage of toxic or hazardous materials not owned by the DoD, 10 U.S.C. 2692, the relevant portion of HWAD would likely need to be purchased by or otherwise transferred to DOE before non-DoD elemental mercury could be stored at the facility. An acquisition or administrative transfer process would require actions by multiple Federal agencies, including the Department of the Army and the General Services Administration, and the timing and decision making of those agencies is outside DOE's control. The additional time required to build a new facility or modify an existing facility like HWAD would cause DOE to fall significantly further behind the statutory deadline for a DOE-designated LTEMFSF to be operational. MEBA imposed financial consequences on DOE for missing the January 1, 2019, deadline, such that the longer it takes for DOE to have an operational LTEMFSF, the greater the amount of private mercury storage costs that are borne by DOE, and indirectly, by the United States.⁶ Selecting WCS as the designated LTEMFSF brings DOE into compliance with MEBA's directives as soon as practicable, avoids introducing

uncertainty in the timeline for when the LTEMFSF will become operational and capable of accepting elemental mercury, and minimizes DOE's financial responsibility for the ongoing storage of elemental mercury by generators pending the availability of the LTEMFSF.

Second, leasing space for management and storage at WCS provides DOE managerial flexibility to adjust to evolving circumstances as it conducts its management and storage obligations pursuant to MEBA. Based on currently available information, DOE believes there is a realistic possibility that an approved treatment and disposal method for elemental mercury in the United States will be available within 10 years. An approved treatment and disposal method would likely decrease both the length of time the designated MEBA facility would need to store elemental mercury and the quantity of elemental mercury to be stored. Given the uncertainty in how long the LTEMFSF will be needed, designating WCS enables DOE to evaluate the impact of any forthcoming treatment and disposal option or other statutory or regulatory changes that may affect the expected storage duration or capacity, without making the larger commitments of capital and administrative resources necessary to purchase, construct, or significantly modify a federally owned facility.

Additionally, because there is a realistic possibility that a treatment and disposal method for domestic elemental mercury will be available within 10 years, and because it will take at least 5 years after designation for HWAD or a newly constructed facility to be ready to receive elemental mercury, investing resources to modify or construct a facility that may only be used for 5 years is not cost effective or a prudent investment of resources. DOE has prepared a relative cost comparison workbook based on a 2007 EPA report that demonstrates that, in the short-term (e.g., about 10 years), management and storage of elemental mercury at an existing, permitted, commercial facility like WCS is likely to be less expensive than any of the previously evaluated alternatives requiring capital improvements (DOE-New, DOE-Existing/Retrofit, and Hawthorne/Retrofit). Other factors not reflected in DOE's cost comparison workbook also weigh in favor of selecting WCS. The workbook does not include administrative burdens associated with a federally funded project and DOE's acquisition of real property, which would likely be required to establish an LTEMFSF at HWAD (see 10 U.S.C. 2692) or for construction of a new facility.

and regional land use plans if used for mercury storage, and new construction would be feasible, as may be required; must be accessible to major transportation routes; and must have sufficient information on hand to adequately characterize the site. SEIS–II (Section 2.2.4).

⁶ Because the LTEMFSF was not operational by January 1, 2019, MEBA compels DOE to subtract the costs to mercury generators of temporarily accumulating certain elemental mercury after that date from DOE's future fee assessments to those generators. 42 U.S.C. 6939f(b)(1)(B)(iv). The more time that passes after January 1, 2019, and before the LTEMFSF is operational and accepts custody of elemental mercury, the greater the amount DOE will need to subtract from its future fee assessments to mercury generators, resulting in correspondingly greater costs to the United States.

Selecting WCS avoids these costs to DOE and other Federal agencies. The cost comparison workbook also does not reflect the fact that MEBA, as amended, makes DOE indirectly financially responsible for the costs of storing certain elemental mercury accumulated by mercury generators after January 1, 2019, by requiring DOE to subtract these costs from its future MEBA fee assessments to these generators. 42 U.S.C. 6939f(b)(1)(B)(iv). These indirect costs to DOE, in the form of foregone future fee assessments, increase the longer it takes DOE's designated LTEMFSF to become operational. Selecting an existing, permitted facility like WCS minimizes these costs.

Third, DOE's selection of WCS as the Secretary's designated LTEMFSF satisfies the requirement of MEBA that "the Secretary of Energy shall designate a facility or facilities of the Department of Energy for the purpose of long-term management and storage of elemental mercury generated within the United States." MEBA section 5(a)(1) (42 U.S.C. 6939f(a)(1)). MEBA does not define the phrase, "facility or facilities of the Department of Energy[.]" but it does state that "[t]he Secretary is authorized to establish such terms, conditions, and procedures as are necessary to carry out this section." DOE construes the phrase "facility or facilities of the Department of Energy" to include a facility leased from a commercial entity or another Federal agency, over which DOE provides an appropriate level of responsibility and control. This construction is consistent with MEBA's plain language and DOE's operational history. Certain comments on the Draft SEIS-II asserted that "facility or facilities of the Department of Energy" could only mean one or more facilities owned by DOE or owned and operated by DOE. However, MEBA does not expressly require the designated facility to be owned by DOE or even by the U.S. government. Similarly, MEBA does not mandate that DOE employees operate the designated facility and does not prohibit DOE from using qualified contractors in connection with the facility. The phrase "facility or facilities of the Department of Energy" encompasses facilities leased by DOE and subject to an appropriate level of DOE responsibility and control. This structure provides DOE flexibility to select a facility that best serves the various requirements and purposes of MEBA and the fiscal and mission responsibilities of DOE, regardless of ownership.

DOE has determined that the lease and contract with WCS, developed through DOE's competitive procurement

process, will provide DOE a leasehold interest in WCS property and an appropriate level of responsibility and control over the property such that it will become a "facility or facilities of the Department of Energy" within the meaning of MEBA Section 5(a)(1). By entering into the lease and contract DOE can ensure that the LTEMFSF is managed and operated in compliance with MEBA and other applicable legal requirements, including those addressing the protection of human health and the environment. For example, as set forth in the RFP, among other control measures, DOE will ensure that the designated facility: (1) complies with all applicable local, state, and Federal regulations including all applicable RCRA requirements; (2) employs a fully enclosed, weather-protected structure that complies with all applicable building, fire, and life safety codes and standards; (3) meets RCRA and Department of Transportation-compliant performance measures covering, among other things, receiving, handling, container storage, and security; (4) satisfies applicable local, state, and Federal regulatory requirements for recordkeeping and reporting; and (5) submits operating records, inventories, and other reports to DOE for periodic review. In addition to contractually imposed oversight, the arrangement between DOE and WCS will involve DOE entering into a lease agreement covering the premises where the operations will occur. The lease will require, among other things, the premises to be used exclusively for DOE elemental mercury management and storage, consistent with contract provisions governing operations at the premises, and will grant DOE access to the premises.⁷ Awarding the contract to WCS will formally conclude DOE's independent and competitive procurement process, which was conducted in compliance with applicable Federal Acquisition Regulations.⁸

Therefore, DOE has selected WCS for designation as the LTEMFSF under MEBA. As identified in Section E, Potential Environmental Impacts, the impacts presented in the Mercury Storage SEIS-II for the WCS site were comparable to the other action alternatives. This MEBA decision is consistent with the preferred alternative in the Final Mercury Storage SEIS-II and the NEPA decision in this ROD.

⁷ Request for Proposals, Section J.5.

⁸ The selection of WCS is also consistent with the Federal Government's general policy of using commercial services and capabilities when they are sufficient to meet the mission needs. See, e.g. FAR Part 12.

Although this document satisfies DOE's obligation to designate a facility or facilities of the DOE for the purpose of long-term management and storage of elemental mercury generated within the United States, MEBA Section 5(b) (42 U.S.C. 6939f(b)) also requires DOE to assess and collect a fee at the time that elemental mercury is delivered to the designated facility. As explained in responses to comments on the Draft SEIS-II, after publication of this document, DOE intends to focus on issuing a rule to establish the fee. At this time, however, DOE remains unable to accept elemental mercury from generators at a facility of the Department of Energy for long-term management and storage. DOE acknowledges that the temporary storage provisions of MEBA Section 5(g)(2) (42 U.S.C. 6939f(g)(2)) remain in effect until DOE is able to accept elemental mercury shipments at the designated facility or facilities, which will generally require applying DOE's future fee rule to assess a fee pursuant to MEBA Section 5(b).

Signing Authority

This document of the Department of Energy was signed on November 21, 2024, by Candice Trummell, Senior Advisor for Environmental Management, pursuant to delegated authority from the Secretary of Energy. The document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on November 22, 2024.

Treena V. Garrett,

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

[FR Doc. 2024-27859 Filed 11-29-24; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Privacy Act of 1974; System of Records

AGENCY: U.S. Department of Energy.

ACTION: Notice of a modified system of records.

SUMMARY: As required by the Privacy Act of 1974 and the Office of

Management and Budget (OMB) Circulars A–108 and A–130, the Department of Energy (DOE or the Department) is publishing notice of a modification to an existing Privacy Act System of Records. DOE proposes to amend System of Records DOE–26 Official Travel Records. This System of Records Notice (SORN) is being modified to align with new formatting requirements, published by OMB, and to ensure appropriate Privacy Act coverage of business processes and Privacy Act information.

DATES: This modified SORN will become applicable following the end of the public comment period on January 2, 2025 unless comments are received that result in a contrary determination.

ADDRESSES: Written comments should be sent to Ken Hunt, Chief Privacy Officer, U.S. Department of Energy, 1000 Independence Avenue SW, Rm. 8H–085, Washington, DC 20585, by facsimile at (202) 586–8151, or by email at privacy@hq.doe.gov.

FOR FURTHER INFORMATION CONTACT: Ken Hunt, Chief Privacy Officer, U.S. Department of Energy, 1000 Independence Avenue SW, Rm. 8H–085, Washington, DC 20585, by facsimile at (202) 586–8151, by email at privacy@hq.doe.gov, or by telephone (240) 686–9485.

SUPPLEMENTARY INFORMATION: On January 9, 2009, DOE published a Compilation of its Privacy Act Systems of Records, which included System of Records DOE–26 Official Travel Records. This notice proposes amendments to the system locations section of that system of records by removing the following system locations where DOE–26 is no longer applicable: Office of Science, Chicago and Oak Ridge Offices, Alaska Power Administration, National Energy Technology Laboratory (Pittsburgh Office), Naval Petroleum and Oil Shale Reserves in Colorado, Utah, and Wyoming, Naval Petroleum Reserves in California, and the National Nuclear Security Administration (NNSA) Nevada Site Office. This notice updates addresses for the following sites: NNSA John A. Gordon Albuquerque Complex, Office of River Protection, and the Southwestern Power Administration. In the “Routine Uses” section, this modified notice deletes a previous routine use concerning efforts responding to a suspected or confirmed loss of confidentiality of information as it appears in DOE’s compilation of its Privacy Act systems of records (January 9, 2009) and replaces it with one to assist DOE with responding to a suspected or confirmed breach of its

records of Personally Identifiable Information (PII), modeled with language from OMB’s Memorandum M–17–12, “Preparing for and Responding to a Breach of Personally Identifiable Information” (January 3, 2017). Further, this notice adds one new routine use to ensure that DOE may assist another agency or entity in responding to the other agency’s or entity’s confirmed or suspected breach of PII, as appropriate, as aligned with OMB’s Memorandum M–17–12. To “Categories of Individuals Covered by the System,” this notice now includes individuals who travel or relocate “as part of their official duties.” To the “Categories of Records in the System,” this notice now includes age, passport information, known traveler number or other official identifying number, travel sponsor, or host information.” “Record Source Categories” now includes “travel and financial systems” and “human resource systems.” This notice now includes a routine use that allows the Department to disclose information “to protect national security and the security of activities, information, installations, property, or individuals.” This new routine use is listed as number seven. “Policies and Practices for Retrieval of Records” now include the possibility that records may be retrieved using a “unique identifier, such as employee ID.” An administrative change required by the FOIA Improvement Act of 2016 extends the length of time a requestor is permitted to file an appeal under the Privacy Act from 30 to 90 days. Both the “System Locations” and “Administrative, Technical and Physical Safeguards” sections have been modified to reflect the Department’s usage of cloud-based services for records storage. Language throughout the SORN has been updated to align with applicable Federal privacy laws, policies, procedures, and best practices.

SYSTEM NAME AND NUMBER:

DOE–26 Official Travel Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Systems leveraging this SORN may exist in multiple locations. All systems storing records in a cloud-based server are required to use government-approved cloud services and follow National Institute of Standards and Technology (NIST) security and privacy standards for access and data retention. Records maintained in a government-approved cloud server are accessed

through secure data centers in the continental United States.

U.S. Department of Energy, Headquarters, 1000 Independence Avenue SW, Washington, DC 20585.

U.S. Department of Energy, Bonneville Power Administration, P.O. Box 3621, Portland, OR 97208.

U.S. Department of Energy, Environmental Management Consolidated Business Center (EMCBC), 550 Main Street, Rm. 7–010, Cincinnati, OH 45202.

U.S. Department of Energy, Idaho Operations Office, 1955 Fremont Avenue, Idaho Falls, ID 83415.

U.S. Department of Energy, NNSA Naval Reactors Field Office, Pittsburgh Naval Reactors, P.O. Box 109, West Mifflin, PA 15122–0109.

U.S. Department of Energy, NNSA Naval Reactors Field Office, Schenectady Naval Reactors, P.O. Box 1069, Schenectady, NY 12301.

U.S. Department of Energy, John A. Gordon Albuquerque Complex, 24600 20th Street SE, Albuquerque, NM 87116.

U.S. Department of Energy, Hanford Field Office, P.O. Box 550, Richland, WA 99352.

U.S. Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, SC 29801.

U.S. Department of Energy, Southeastern Power Administration, 1166 Athens Tech Road, Elberton, GA 30635–6711.

U.S. Department of Energy, Southwestern Power Administration, One West Third Street, Suite 1500, Tulsa, OK 74103.

U.S. Department of Energy, Strategic Petroleum Reserve Project Management Office, 900 Commerce Road East, New Orleans, LA 70123.

U.S. Department of Energy, Western Area Power Administration, P.O. Box 281213, Lakewood, CO 80228–8213.

SYSTEM MANAGER(S):

Headquarters: Chief Financial Officer, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585.

Field Offices: The field Chief Financial Officers of the “System Locations” listed above are the system managers for their respective portions of this system.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*; 5 U.S.C. 301; 5 U.S.C. chapter 57; Policy and Procedures Manual for Guidance of Federal Agencies, titles 3 and 4; Federal Travel Regulation; Federal Property Management Regulations 101–41; Department of Energy Order 550.1, current version.

PURPOSE(S) OF THE SYSTEM:

Records in this system are maintained and used by DOE to document official domestic and foreign travel and relocation expenditures and to support reimbursement of allowable expenses.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who travel or relocate as part of their official duties or at the expense of DOE, including NNSA.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, weight, age, address, telephone number, passport information, known traveler number or other official identifying number, travel sponsor, host information, authorization number, travel itinerary, mode, and purpose of travel, advance amount, expenses claimed, amounts reimbursed, charge card account numbers, residential sales records, and receipts.

RECORD SOURCE CATEGORIES:

Individual travelers, supervisors, government travel offices, travel and financial systems, human resource systems, and finance office standard references.

ROUTINE USES OF RECORDS IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

1. A record from this system may be disclosed as a routine use to the U.S. Treasury for payment of a claim.

2. A record from this system may be disclosed as a routine use to the U.S. General Accounting Office for audit and verification of accuracy and legality of disbursements.

3. A record from this system may be disclosed as a routine use to the Internal Revenue Service for notification regarding taxable reimbursements.

4. A record from this system may be disclosed as a routine use to the General Services Administration for audit of transportation services.

5. A record from this system may be disclosed as a routine use to DOE contractors in performance of their contracts, and their officers and employees who have a need for the record in the performance of their duties. Those provided information under this routine use are subject to the same limitations applicable to Department officers and employees under the Privacy Act.

6. A record from this system may be disclosed as a routine use to the appropriate local, tribal, state, or Federal agency when records, alone or in conjunction with other information, indicate a violation or potential violation of law whether civil, criminal, or regulatory in nature, and whether

arising by general statute or particular program pursuant thereto.

7. A record from this system may be disclosed as a routine use to the appropriate local, tribal, state, or Federal agency to protect national security and the security of activities, information, installations, property, or individuals.

8. A record from this system may be disclosed as a routine use to a member of Congress submitting a request involving a constituent when the constituent has requested assistance from the member concerning the subject matter of the record. The member of Congress must provide a copy of the constituent's signed request for assistance.

9. A record from this system may be disclosed as a routine use to appropriate agencies, entities, and persons when (1) the Department suspects or has confirmed that there has been a breach of the system of records; (2) the Department has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, DOE (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

10. A record from this system may be disclosed as a routine use to another Federal agency or Federal entity, when the Department determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records may be stored as paper records or electronic media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by name or other unique identifier, such as employee ID, or travel authorization number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Retention and disposition of these records is in accordance with the National Archives and Records Administration-approved records disposition schedule with a retention of 6 years.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Electronic records may be secured and maintained on a cloud-based software server and operating system that resides in Federal Risk and Authorization Management Program (FedRAMP) and Federal Information Security Modernization Act (FISMA) hosting environment. Data located in the cloud-based server is firewalled and encrypted at rest and in transit. The security mechanisms for handling data at rest and in transit are in accordance with DOE encryption standards. Records are protected from unauthorized access through the following appropriate safeguards:

- *Administrative:* Access to all records is limited to lawful government purposes only, with access to electronic records based on role and either two-factor authentication or password protection. The system requires passwords to be complex and to be changed frequently. Users accessing system records undergo frequent training in Privacy Act and information security requirements. Security and privacy controls are reviewed on an ongoing basis.

- *Technical:* Computerized records systems are safeguarded on Departmental networks configured for role-based access based on job responsibilities and organizational affiliation. Privacy and security controls are in place for this system and are updated in accordance with applicable requirements as determined by NIST and DOE directives and guidance.

- *Physical:* Computer servers on which electronic records are stored are located in secured Department facilities, which are protected by security guards, identification badges, and cameras. Paper copies of all records are locked in file cabinets, file rooms, or offices and are under the control of authorized personnel. Access to these facilities is granted only to authorized personnel and each person granted access to the system must be an individual authorized to use or administer the system.

RECORD ACCESS PROCEDURES:

The Department follows the procedures outlined in title 10 CFR 1008.4. Valid identification of the

individual making the request is required before information will be processed, given, access granted, or a correction considered, to ensure that information is processed, given, corrected, or records disclosed or corrected only at the request of the proper person.

CONTESTING RECORD PROCEDURES:

Any individual may submit a request to the System Manager and request a copy of any records relating to them. In accordance with 10 CFR 1008.11, any individual may appeal the denial of a request made by him or her for information about or for access to or correction or amendment of records. An appeal shall be filed within 90 calendar days after receipt of the denial. When an appeal is filed by mail, the postmark is conclusive as to timeliness. The appeal shall be in writing and must be signed by the individual. The words "PRIVACY ACT APPEAL" should appear in capital letters on the envelope and the letter. Appeals of denials relating to records maintained in government-wide System of Records reported by Office of Personnel Management (OPM), shall be filed, as appropriate, with the Assistant Director for Agency Compliance and Evaluation, OPM, 1900 E Street NW, Washington, DC 20415. All other appeals relating to DOE records shall be directed to the Director, Office of Hearings and Appeals (OHA), 1000 Independence Ave. SW, Washington, DC 20585.

NOTIFICATION PROCEDURES:

In accordance with the DOE regulation implementing the Privacy Act, 10 CFR part 1008, a request by an individual to determine if a system of records contains information about themselves should be directed to the U.S. Department of Energy, Headquarters, Privacy Act Officer. The request should include the requester's complete name and the time period for which records are sought.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

This SORN was last published in the **Federal Register**, 74 FR 1026–1028, on January 9, 2009.

Signing Authority

This document of the Department of Energy was signed on Nov 27, 2024, by Ann Dunkin, Senior Agency Official for Privacy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in

compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on November 26, 2024.

Treena V. Garrett,

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

[FR Doc. 2024–28153 Filed 11–29–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG25–43–000.

Applicants: Wild Plains Wind Project, LLC.

Description: Wild Plains Wind Project, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 11/21/24.

Accession Number: 20241121–5203.

Comment Date: 5 p.m. ET 12/12/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER22–2467–001.

Applicants: ISO New England Inc., Eversource Energy Service Company (as agent), New England Power Company, Vermont Electric Power Company, Inc.

Description: Compliance filing: Eversource Energy Service Company (as agent) submits tariff filing per 35: Filing Providing Order No. 881 Implementation Details to be effective N/A.

Filed Date: 11/22/24.

Accession Number: 20241122–5048.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER22–2468–001.

Applicants: ISO New England Inc., New England Power Company, Vermont Electric Power Company, Inc., Eversource Energy Service Company (as agent).

Description: Compliance filing: ISO New England Inc. submits tariff filing per 35: Filing Providing Order No. 881 Implementation Details to be effective N/A.

Filed Date: 11/22/24.

Accession Number: 20241122–5049.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER24–2033–001.

Applicants: GridLiance High Plains LLC.

Description: Compliance filing: GHP Order 2023 Further Compliance Filing to be effective 9/1/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5047.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER24–2899–002.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Amendment of ER25–2699–001 re: Amendment of GIA SA No. 7337; AF2–238 to be effective 7/29/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5040.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–509–000.

Applicants: FirstLight Power Management LLC.

Description: 205(d) Rate Filing: Normal filing 2024 to be effective 1/20/2025.

Filed Date: 11/21/24.

Accession Number: 20241121–5208.

Comment Date: 5 p.m. ET 12/12/24.

Docket Numbers: ER25–510–000.

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 d/b/a National Grid 2024 PBOP Refund to be effective 1/21/2025.

Filed Date: 11/22/24.

Accession Number: 20241122–5007.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–511–000.

Applicants: PJM Interconnection, L.L.C.

Description: 205(d) Rate Filing: Original GIA Service Agreement No. 7406; Project Identifier No. AG1–301 to be effective 10/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5046.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–512–000.

Applicants: Midcontinent Independent System Operator, Inc., Ameren Illinois Company.

Description: 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): 2024–11–22_SA 4403 Ameren IL-Cumberland Road North Solar E&P (J1744) to be effective 11/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5052.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–513–000.

Applicants: Public Service Company of Colorado.

Description: 205(d) Rate Filing: 2024–11–22—PSC–SLVREC–Stockade Circuit 4–817–0.0.0 to be effective 1/21/2025.

Filed Date: 11/22/24.

Accession Number: 20241122–5056.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–514–000.

Applicants: Baltimore Gas and Electric Company, PJM Interconnection, L.L.C.

Description: 205(d) Rate Filing: Baltimore Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii): BGE submits Revisions to Tariff, Attachment H–2A Clean-Up to be effective 1/1/2021.

Filed Date: 11/22/24.

Accession Number: 20241122–5066.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–515–000.

Applicants: PJM Interconnection, L.L.C.

Description: 205(d) Rate Filing: Original GIA & CSA, SA Nos. 7404 & 7405; Project Identifier No. AG1–511 to be effective 10/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5094.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–516–000.

Applicants: Tucson Electric Power Company.

Description: 205(d) Rate Filing: OATT Revisions to Creditworthiness Procedures to be effective 1/6/2025.

Filed Date: 11/22/24.

Accession Number: 20241122–5095.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–517–000.

Applicants: NGI-Kayenta II, LLC.

Description: Tariff Amendment: Notice of Cancellation of Market-Based Rate Tariff (Entire TDB) to be effective 12/22/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5096.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–518–000.

Applicants: Electricity Maine, LLC.

Description: Compliance filing: Revised Tariff & New Baseline to be effective 11/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5100.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–519–000.

Applicants: ISO New England Inc., New England Power Pool Participants Committee.

Description: ISO New England Inc., et al. Filing of Installed Capacity Requirements, Hydro-Quebec Interconnection Capability Credits and Related Values for 2025–2026, 2026–2027 and 2027–2028 Annual

Reconfiguration Auctions under ER25–519.

Filed Date: 11/22/24.

Accession Number: 20241122–5103.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–520–000.

Applicants: Electricity NH, LLC.

Description: Compliance filing: Revised Tariff and New Baseline to be effective 11/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5104.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–521–000.

Applicants: Perigee Energy, LLC.

Description: Compliance filing: Revised Tariff and New Baseline to be effective 11/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5108.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–522–000.

Applicants: Desert Quartzite, LLC.

Description: 205(d) Rate Filing: 2024–11–22 Desert Quartzite Ministerial Amendment to Cotenancy () Agmt to be effective 7/22/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5111.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–523–000.

Applicants: Provider Power MASS, LLC.

Description: Compliance filing: Revised Tariff and New Baseline to be effective 11/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5114.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–524–000.

Applicants: Spark Energy, LLC.

Description: Compliance filing: Revised Tariff and New Baseline to be effective 11/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5116.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–525–000.

Applicants: Casselman Windpower LLC.

Description: 205(d) Rate Filing: Common Facilities Ownership and Use Agreement to be effective 10/22/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5141.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–527–000.

Applicants: Censtar Energy Corp.

Description: Compliance filing: Revised Market-Based Rate Tariff to be effective 11/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5159.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–528–000.

Applicants: Censtar Operating Company, LLC.

Description: Compliance filing: Revised Market-Based Rate Tariff to be effective 11/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5163.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–529–000.

Applicants: Major Energy Electric Services, LLC.

Description: Compliance filing: Revised Market-Based Rate Tariff to be effective 11/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5175.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–530–000.

Applicants: Duke Energy Carolinas, LLC.

Description: 205(d) Rate Filing: DEC–DEC PISSA SA No. 675 to be effective 11/15/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5177.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–531–000.

Applicants: Bakeoven Solar, LLC.

Description: 205(d) Rate Filing: Cotenancy, Common Facilities, Easement, and Development Cooperation Agreement to be effective 10/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5178.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–532–000.

Applicants: National Gas & Electric, LLC.

Description: Compliance filing: Revised Market-Based Rate Tariff to be effective 11/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5180.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–533–000.

Applicants: Oasis Power, LLC.

Description: Compliance filing: Revised Market-Based Rate Tariff to be effective 11/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5192.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–534–000.

Applicants: Daybreak Solar, LLC.

Description: 205(d) Rate Filing: Certificate of Concurrence to be effective 10/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5194.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–535–000.

Applicants: Duke Energy Florida, LLC.

Description: 205(d) Rate Filing: DEF–DEF PISSA SA No. 472 to be effective 11/15/2024.

Filed Date: 11/22/24.

Accession Number: 20241122–5197.

Comment Date: 5 p.m. ET 12/13/24.
Docket Numbers: ER25–536–000.
Applicants: Respond Power, LLC.
Description: Compliance filing:
 Revised Market-Based Rate Tariff to be
 effective 11/23/2024.

Filed Date: 11/22/24.
Accession Number: 20241122–5202.
Comment Date: 5 p.m. ET 12/13/24.
Docket Numbers: ER25–537–000.
Applicants: Verde Energy USA New
 York, LLC.
Description: Compliance filing:
 Revised Market-Based Rate Tariff to be
 effective 11/23/2024.

Filed Date: 11/22/24.
Accession Number: 20241122–5207.
Comment Date: 5 p.m. ET 12/13/24.
Docket Numbers: ER25–538–000.
Applicants: Placid Solar II, LLC.
Description: Baseline eTariff Filing:
 Placid Solar II, LLC MBR Application
 Filing to be effective 1/22/2025.

Filed Date: 11/22/24.
Accession Number: 20241122–5214.
Comment Date: 5 p.m. ET 12/13/24.
Docket Numbers: ER25–539–000.
Applicants: Verde Energy USA
 Trading, LLC.
Description: Compliance filing:
 Revised Market-Based Rate Tariff to be
 effective 11/23/2024.

Filed Date: 11/22/24.
Accession Number: 20241122–5216.
Comment Date: 5 p.m. ET 12/13/24.
Docket Numbers: ER25–540–000.
Applicants: Verde Energy USA Inc.
Description: Compliance filing:
 Revised Market-Based Rate Tariff to be
 effective 11/23/2024.

Filed Date: 11/22/24.
Accession Number: 20241122–5218.
Comment Date: 5 p.m. ET 12/13/24.

Take notice that the Commission
 received the following qualifying
 facility filings:

Docket Numbers: QF13–22–002.
Applicants: FRV Tucson Solar, LLC.
Description: Refund Report of Picture
 Rocks Solar, LLC.

Filed Date: 11/14/24.
Accession Number: 20241114–5296.
Comment Date: 5 p.m. ET 12/5/24.

Docket Numbers: QF13–654–002;
 QF13–655–002.

Applicants: Sol Orchard San Diego
 23, LLC, Sol Orchard San Diego 22, LLC.
Description: Refund Report of Sol
 Orchard San Diego 22, LLC, et al.

Filed Date: 11/14/24.
Accession Number: 20241114–5298.
Comment Date: 5 p.m. ET 12/5/24.

Docket Numbers: QF13–656–002;
 QF13–653–002.

Applicants: Sol Orchard San Diego
 21, LLC, Sol Orchard San Diego 20, LLC.
Description: Refund Report of Sol
 Orchard San Diego 20, LLC, et al.

Filed Date: 11/14/24.

Accession Number: 20241114–5297.

Comment Date: 5 p.m. ET 12/5/24.

Docket Numbers: QF15–719–003.

Applicants: Ewauna Solar 2, LLC.

Description: Refund Report of
 Klamath Falls Solar 2 LLC.

Filed Date: 11/14/24.

Accession Number: 20241114–5294.

Comment Date: 5 p.m. ET 12/5/24.

Docket Numbers: QF19–881–002.

Applicants: Branch Street Solar
 Partners LLC.

Description: Refund Report of Branch
 Street Solar Partners, LLC.

Filed Date: 11/14/24.

Accession Number: 20241114–5295.

Comment Date: 5 p.m. ET 12/5/24.

The filings are accessible in the
 Commission's eLibrary system ([https://
 elibrary.ferc.gov/idmws/search/
 fercgensearch.asp](https://elibrary.ferc.gov/idmws/search/fercgensearch.asp)) by querying the
 docket number.

Any person desiring to intervene, to
 protest, or to answer a complaint in any
 of the above proceedings must file in
 accordance with Rules 211, 214, or 206
 of the Commission's Regulations (18
 CFR 385.211, 385.214, or 385.206) 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: [https://www.ferc.gov/
 docs-filing/efiling/filing-req.pdf](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.

The Commission's Office of Public
 Participation (OPP) supports meaningful
 public engagement and participation in
 Commission proceedings. OPP can help
 members of the public, including
 landowners, environmental justice
 communities, Tribal members and
 others, access publicly available
 information and navigate Commission
 processes. For public inquiries and
 assistance with making filings such as
 interventions, comments, or requests for
 rehearing, the public is encouraged to
 contact OPP at (202) 502–6595 or [OPP@
 ferc.gov](mailto:OPP@ferc.gov).

Dated: November 22, 2024.

Debbie-Anne A. Reese,
Secretary.

[FR Doc. 2024–28089 Filed 11–29–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP17–486–001]

National Fuel Gas Supply Corporation; Notice of Request for Extension of Time

Take notice that on November 19,
 2024, National Fuel Gas Supply
 Corporation (National Fuel) requested
 that the Commission grant an extension
 of time, until December 1, 2025, to test
 Well 7451 located within the Beech Hill
 Storage Field buffer boundary (Project)
 located in Allegany and Steuben
 Counties, New York as authorized in the
 January 26, 2018 Commission Order
 (Order).¹ The Order required National
 Fuel to complete well testing of Well
 7451 within three years of the date of
 the Order. The Commission
 subsequently granted two extensions of
 time; the current deadline for
 completing the well testing is December
 1, 2024.²

Currently, National Fuel has
 completed withdrawals from Well 7451
 and does not intend to undertake further
 withdrawals from the well. National
 Fuel states that it needs additional time
 to complete its assessment of data
 gathered from well testing which
 includes analyses of associated
 modeling and other data gathered over
 the testing period. National Fuel
 requests an extension of time to
 December 1, 2025, to complete its
 assessment and finalize an application
 filing.

This notice establishes a 15-calendar
 day intervention and comment period
 deadline. Any person wishing to
 comment on National Fuel's request for
 an extension of time may do so. No
 reply comments or answers will be
 considered. If you wish to obtain legal
 status by becoming a party to the
 proceedings for this request, you
 should, on or before the comment date
 stated below, file a motion to intervene
 in accordance with the requirements of
 the Commission's Rules of Practice and
 Procedure (18 CFR 385.214 or 385.211)
 and the Regulations under the Natural
 Gas Act (NGA) (18 CFR 157.10).

As a matter of practice, the
 Commission itself generally acts on
 requests for extensions of time to
 complete construction for NGA facilities
 when such requests are contested before
 order issuance. For those extension

¹ National Fuel Gas Supply Corporation, 162
 FERC ¶ 62,063 (2018).

² National Fuel Gas Supply Corporation, Docket
 No. CP17–486–000, Letter Order Granting
 Extension, (December 18, 2023).

requests that are contested,³ the Commission will aim to issue an order acting on the request within 45 days.⁴ The Commission will address all arguments relating to whether the applicant has demonstrated there is good cause to grant the extension.⁵ The Commission will not consider arguments that re-litigate the issuance of the certificate order, including whether the Commission properly found the project to be in the public convenience and necessity and whether the Commission's environmental analysis for the certificate complied with the National Environmental Policy Act (NEPA).⁶ At the time a pipeline requests an extension of time, orders on certificates of public convenience and necessity are final and the Commission will not re-litigate their issuance.⁷ The Director of the Office of Energy Projects, or his or her designee, will act on all of those extension requests that are uncontested.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<https://www.ferc.gov>). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at public.referenceroom@ferc.gov.

The Commission strongly encourages electronic filings of comments in lieu of paper using the "eFile" link at <https://www.ferc.gov>.

³ Contested proceedings are those where an intervenor disputes any material issue of the filing. 18 CFR 385.2201(c)(1).

⁴ *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144, at P 40 (2020).

⁵ *Id.* at P 40.

⁶ Similarly, the Commission will not re-litigate the issuance of an NGA section 3 authorization, including whether a proposed project is not inconsistent with the public interest and whether the Commission's environmental analysis for the permit order complied with NEPA.

⁷ *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144, at P 40 (2020).

www.ferc.gov. In lieu of electronic filing, you may submit a paper copy which must reference the Project docket number.

To file via USPS: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other courier: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502-6595 or OPP@ferc.gov.

Comment Date: 5:00 p.m. Eastern Time on December 9, 2024.

Dated: November 22, 2024.

Debbie-Anne A. Reese,
Secretary.

[FR Doc. 2024-28092 Filed 11-29-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG25-44-000.

Applicants: Northwest Ohio Wind, LLC.

Description: Northwest Ohio Wind, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 11/22/24.

Accession Number: 20241122-5240.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: EG25-45-000.

Applicants: Bocanova Power LLC.

Description: Bocanova Power LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 11/25/24.

Accession Number: 20241125-5169.

Comment Date: 5 p.m. ET 12/16/24.

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL25-20-000.

Applicants: Constellation Energy Generation, LLC v. PJM Interconnection, L.L.C.

Description: Complaint of Constellation Energy Generation, LLC v. PJM Interconnection, L.L.C.

Filed Date: 11/22/24.

Accession Number: 20241122-5285.

Comment Date: 5 p.m. ET 12/12/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER23-93-003.

Applicants: Consumers Energy Company.

Description: Compliance filing: Amended WDS SA with Michigan Public Power Agency, Docket No. ER23-93-to be effective 12/14/2022.

Filed Date: 11/25/24.

Accession Number: 20241125-5086.

Comment Date: 5 p.m. ET 12/16/24.

Docket Numbers: ER25-474-000.

Applicants: Blossburg Power, LLC, Brunot Island Power, LLC, Gilbert Power, LLC, Hamilton Power, LLC, Hunterstown Power, LLC, Mountain Power, LLC, New Castle Power, LLC, Orrtanna Power, LLC, Portland Power, LLC, Sayreville Power, LLC, Shawnee Power, LLC, Shawville Power, LLC, Titus Power, LLC, Tolna Power, LLC, Warren Generation, LLC.

Description: Joint Request for Limited Waiver of Blossburg Power, LLC, et al.

Filed Date: 11/15/24.

Accession Number: 20241115-5295.

Comment Date: 5 p.m. ET 12/6/24.

Docket Numbers: ER25-541-000.

Applicants: Big Rock ESS Assets LLC.
Description: 205(d) Rate Filing: Big Rock ESS Asset, Certificate of Concurrence Filing to be effective 11/22/2024.

Filed Date: 11/22/24.

Accession Number: 20241122-5242.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25-542-000.

Applicants: California Independent System Operator Corporation.

Description: 205(d) Rate Filing: 2024-11-22 Regulatory Filings Provision—Pathways Step 1 Proposal to be effective 12/31/9998.

Filed Date: 11/22/24.

Accession Number: 20241122-5247.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25-543-000.

Applicants: California Independent System Operator Corporation.

Description: 205(d) Rate Filing: 2024-11-22 SWIP-North Development Agreement btwn Great Basin & CAISO to be effective 11/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122-5258.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: ER25–548–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Amendment to WMPA SA No. 5874; AF1–006 to be effective 1/25/2025.
Filed Date: 11/25/24.
Accession Number: 20241125–5035.
Comment Date: 5 p.m. ET 12/16/24.
Docket Numbers: ER25–549–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 6657; Queue No. AF1–050 to be effective 1/25/2025.
Filed Date: 11/25/24.
Accession Number: 20241125–5043.
Comment Date: 5 p.m. ET 12/16/24.
Docket Numbers: ER25–550–000.
Applicants: Southern California Edison Company.
Description: Informational Filing of 2025 Formula Rate Annual Update of Southern California Edison Company.
Filed Date: 11/22/24.
Accession Number: 20241122–5289.
Comment Date: 5 p.m. ET 12/13/24.
Docket Numbers: ER25–551–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Original GIA & CSA, SA Nos. 7411 & 7412; Project Identifier No. AF2–029 to be effective 10/24/2024.
Filed Date: 11/25/24.
Accession Number: 20241125–5118.
Comment Date: 5 p.m. ET 12/16/24.
Docket Numbers: ER25–552–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Amended ISA; Service Agreement No. 6664; AF1–083 to be effective 1/25/2025.
Filed Date: 11/25/24.
Accession Number: 20241125–5093.
Comment Date: 5 p.m. ET 12/16/24.
Docket Numbers: ER25–553–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 205(d) Rate Filing: 2024–11–25 SA 4398 ATC–MPFCA Elm Road to be effective 1/25/2025.
Filed Date: 11/25/24.
Accession Number: 20241125–5115.
Comment Date: 5 p.m. ET 12/16/24.
Docket Numbers: ER25–554–000.
Applicants: Wild Plains Wind Project, LLC.
Description: 205(d) Rate Filing: Application for MBR Authorization—Expedited Treatment to be effective 12/6/2024.
Filed Date: 11/25/24.
Accession Number: 20241125–5123.
Comment Date: 5 p.m. ET 12/16/24.

Docket Numbers: ER25–555–000.
Applicants: NextEra Energy Transmission MidAtlantic, Inc.
Description: Tariff Amendment: Notice of Cancellation of Transmission Owner Tariff to be effective 11/26/2024.
Filed Date: 11/25/24.
Accession Number: 20241125–5129.
Comment Date: 5 p.m. ET 12/16/24.
Docket Numbers: ER25–556–000.
Applicants: GridLiance West LLC.
Description: 205(d) Rate Filing: GLW Annual TRBAA Filing 2025 to be effective 1/1/2025.
Filed Date: 11/25/24.
Accession Number: 20241125–5191.
Comment Date: 5 p.m. ET 12/16/24.
Docket Numbers: ER25–557–000.
Applicants: Trans Bay Cable LLC.
Description: 205(d) Rate Filing: Annual TRBAA Filing—2025 to be effective 1/1/2025.
Filed Date: 11/25/24.
Accession Number: 20241125–5196.
Comment Date: 5 p.m. ET 12/16/24.
Docket Numbers: ER25–558–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Original GIA, SA No. 7410; Project Identifier AG1–189 to be effective 10/24/2024.
Filed Date: 11/25/24.
Accession Number: 20241125–5198.
Comment Date: 5 p.m. ET 12/16/24.
Docket Numbers: ER25–559–000.
Applicants: Northwest Power Pool.
Description: 205(d) Rate Filing: Tariff Revisions to Adopt a Revised Transition to a Binding Program to be effective 1/27/2025.
Filed Date: 11/25/24.
Accession Number: 20241125–5207.
Comment Date: 5 p.m. ET 12/16/24.
 The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.
 Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) 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.

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Dated: November 25, 2024.

Carlos D. Clay,

Acting Deputy Secretary.

[FR Doc. 2024–28160 Filed 11–29–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP25–208–000.
Applicants: NEXUS Gas Transmission, LLC.
Description: Compliance filing: NEXUS 2024 Stipulation and Agreement Filing to be effective N/A.
Filed Date: 11/22/24.
Accession Number: 20241122–5205.
Comment Date: 5 p.m. ET 12/4/24.
Docket Numbers: RP25–209–000.
Applicants: Guardian Pipeline, L.L.C.
Description: 4(d) Rate Filing: Negotiated Rate Parking and Lending Agreement to be effective 11/21/2024.
Filed Date: 11/22/24.
Accession Number: 20241122–5228.
Comment Date: 5 p.m. ET 12/4/24.
Docket Numbers: RP25–210–000.
Applicants: Columbia Gas Transmission, LLC.
Description: 4(d) Rate Filing: Neg Rate Vitol OPT30 & OPT60, Eff. 12.1.24 to be effective 12/1/2024.
Filed Date: 11/25/24.
Accession Number: 20241125–5044.
Comment Date: 5 p.m. ET 12/9/24.
Docket Numbers: RP25–211–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: 4(d) Rate Filing: Rate Schedule S–2 Tracker Filing Eff 12–1–2024 to be effective 12/1/2024.
Filed Date: 11/25/24.
Accession Number: 20241125–5045.

Comment Date: 5 p.m. ET 12/9/24.

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Dated: November 25, 2024.

Carlos D. Clay,

Acting Deputy Secretary.

[FR Doc. 2024-28161 Filed 11-29-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Privacy Act of 1974; System of Records

AGENCY: Federal Energy Regulatory Commission (FERC), Department of Energy (DOE).

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, all agencies are required to publish in the **Federal Register** a notice of their systems of records. Notice is hereby given that the Federal Energy Regulatory Commission (FERC) is publishing a notice of modifications to an existing FERC

system of records titled "Federal Personnel and Payroll Records (FERC-57)" previously titled "Federal Personnel and Payroll System (FPPS)."

DATES: Comments on this modified system of records must be received no later than 30 days after date of publication in the **Federal Register**. If no public comment is received during the period allowed for comment or unless otherwise published in the **Federal Register** by FERC, the modified system of records will become effective a minimum of 30 days after date of publication in the **Federal Register**. If FERC receives public comments, FERC shall review the comments to determine whether any changes to the notice are necessary.

ADDRESSES: Comments should be submitted in writing to Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426 or electronically to privacy@ferc.gov. Comments should indicate that they are submitted in response to "Federal Personnel and Payroll Records (FERC-57)".

FOR FURTHER INFORMATION CONTACT: Mittal Desai, Chief Information Officer & Senior Agency Official for Privacy, Office of the Executive Director, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, privacy@ferc.gov, (202) 502-6832.

SUPPLEMENTARY INFORMATION: In accordance with the Privacy Act of 1974, and to comply with the Office of Management and Budget (OMB) Memorandum M-17-12, "Preparing for and Responding to a Breach of Personally Identifiable Information," January 3, 2017, this notice has twelve (12) new routine uses (routine uses 1-12), including two routine uses that will permit FERC to disclose information as necessary in response to an actual or suspected breach that pertains to a breach of its own records or to assist another agency in its efforts to respond to a breach that was previously published separately at 87 FR 35543 (June 10, 2022).

The following sections have been updated to reflect changes made since the publication of the last notice in the **Federal Register**: dates; addresses; for further contact information; system name and number; system location; purpose of the system; categories of individuals covered by the system; categories of records in the system; record source categories; routine uses of records maintained in the system, including categories of users and the purpose of such; policies and practices for storage of records; policies and

practices for retrieval of records; policies and practices for retention and disposal of records; administrative, technical, physical safeguards; records access procedures; contesting records procedures; notification procedures; and history.

SYSTEM NAME AND NUMBER:

Federal Personnel and Payroll Records (FERC-57).

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Interior Business Center, U.S. Department of the Interior, One Denver Federal Center, Bldg. 48, Denver, CO 80225.

Human Resources Division, Office of the Executive Director, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

SYSTEM MANAGER(S):

Director, Human Resources Division, Office of the Executive Director, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502-6852.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 2951, 5 U.S.C. 5101 *et seq.*

PURPOSE(S) OF THE SYSTEM:

The main purpose of the system is to provide personnel and payroll support and workforce management including: salary and benefits payment; and time, attendance, leave, other absences tracking and reporting. The system is used to create and generate the full life cycle of personnel transactions including, but not limited to, personnel actions, vacancy announcements, candidate processing and interviews, new hire tracking, specialized pay, garnishments, and appointment programs.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The following categories of individuals are covered by the system: current and former employees and their beneficiaries; and candidates for employment.

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories of records in the system are: name; citizenship; gender; date of birth; marital status; other names; social security number (SSN); legal status; place of birth; security clearance; financial information; disability information; education information; race/ethnicity; driver's license; personal cellphone number; personal email address; home telephone

number; child or dependent information; employment information; military status/service; mailing/home address; taxpayer identification number (TIN); bank account information such as routing and account numbers; beneficiary information such as name, date of birth, address, telephone number, SSN, and relationship; family member and dependents information; professional licensing and credentials; family relationships; age; involuntary debt (garnishments or child support payments); court order information; back pay information; user ID; time and attendance data; leave time information; Employee Common Identifier (ECI); pay rate; grade; length of service; and deductions.

RECORD SOURCE CATEGORIES:

Records are obtained from FERC employees, supervisors, timekeepers, previous employers, the Internal Revenue Service and State tax agencies, the Department of the Treasury, other Federal agencies, courts, State child support agencies, employing agency accounting offices, and third-party benefit providers.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, information maintained in this system may be disclosed to authorized entities outside FERC for purposes determined to be relevant and necessary as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. To appropriate agencies, entities, and persons when (1) FERC suspects or has confirmed that there has been a breach of the system of records; (2) FERC has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Commission (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Commission's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.
2. To another Federal agency or Federal entity, when FERC determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or

entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

3. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of that individual.

4. To the Equal Employment Opportunity Commission (EEOC) when requested in connection with investigations of alleged or possible discriminatory practices, examination of Federal affirmative employment programs, or other functions of the Commission as authorized by law or regulation.

5. To the Federal Labor Relations Authority or its General Counsel when requested in connection with investigations of allegations of unfair labor practices or matters before the Federal Service Impasses Panel.

6. To disclose information to another Federal agency, to a court, or a party in litigation before a court or in an administrative proceeding being conducted by a Federal agency, when the Government is a party to the judicial or administrative proceeding. In those cases where the Government is not a party to the proceeding, records may be disclosed if a subpoena has been signed by a judge.

7. To the Department of Justice (DOJ) for its use in providing legal advice to FERC or in representing FERC in a proceeding before a court, adjudicative body, or other administrative body, where the use of such information by the DOJ is deemed by FERC to be relevant and necessary to the advice or proceeding, and such proceeding names as a party in interest: (a) FERC; (b) any employee of FERC in his or her official capacity; (c) any employee of FERC in his or her individual capacity where DOJ has agreed to represent the employee; or (d) the United States, where FERC determines that litigation is likely to affect FERC or any of its components.

8. To non-Federal Personnel, such as contractors, agents, or other authorized individuals performing work on a contract, service, cooperative agreement, job, or other activity on behalf of FERC or Federal Government and who have a need to access the information in the performance of their duties or activities.

9. To the National Archives and Records Administration in records management inspections and its role as Archivist.

10. To the Merit Systems Protection Board or the Board's Office of the Special Counsel, when relevant information is requested in connection

with appeals, special studies of the civil service and other merit systems, review of OPM rules and regulations, and investigations of alleged or possible prohibited personnel practices.

11. To appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, if the information may be relevant to a potential violation of civil or criminal law, rule, regulation, order.

12. To appropriate agencies, entities, and person(s) that are a party to a dispute, when FERC determines that information from this system of records is reasonably necessary for the recipient to assist with the resolution of the dispute; the name, address, telephone number, email address, and affiliation; of the agency, entity, and/or person(s) seeking and/or participating in dispute resolution services, where appropriate.

13. To consumer reporting agencies as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Act of 1966 (31 U.S.C. 3701(a)(3)).

14. To the Commission's parent agency, the Department of Energy (DOE) for reporting purposes; as well as individuals, entities, and agencies identified in:

(a) Payroll, Attendance, Retirement, and Leave Records—Interior, DOI-85.

(b) Interior Personnel Records—Interior, DOI-79.

(c) General Personnel Records—OPM, OPM/GOVT-1.

POLICIES AND PRACTICES FOR THE STORAGE OF RECORDS:

Records are stored in paper and electronic form. All FERC employees and contractors with authorized access have undergone a thorough background security investigation. Paper records are stored in a lockable file cabinet. Data access is restricted to agency personnel or contractors whose responsibilities require access. Access to electronic records is controlled by the organization's Single Sign-On and Multi-Factor Authentication Solution. Role based access is used to restrict electronic data access and the organization employs the principle of least privilege, allowing only authorized users with access (or processes acting on behalf of users) necessary to accomplish assigned tasks in accordance with organizational missions and business functions.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by employee identification such as name, SSN, and ECI.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained in accordance with the applicable National Archives and Records Administration Schedules, with the following applicable General Records Schedules:

(1.) General Records Schedule (GRS) 2.2: Employee Management Records, Item 030, DAA-GRS-2017-0007-0003. Temporary. Destroy when 2 years old or 2 years after award is approved or disapproved, whichever is later, but longer retention is authorized if required for business use.

(2.) General Records Schedule (GRS) 2.2: Employee Management Records, Item 040, DAA-GRS-2017-0007-0004. Temporary. Destroy when survivor or retirement claims are adjudicated or when records are 129 years old, whichever is sooner, but longer retention is authorized if required for business use.

(3.) General Records Schedule (GRS) 2.2: Employee Management Records, Item 041, DAA-GRS-2017-0007-0005. Temporary. Destroy when superseded or obsolete, or upon separation or transfer of employee, whichever is earlier.

(4.) General Records Schedule (GRS) 2.4: Employee Compensation and Benefits Records, Item 050, DAA-GRS-2018-0002-0005. Temporary. Destroy 7 years after case is closed or final settlement on appeal, as appropriate, but longer retention is authorized if required for business use.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Authorized users complete the Rules of Behavior for HR Access, which provides guidance on the user's roles and responsibilities. Security controls used to protect personal sensitive data are commensurate with those required for an information system rated moderate for confidentiality, integrity, and availability, as prescribed in NIST Special Publication, 800-53, "Recommended Security Controls for Federal Information Systems," Revision 5. FERC personnel are required to complete annual agency Information Security and Privacy training. FERC personnel are instructed to lock their computers when they leave their desks. Electronic records are restricted to authorized users with appropriate security privileges, including the use of 2-factor PIV Card authentication. Web-based connections are VPN encrypted sessions between FERC and DOI. Access to electronic records is controlled by the organization's Single Sign-On and Multi-Factor Authentication Solution. The database is maintained behind a firewall. These records are maintained

in controlled access areas. Identification cards are verified to ensure that only authorized personnel can access the records.

RECORD ACCESS PROCEDURES:

Individuals requesting access to the contents of records must submit a request through the Freedom of Information Act (FOIA) office. The FOIA website is located at: <https://www.ferc.gov/foia>. Requests may be submitted through the following portal: <https://www.ferc.gov/enforcement-legal/foia/electronic-foia-privacy-act-request-form>. Written requests for access to records should be directed to: Director, Office of External Affairs, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

CONTESTING RECORD PROCEDURES:

See Records Access procedures.

NOTIFICATION PROCEDURES:

Generalized notice is provided by the publication of this notice. For specific notice, see Records Access Procedure, above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

74 FR 57308 (November 5, 2009).

Dated: November 22, 2024.

Debbie-Anne A. Reese,

Secretary.

[FR Doc. 2024-28091 Filed 11-29-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****Combined Notice of Filings**

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: PR25-19-000.

Applicants: Arcadia Gas Storage, LLC.

Description: 284.123 Rate Filing;

Arcadia SOC—Revised Contact Information to be effective 12/23/2024.

Filed Date: 11/22/24.

Accession Number: 20241122-5098.

Comment Date: 5 p.m. ET 12/13/24.

Docket Numbers: PR25-20-000.

Applicants: Louisville Gas and Electric Company.

Description: 284.123(g) Rate Filing; Operating Statement Rate Change Revised Exhibit A to be effective 11/1/2024.

Filed Date: 11/22/24.

Accession Number: 20241122-5118.

Comment Date: 5 p.m. ET 12/13/24.

284.123(g) Protest: 5 p.m. ET 1/21/25.

Docket Numbers: RP25-202-000.

Applicants: Florida Gas Transmission Company, LLC.

Description: 4(d) Rate Filing: Interim Fuel Adjustment on 11-22-24 to be effective 12/1/2024.

Filed Date: 11/22/24.

Accession Number: 20241122-5002.

Comment Date: 5 p.m. ET 12/4/24.

Docket Numbers: RP25-203-000.

Applicants: Southern Natural Gas Company, L.L.C.

Description: 4(d) Rate Filing: SNG SCRM Filing 2024 to be effective 1/1/2025.

Filed Date: 11/22/24.

Accession Number: 20241122-5042.

Comment Date: 5 p.m. ET 12/4/24.

Docket Numbers: RP25-204-000.

Applicants: Southern Star Central Gas Pipeline, Inc.

Description: Compliance filing: Annual Cash-Out Activity Report 2024 to be effective N/A.

Filed Date: 11/22/24.

Accession Number: 20241122-5059.

Comment Date: 5 p.m. ET 12/4/24.

Docket Numbers: RP25-205-000.

Applicants: Midship Pipeline Company, LLC.

Description: 4(d) Rate Filing: Midship Pipeline Company Fuel Filing to be effective 1/1/2025.

Filed Date: 11/22/24.

Accession Number: 20241122-5078.

Comment Date: 5 p.m. ET 12/4/24.

Docket Numbers: RP25-206-000.

Applicants: Florida Gas Transmission Company, LLC.

Description: 4(d) Rate Filing: New Service Agreements—City of Lakeland to be effective 12/1/2024.

Filed Date: 11/22/24.

Accession Number: 20241122-5101.

Comment Date: 5 p.m. ET 12/4/24.

Docket Numbers: RP25-207-000.

Applicants: Florida Gas Transmission Company, LLC.

Description: 4(d) Rate Filing: Update Non-Conforming List—City of Lakeland to be effective 12/1/2024.

Filed Date: 11/22/24.

Accession Number: 20241122-5102.

Comment Date: 5 p.m. ET 12/4/24.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP19–73–010.

Applicants: El Paso Natural Gas Company, L.L.C.

Description: Compliance filing: Motion to Place 2025 Settlement Rates Into Effect to be effective 1/1/2025.

Filed Date: 11/21/24.

Accession Number: 20241121–5204

Comment Date: 5 p.m. ET 12/3/24.

Docket Numbers: RP23–1099–005.

Applicants: Gas Transmission Northwest LLC.

Description: Compliance filing: Phase I Settlement Rate Implementation to be effective 4/1/2024.

Filed Date: 11/21/24.

Accession Number: 20241121–5182.

Comment Date: 5 p.m. ET 12/3/24.

Docket Numbers: RP23–1099–006.

Applicants: Gas Transmission Northwest LLC.

Description: Compliance filing: GTN Rate Case Tariff Records Implementation to be effective 11/21/2024.

Filed Date: 11/21/24.

Accession Number: 20241121–5187.

Comment Date: 5 p.m. ET 12/3/24.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at <https://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. Other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov*.

Dated: November 22, 2024.

Debbie-Anne A. Reese,
Secretary.

[FR Doc. 2024–28093 Filed 11–29–24; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–12404–02–OA]

Animal Agriculture and Water Quality Subcommittee (AAWQ), Subcommittee of the Farm, Ranch, and Rural Communities Committee (FRRCC) Notice of Public Meeting; Extension of Public Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting; extension of public comment period.

SUMMARY: This notice is to extend the deadline for attendees to submit their public comments. Pursuant to the Federal Advisory Committee Act (FACA), notice is hereby given that the next meeting of the Animal Agriculture and Water Quality Subcommittee, a subcommittee of the Farm, Ranch, and Rural Communities Advisory Committee (FRRCC) will be held virtually on December 6, 2024. The goal of the AAWQ subcommittee is to provide recommendations that will inform the Agency's decisions regarding how to improve the implementation of the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) permitting program.

DATES: The public meeting of the AAWQ will be held virtually only on Friday, December 6, 2024, from approximately 8:30 a.m. to 5:30 p.m. (EST). The public comment period for the notice published November 22, 2024 at 89 FR 92681 is extended to Thursday December 5, 2024, at 12 p.m. (EST) to AAWQ@epa.gov.

ADDRESSES: The meeting will take place virtually only. To register to attend virtually and receive information on how to listen to the meeting and to provide comments, please visit: www.epa.gov/faca/frcc-0. Virtual attendance will be via Zoom. The link to register for the meeting can be found on the FRRCC web page, www.epa.gov/faca/frcc-0. To provide public comments, attendees must submit request by Thursday, December 5, 2024, at 12 p.m. NOON (EST) to the AAWQ@epa.gov.

FOR FURTHER INFORMATION CONTACT: Dr. Venus Welch-White, Designated Federal Officer (DFO), at AAWQ@epa.gov or telephone. (202) 564–0595. General information regarding the FRRCC and AAWQ can be found on the EPA website at: www.epa.gov/faca/frcc.

SUPPLEMENTARY INFORMATION: Meetings of the AAWQ are open to the public. An agenda will be posted on AAWQ's

website at <https://www.epa.gov/faca/frcc-0>. Due to unforeseen administrative circumstances, EPA is announcing this meeting with less than 15 calendar days' notice.

Access and Accommodation:

Requests for accessibility and/or accommodations for individuals with disabilities should be directed to AAWQ@epa.gov. The deadline to make these request is Tuesday, December 3, 2024 at 11:59 p.m. (EST).

Venus Welch-White,

Acting Deputy Director, EPA Office of Agriculture and Rural Affairs.

[FR Doc. 2024–28218 Filed 11–29–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–12387–01–R2]

Public Water System Supervision Program Revision for New York; Notice of Approval and Opportunity for Public Comment and Public Hearing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Public notice is hereby given that the state of New York has revised its approved Public Water System Supervision Program. New York has adopted drinking water regulations for the Revised Total Coliform Rule. The EPA has determined that New York's revised regulations meet all minimum Federal requirements, and that they are no less stringent than the corresponding Federal regulations. Therefore, the EPA has decided to tentatively approve the State program revisions. All interested parties may request a public hearing or submit comments.

DATES: Comments or request for public hearing must be received on or before January 2, 2025.

ADDRESSES: Comments or a request for a public hearing must be submitted to the Regional Administrator, U.S. Environmental Protection Agency, Region 2, 290 Broadway, FL 24, New York, NY 10007. All documents relating to this determination are available for inspection between the hours of 8 a.m. and 3 p.m., Monday through Friday, at the following offices: U.S. Environmental Protection Agency, Region 2, Water Division, 290 Broadway, FL 24, New York, NY 10007–1823; and New York State Department of Health, Bureau of Water Supply Protection, Empire State Plaza-Corning Tower, Room 1110, Albany, New York 12237.

FOR FURTHER INFORMATION CONTACT: Dorina Aliu, Water Division, Drinking Water and Groundwater Protection Section, Environmental Protection Agency, Region 2, 290 Broadway, FL 24, New York, NY 10007-1823; telephone number: (929) 930-0689; email address: Aliu.Dorina@epa.gov.

SUPPLEMENTARY INFORMATION: All interested parties are invited to submit written comments on this determination and may request a hearing. All comments will be considered, and if necessary, EPA will issue a response. Frivolous or insubstantial requests for a hearing will be denied by the Regional Administrator. If a substantial request for a public hearing is made by January 2, 2025, a public hearing will be held. A request for public hearing shall include the following: (1) The name, address, and telephone number of the individual, organization, or other entity requesting a hearing; (2) a brief statement of the requesting person's interest in the Regional Administrator's determination and of information that the requesting person intends to submit at such hearing; and (3) the signature of the individual making the request; or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

Authority: Section 1413 of the Safe Drinking Water Act, as amended (1996), and 40 CFR part 142 of the National Primary Drinking Water Regulations.

Lisa P. Garcia,

Regional Administrator, Region 2.

[FR Doc. 2024-28220 Filed 11-29-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OGC-2024-0251; FRL-12440-01-OGC]

Proposed Settlement Agreement, Federal Insecticide, Rodenticide, and Fungicide Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement agreement and request for public comment.

SUMMARY: Consistent with *Consent Decrees and Settlement Agreements to Resolve Environmental Claims Against the Agency* (March 18, 2022), EPA is giving notice of and seeking comment on a proposed settlement agreement for *In re Center for Biological Diversity*, No. 21-1270 (D.C. Circuit) and *Center for Biological Diversity v. Environmental*

Protection Agency, No. 23-1329 (D.C. Circuit). Defendant-Intervenors—who represent the registrants for products contain cyantraniliprole—do not oppose this proposed settlement agreement.

DATES: Comments are due by January 2, 2025.

ADDRESSES: Please submit your comments online at <https://www.regulations.gov>. Follow the online instructions for submitting comments.

Instructions: All comments should include the Docket ID (EPA-HQ-OGC-2024-0251) for this action. Submitted comments will be posted without change to <https://www.regulations.gov>, including any personal information provided. For detailed instructions on commenting, see the “Public Comment on the Proposed Settlement Agreement” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Jori Reilly-Diakun (Pesticides and Toxic Substances Law Office, Office of General Counsel, U.S. Environmental Protection Agency), (202) 564-9567, reillydiakun.jori@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Obtaining a Copy of the Proposed Stipulated Settlement Agreement

The official public docket for this action contains a copy of the proposed settlement agreement. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OEI Docket is (202) 566-1752.

The electronic version of the public docket for this action also contains a copy of the proposed settlement agreement. The electronic version of the public docket is available at <https://www.regulations.gov/docket/EPA-HQ-OGC-2024-0251>.

II. Background on the Proposed Settlement Agreement

This proposed settlement agreement follows petitions for review in the United States Court of Appeals for the District of Columbia (D.C. Circuit) of EPA's decisions granting pesticide registrations and amendments to those registrations under the Federal Insecticide, Rodenticide, and Fungicide Act (FIFRA) for products containing the active ingredient cyantraniliprole.

On June 30, 2017, the D.C. Circuit addressed the initial petition for review and remanded the registration decisions to EPA without vacatur for EPA to address its obligations under the Endangered Species Act (ESA). *Center for Biological Diversity v. Environmental Protection Agency*, 861 F.3d 174 (D.C. Cir. 2017). In 2021, Petitioners filed a writ of mandamus with the D.C. Circuit, seeking to compel action by EPA in accordance with the Court's 2017 order. On November 22, 2022, the D.C. Circuit held that EPA had unreasonably delayed in complying with its 2017 order and ordered EPA to complete effects determinations for cyantraniliprole and replace its previous registration orders with orders consistent with the ESA by September 2023. *In re Center for Biological Diversity*, 53 F.4th 665 (D.C. Cir. 2022).

In September 2023, EPA completed its final biological evaluation for cyantraniliprole and initiated ESA section 7 consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, before granting registrants' requests to amend the registrations for products containing cyantraniliprole. *See* EPA-HQ-OPP-2011-0668. EPA filed a Notice of Completion with the D.C. Circuit in *In re Center for Biological Diversity* on October 4, 2023. Petitioners filed a new petition for review challenging EPA's September 2023 registration amendments. *Center for Biological Diversity v. Environmental Protection Agency*, No. 23-1329 (D.C. Circuit).

This proposed settlement agreement would resolve any remaining claims against EPA in these cases. In the proposed settlement, EPA would agree to implement any final Biological Opinion for cyantraniliprole no later than 12 months from the date that each Service issues a final Biological Opinion or the deadline set by each Service for implementing its final Biological Opinion—whichever is earlier—with several options for extension, if appropriate.

III. Public Comment on the Proposed Settlement Agreement

EPA will accept written comments on the proposed settlement until January 2, 2025 from anyone who is not a named party to the litigation in question. EPA or the U.S. Department of Justice (DOJ) may decide to withdraw consent to enter the proposed settlement agreement if the comments indicate that such consent is inappropriate. However, the terms of the proposed settlement agreement will be affirmed unless EPA or DOJ so decide based on the comments.

Please submit your comments, identified by Docket ID No. EPA-HQ-OGC-2024-0251, through <https://www.regulations.gov>. Once submitted, comments cannot be edited or removed from this docket. EPA may publish any comment received to its public docket. Do not submit any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (e.g., audio, video) must be accompanied by a written comment. EPA will consider the written comment to be the official comment, and it should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (e.g., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/submitting-epa-dockets>. For additional information about submitting information identified as CBI, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the <https://www.regulations.gov> website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an "anonymous access" system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment.

Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be

marked "late." EPA is not required to consider these late comments.

Dated: November 25, 2024.

Randolph L. Hill,

Associate General Counsel.

[FR Doc. 2024-28121 Filed 11-29-24; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060-0999; FR ID 264781]

Information Collection 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 of 1995 (PRA), 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 collection. 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 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 Office of Management and Budget (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 comments should be submitted on or before January 31, 2025. 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: 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 No.: 3060-0999.

Title: Hearing Loss Compatible Wireless Handsets Section 20.19 and Hearing Aid Compatibility Act.

Form Numbers: FCC Form 655 and FCC Form 855.

Type of Review: Revision to the currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 934 respondents; 934 responses.

Estimated Time per Response: 13.92 hours per response (average).

Frequency of Response: On occasion and annual reporting requirements, recordkeeping requirements, and third-party disclosure requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151, 154(i), 157, 160, 201, 202, 214, 301, 303, 308, 309(j), 310 and 610 of the Communications Act of 1934, as amended.

Total Annual Burden: 12,998 hours.

Total Annual Cost: No cost.

Needs and Uses: The Commission is requesting that the Office of Management and Budget (OMB) approve a revision to the Commission's currently approved information collection for OMB Control No. 3060-0999. This information collection relates to the Commission's Hearing Loss Compatible Wireless Handsets rules at section 20.19 of the Commission's rules. This revision is necessary to implement the final rules that the Commission adopted on October 17, 2024, in a Report and Order, WT Docket No. 23-388, FCC 24-112, that the Commission released on October 18, 2024. This Report and Order revised the heading of section 20.19 of the Commission's rules from "Hearing aid-compatible mobile handsets" to "Hearing loss compatible wireless handsets." In addition, the revisions that the Commission adopted to section 20.19(b)(3)(iii), (f), (h), and (i)(4)-(5) constitute new or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. These rules will become effective following OMB's completion of its review of these revised rules. Once OMB completes its review of these revisions, the Commission will publish a document in the **Federal**

Register announcing the effective date of section 20.19(b)(3)(iii), (f), (h), and (i)(4)–(5).

The final rules that the Commission adopted require all wireless handset models to be hearing aid compatible. These revised rules ensure that consumers with hearing loss will have equal access to the same handset models as consumers without hearing loss. In order to ensure compliance with this 100% hearing aid compatibility requirement, the Commission adopted revised labeling, website posting, and certification requirements along with removing outdated and unnecessary information collection requirements. The removal of these outdated information collection requirements significantly reduces regulatory burden and cost for handset manufacturers and service providers.

The revised hearing aid compatibility rules include a requirement that a certain number of handset models that handset manufacturers and service providers offer for sale or use in the United States meet Bluetooth coupling requirements. This Bluetooth coupling requirement will benefit consumers by ensuring more universal connectivity between handset models and hearing aids, including over-the-counter hearing aids, and reduces the issue of certain handset models only being able to pair with certain hearing aids. In order to ensure compliance with this new Bluetooth coupling requirement, the Commission adopted a requirement that handset manufacturers submit a sworn declaration attesting to the handset model's compliance with these new Bluetooth coupling requirements. This certification requirement is contained in section 20.19(b)(3)(iii) and requires handset manufacturers to provide: (1) the specific Bluetooth coupling standard included in each handset model; (2) that the relevant handset model has been tested to ensure compliance with the designated Bluetooth coupling standard; and (3) after the transition to a non-proprietary Bluetooth requirement, that the included Bluetooth coupling technology is consistent with the Bluetooth functionality requirements. The Commission adopted this attestation requirement based on the recommendation of handset manufacturers who stated that adopting an attestation requirement is consistent with the Commission's equipment certification process.

In the Report and Order, the Commission revised its external printed package labeling requirements for handset models as well as requirements related to what information must be included within a handset model's

packaging either in the form of a printed insert or a printed handset manual. The Commission is requiring that a handset model's external printed package label indicate whether the handset model includes Bluetooth coupling capabilities or telecoil coupling capabilities or both, and in the case of Bluetooth coupling which Bluetooth technology the handset model incorporates. The Commission is also requiring handset manufacturers and service providers to include information on the hearing aid compatibility settings of handset models and how consumers can turn these settings on and off. As part of these revisions, the Commission eliminated outdated labeling requirements which were no longer necessary and that might cause consumer confusion if retained. By eliminating these outdated requirements, the Commission reduced regulatory burden and cost to handset manufacturers and service providers. The revised labeling requirements are in section 20.19(f)(1) and (2) of the Commission's rules and these revised requirements ensure that consumers have the information that they need to make informed handset model purchasing decisions.

In addition to these revised labeling rules, the Commission determined to allow handset manufacturers and service providers to use digital labeling technology as an alternative to including a printed insert or printed handset manual in a handset model's packaging. Handset manufacturers and service providers choosing this option must maintain publicly accessible websites where consumers can find the required hearing aid compatibility information, and they must provide consumers with a Quick-Response (QR) code and the related website address where the required hearing aid compatibility information can be found. The Commission decided to allow the use of digital labeling technology at the request of handset manufacturers and service providers who argued that the use of digital labeling would reduce regulatory burden and cost for them. The use of digital labeling will also ensure that consumers have access to the most up-to-date handset model information. The Commission's new digital labeling rules are at section 20.19(f)(3) of the Commission's rules.

Along these same lines, the Commission revised its website posting requirements that apply to handset manufacturers and service providers who maintain publicly accessible websites. These companies must indicate on their publicly accessible websites which handset models that they offer for sale or use in the United

States meet telecoil certification requirements and which meet Bluetooth coupling requirements. In addition, these companies must list a handset model's conversational gain if the handset model was certified as hearing aid-compatible using a standard that includes volume control requirements. The Commission also adopted point-of-contact requirements that require handset manufacturers and service providers to list contact information that consumers can use to ask knowledgeable company employees compatibility questions that they might have concerning the handset models that these companies offer for sale or use in the United States. Part of these revisions also included eliminating out-of-date website posting and record retention requirements that no longer served a useful purpose. The elimination of these outdated information collection requirements reduce regulatory burden and cost for handset manufacturers and service providers. The revised website posting requirements are at section 20.19(h) of the Commission's rules.

Finally, the Commission revised its annual certification requirements for handset manufacturers and service providers. After the 100% hearing aid compatibility transition period ends for handset manufacturers, these companies will no longer file FCC Form 655. Instead, handset manufacturers will start filing FCC Form 855 and service providers will continue to file this form. FCC Form 855 is a streamlined certification form that does not require the detail handset model information that FCC Form 655 collects. This change will significantly reduce regulatory burden and cost for handset manufacturers. In addition, the Commission is updating FCC Form 855 to ensure it collects only relevant information consistent with the Commission's 100% hearing aid compatibility requirement. These updates include removing outdated questions and streamlining the information that the form collects. The revised annual certification requirements are at section 20.19 (i)(4) and (5) of the Commission's rules.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–28186 Filed 11–29–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION**[OMB 3060–1070; FR ID 264729]****Information Collection 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 of 1995 (PRA), 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 Office of Management and Budget (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 comments should be submitted on or before January 31, 2025. 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 contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email: 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: As part of its continuing effort to reduce paperwork burdens, and as required by the PRA, 44 U.S.C. 3501–3520, the FCC

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.

OMB Control Number: 3060–1070.

Title: Allocation and Service Rules for the 71–76 GHz, 81–86 GHz, and 92–95 GHz Bands.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; not-for-profit institutions; and State, local, or Tribal Government.

Number of Respondents: 1,177 respondents; 19,604 responses.

Estimated Time per Response: 5.25 hours to 8 hours.

Frequency of Response: On occasion reporting requirement, recordkeeping requirement, and third-party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained 47 U.S.C. 151, 154(i), 302a, 303(c), 303(f), and 303(r) of the Communications Act of 1934, as amended.

Total Annual Burden: 14,347 hours.

Total Annual Cost: \$200,000.

Needs and Uses: The Commission is revising this information collection and would like to obtain the full three-year approval from OMB. The Commission adopted a new *Report and Order*, FCC 24–16, in WT Docket No. 20–133 entitled “Modernizing and Expanding Access to the 70/80/90 GHz Bands” (“*Report and Order*”). The *Report and Order* was subsequently released on January 26, 2024, and published in the **Federal Register** on April 29, 2024. Relevant to Control No. 3060–1070, the *Report and Order* adopted the following Commission rules: section 101.63(b); section 101.1523(a) and (e); and section 101.1528(a)(11), (b)(10), and (d). There are program changes to the reporting, recordkeeping and/or third-party disclosure requirements and the

Commission estimates an increase in nationwide licensees. The recordkeeping, reporting, and third party disclosure requirements will be used by the Commission to verify licensee compliance with the Commission rules and regulations, and to ensure that licensees continue to fulfill their statutory responsibilities in accordance with the Communications Act of 1934. The Commission's rules promote the private sector development and use of 71–76 GHz, 81–86 GHz, and 92–95 GHz bands (70/80/90 GHz bands). Such information has been used in the past and will continue to be used to minimize interference, verify that applicants are legally and technically qualified to hold license, and to determine compliance with Commission rules.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–28179 Filed 11–29–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION**[OMB 3060–1034; FR ID 264570]****Information Collection 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), 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.

DATES: Written comments should be submitted on or before January 31, 2025. 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 contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email 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: The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (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.

As part of its continuing effort to reduce paperwork burdens, and as required by the PRA of 1995 (44 U.S.C. 3501–3520), the FCC 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.

OMB Control Number: 3060–1034.

Title: Digital Audio Broadcasting Systems and their Impact on the Terrestrial Radio Broadcast Service; Form 2100, Schedule 335–FM—FM Digital Notification; Form 2100, Schedule 335–AM—AM Digital Notification.

Form Number: Form 2100, Schedule 335–FM.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 215 respondents; 215 responses.

Estimated Hours per Response: 1 hour–8 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 345 hours.

Total Annual Cost: \$128,250.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in sections 154(i), 303, 310, and 553 of the Communications Act of 1934, as amended.

Needs and Uses: On September 24, 2024, the Commission adopted the First Report and Order in the *Modifying Rules for FM Terrestrial Digital Audio Broadcasting System*, MB Docket No. 22–405, FCC 24–105 (*FM Digital First R&O*) proceeding, to allow digital FM station operation with asymmetric power on the digital sidebands. This asymmetric sideband operation will allow digital FM stations to operate with different power levels on the upper and lower digital sidebands, as a way to facilitate greater digital FM radio coverage without interfering with adjacent-channel FM stations, upon notification to the Commission on FCC Form 2100, Schedule 335–FM. Prior to adoption of the *FM Digital First R&O*, an FM digital station that wished to employ asymmetric sideband operation had to apply for an experimental authorization and renew that authorization annually. Initiating such operation by notification rather than experimental authorization will be simpler and less expensive to the licensee, and thus less burdensome. Additionally, eliminating the requirement of annual experimental authorization will remove a regulatory barrier and incentivize more digital FM stations to adopt such operations. This submission is therefore being made to OMB for approval of new or modified Information Collection requirements stemming from the *FM Digital First R&O*.

The changes as adopted in the *FM Digital First R&O* require modifications to Schedule 335–FM and rule sections 73.404 and 73.406. Specifically, the *FM Digital First R&O* permits digital FM stations to use asymmetric sideband operation by notifying the Commission using Schedule 335–FM, and modifies that schedule by including fields to report the digital ERP being transmitted on each digital sideband, as well as the total digital ERP. Therefore, Schedule 335–FM is being amended to provide fields for the notifying station to indicate the digital ERP transmitted on each digital sideband, as well as the total digital ERP.

The Commission also made an administrative change to the procedures used by FM station licensees seeking to increase digital power above –14 dBc. Those requests, previously submitted by “informal request,” will now be submitted using Schedule 335–FM. After the effective date of the rules adopted in the *First Digital R&O*, digital FM stations must use Schedule 335–FM to request an increase in total digital ERP above –14 dBc, using Table 1 to § 73.404(f), and will also report certain digital power decreases on Schedule 335–FM. In sum, after the effective date of the *FM Digital First R&O*, a digital FM station will report the following actions (or request authority in the case of an increase of total digital ERP above –14 dBc) by submitting Schedule 335–FM: the initiation of hybrid digital operation; the initiation of asymmetric sideband operation at any power level, as well as the discontinuance of asymmetric sideband operation; an increase of total digital ERP above –14 dBc; or a decrease in total digital ERP from a level above –14 dBc to a level at or below –14 dBc. As required with the current informal request process, a station choosing to operate with total digital ERP between –14 dBc and –10 dBc must attach an exhibit demonstrating that the proposed FM digital ERP is permitted for each digital sideband, using Table 1 to § 73.404(f). This exhibit will now be an attachment to the Schedule 335–FM submission. As is the case with the current informal request process, a digital FM station choosing to operate with total digital ERP above –14 dBc may initiate such operation upon approval from the Commission.

Schedule 335–FM is amended as follows:

a. To include a question for the notifying station to report when asymmetric sideband operations commenced.

b. To provide fields for the notifying station to indicate the digital ERP transmitted on each digital sideband, as well as the total digital ERP.

c. To include a question for the notifying station to report that it has discontinued digital broadcasts and/or asymmetric sideband operations, and provide the date of the discontinuance.

d. To include a question for the notifying station to report that the total digital ERP (listed in a previous item of the schedule) is greater than –14 dBc. A station choosing to operate with total digital ERP between –14 dBc and –10 dBc must attach an exhibit demonstrating that the proposed FM digital ERP is permitted for each digital sideband, using Table 1 in § 73.404(f).

e. To include a question for the notifying station to report a decrease in the total digital ERP to -14 dBc or below, and provide the date on which such decreased digital ERP operations commenced.

Moreover, to implement the new or modified information collection requirements contained in the *FM Digital First R&O*, sections 73.404(e) and (f) of the rules are revised to allow digital FM stations to use asymmetric power on the digital sidebands and to use the “Maximum permissible FM digital ERP per-sideband” Table to comport with the current limits on FM digital ERP. Additionally, the newly adopted digital FM notification requirements are added to rule section 73.406 in new paragraphs (d)(5) and (d)(6) as follows:

§ 73.406 Notification

(d)(5) Any digital FM station taking any of the following actions must notify the Commission of such action on Form 2100, Schedule 335–FM:

(i) Upon initiation of hybrid digital operation;

(ii) Upon initiation of asymmetric sideband operation at any power level. For FM stations employing asymmetric sideband operation as defined in § 73.402(i), the notification must include a certification that the proposed digital sideband power on each sideband conforms to the Maximum Permissible FM Digital ERP set forth in Table 1 to § 73.404(f), and that the total digital sideband power will not exceed the total power if the digital sideband operation were symmetric. The notifying station may commence asymmetric sideband operation upon filing Form 2100, Schedule 335–FM, and may continue such operation unless notified by the Commission that such operation is not rule-compliant;

(iii) Discontinuing asymmetric sideband operation and reverting to symmetric sideband operation. The digital FM station must file Form 2100, Schedule 335–FM within 30 days of discontinuing asymmetric sideband operation; or

(iv) Decreasing total digital Effective Radiated Power from a level above -14 dBc to a level at or below -14 dBc. The digital FM station must file Form 2100, Schedule 335–FM within 30 days of decreasing power.

(6) Any digital FM station seeking authority to increase total digital Effective Radiated Power above -14 dBc must submit Form 2100, Schedule 335–FM. The submission must include a certification that the proposed FM digital Effective Radiated Power is permitted, using the table set forth in

Table 1 to § 73.404(f). Certifications must be based on the most restrictive analog field strength of the proponent at any nearby first-adjacent channel station’s 60 dBμ contour. The station choosing to operate with total digital ERP above -14 dBc may initiate such operation upon approval from the Commission.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–28185 Filed 11–29–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

[DOCKET NO. 24–28]

Baylink Shipping Inc., Complainant v. ZIM Integrated Shipping Services, Ltd., Respondent; Notice of Filing of Complaint and Assignment

Served: November 25, 2024.

Notice is given that a complaint has been filed with the Federal Maritime Commission (the “Commission”) by Baylink Shipping Inc. (the “Complainant”) against ZIM Integrated Shipping Services, Ltd. (the “Respondent”). Complainant states that the Commission has subject-matter jurisdiction over the complaint pursuant to the Shipping Act of 1984, as amended, 46 U.S.C. 40101 *et seq.* and personal jurisdiction over Respondent as a common carrier, as defined in 46 U.S.C. 40102(7).

Complainant is a corporation organized and existing under the laws of the State of New York with its principal place of business in Floral Park, New York.

Complainant identifies Respondent as a global ocean carrier with a United States office located in Norfolk, Virginia.

Complainant alleges that Respondent violated 46 U.S.C. 41102(c); 41104(a)(14), (a)(15), and (d)(2); and 46 CFR 545.4 and 545.5. Complainant alleges these violations arose from the release of a container to a party other than the named consignee in the bill of lading, the assessment of detention charges on this container, and other acts and omissions of Respondent.

An answer to the complaint must be filed with the Commission within 25 days after the date of service.

The full text of the complaint can be found in the Commission’s electronic Reading Room at <https://www2.fmc.gov/readingroom/proceeding/24-28/>. This proceeding has been assigned to the Office of Administrative Law Judges. The initial decision of the presiding

judge shall be issued by November 25, 2025, and the final decision of the Commission shall be issued by June 8, 2026.

David Eng,

Secretary.

[FR Doc. 2024–28213 Filed 11–29–24; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board’s Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board’s Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments received are subject to public disclosure. In general, comments received will be made available without change and will not be modified to remove personal or business information including confidential, contact, or other identifying information. Comments should not include any information such as confidential information that would not be appropriate for public disclosure.

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 December 17, 2024.

A. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001. Comments can also be sent electronically to KCApplicationComments@kc.frb.org:

1. *William F. Dugan, Waterloo, Nebraska, individually, and as trustee of*

the Flatirons Bank Employee Stock Ownership Plan and Trust, both of Boulder, Colorado; to acquire voting shares of FBHC Holding Company, and thereby indirectly acquire voting shares of Flatirons Bank, both of Boulder, Colorado.

2. *The Glenn R. Hamilton Trust dated November 20, 1998, and Glenn Hamilton, trustee, both of Butler, Missouri*; to join the Hamilton Family Control Group, a group acting in concert, to retain voting shares of Community First Bancshares, Inc., and thereby indirectly acquire voting shares of Community First Bank, both of Butler, Missouri. In addition, Marsha Hamilton, Butler, Missouri, to retain voting shares and join the Hamilton Family Control Group.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Associate Secretary of the Board.

[FR Doc. 2024-28216 Filed 11-29-24; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Solicitation of Nominations for Appointment to the Safety and Occupational Health Study Section

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, the Centers for Disease Control and Prevention (CDC), within the Department of Health and Human Services (HHS), is seeking nominations for membership on the Safety and Occupational Health Study Section (SOHSS). SOHSS consists of 20 experts in fields associated with occupational medicine and nursing, industrial hygiene, occupational safety and engineering, toxicology, chemistry, safety and health education, ergonomics, epidemiology, economic science, psychology, pulmonary pathology/physiology, and social science.

DATES: Nominations for membership on SOHSS must be received no later than January 31, 2025. Packages received after this time will not be considered for the current membership cycle.

ADDRESSES: All nominations should be mailed to Dr. Michael Goldcamp, 1095

Willowdale Road, Morgantown, West Virginia 26505 or emailed to MGoldcamp@cdc.gov.

FOR FURTHER INFORMATION CONTACT: Michael Goldcamp, Ph.D., Scientific Review Officer, Office of Extramural Programs, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, 1095 Willowdale Road, Morgantown, West Virginia 26505. Telephone: (304) 285-5951; Email: MGoldcamp@cdc.gov.

SUPPLEMENTARY INFORMATION: Nominations are sought for individuals who have the expertise and qualifications necessary to contribute to the accomplishment of the objectives of the Safety and Occupational Health Study Section (SOHSS). Nominees will be selected based on expertise in the fields of occupational medicine and nursing, industrial hygiene, occupational safety and engineering, toxicology, chemistry, safety and health education, ergonomics, epidemiology, economic science, psychology, pulmonary pathology/physiology, and social science. Members may be invited to serve up to four-year terms. Selection of members is based on candidates' qualifications to contribute to the accomplishment of SOHSS objectives (<https://www.cdc.gov/faca/committees/sohss.html>).

Department of Health and Human Services (HHS) policy stipulates that committee membership be balanced in terms of points of view represented and the committee's function. Appointments shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, gender identity, HIV status, disability, and cultural, religious, or socioeconomic status. Nominees must be U.S. citizens and cannot be full-time employees of the U.S. Government. Current participation on Federal workgroups or prior experience serving on a Federal advisory committee does not disqualify a candidate; however, HHS policy is to avoid excessive individual service on advisory committees and multiple committee memberships. Committee members are Special Government Employees, requiring the filing of financial disclosure reports at the beginning of and annually during their terms. The Centers for Disease Control and Prevention (CDC) reviews potential candidates for SOHSS membership each year and provides a slate of nominees for consideration to the Secretary of HHS for final selection. HHS notifies selected candidates of their appointment near the start of the term in October 2025, or as soon as the HHS selection process is completed. Note

that the need for different expertise varies from year to year and a candidate who is not selected in one year may be reconsidered in a subsequent year.

Candidates should submit the following items:

- Current curriculum vitae, including complete contact information (telephone numbers, mailing address, email address).

- At least one letter of recommendation from person(s) not employed by HHS. Candidates may submit letter(s) from current HHS employees if they wish, but at least one letter must be submitted by a person not employed by an HHS agency (e.g., CDC, National Institutes of Health, Food and Drug Administration).

Nominations may be submitted by the candidate or by the person/organization recommending the candidate.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024-28183 Filed 11-29-24; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to 5 U.S.C. 1009(d), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, pursuant to Public Law 92-463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which

would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE25–027, Evaluate STEADI-based Fall Prevention in Assisted Living Facilities.

Dates: March 4–5, 2025.

Times: 10 a.m.–5 p.m., EST.

Place: Web Conference.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Aisha L. Wilkes, M.P.H., Scientific Review Officer, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 4770 Buford Highway NE, Mailstop S106–9, Atlanta, Georgia 30341. Telephone: (404) 639–6473; Email: AWilkes@cdc.gov.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024–28181 Filed 11–29–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to 5 U.S.C. 1009(d), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended, and the Determination of the Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel; (SEP)—TS25–036, Identify and Evaluate Potential Risk Factors for ALS.

Dates: February 25–26, 2025.

Times: 10 a.m.–5 p.m., EST.

Place: Web Conference.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Carlisha Gentles, Pharm.D., B.C.P.S., C.D.C.E.S., Scientific Review Officer, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 4770 Buford Highway NE, Mailstop S106–9, Atlanta, Georgia 30341. Telephone: (770) 488–1504; Email: CGentles@cdc.gov.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024–28182 Filed 11–29–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–6094–N]

RIN 0938–ZB85

Medicare, Medicaid, and Children's Health Insurance Programs; Provider Enrollment Application Fee Amount for Calendar Year 2025

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

ACTION: Notice.

SUMMARY: This notice announces a \$730.00 calendar year (CY) 2025 application fee for institutional providers that are initially enrolling in the Medicare or Medicaid program or the Children's Health Insurance Program (CHIP); revalidating their Medicare, Medicaid, or CHIP enrollment; or adding a new Medicare practice location. This fee is required with any enrollment application

submitted on or after January 1, 2025, and on or before December 31, 2025.

DATES: The application fee announced in this notice is effective on January 1, 2025.

FOR FURTHER INFORMATION CONTACT:

Frank Whelan, (410) 786–1302.

SUPPLEMENTARY INFORMATION:

I. Background

In the February 2, 2011 **Federal Register** (76 FR 5862), we published a final rule with comment period titled “Medicare, Medicaid, and Children's Health Insurance Programs; Additional Screening Requirements, Application Fees, Temporary Enrollment Moratoria, Payment Suspensions and Compliance Plans for Providers and Suppliers.” This rule finalized, among other things, provisions related to the submission of application fees as part of the Medicare, Medicaid, and CHIP provider enrollment processes.

As provided in section 1866(j)(2)(C)(i) of the Social Security Act (the Act) and in 42 CFR 424.514, “institutional providers” that are initially enrolling in the Medicare or Medicaid programs or CHIP, revalidating their enrollment, or adding a new Medicare practice location are required to submit a fee with their enrollment application. An “institutional provider” for purposes of Medicare is defined at § 424.502 as “any provider or supplier that submits a paper Medicare enrollment application using the CMS–855A, CMS–855B (not including physician and non-physician practitioner organizations), CMS–855S, or associated internet-based PECOS enrollment application.” As we explained in the February 2, 2011 final rule (76 FR 5914), in addition to the providers and suppliers subject to the application fee under Medicare, Medicaid-only and CHIP-only institutional providers would include nursing facilities, intermediate care facilities for persons with intellectual disabilities (ICF/IID), and psychiatric residential treatment facilities; they may also include other institutional provider types designated by a State in accordance with their approved State plan.

As indicated in § 424.514 and § 455.460, the application fee is not required for either of the following:

- A Medicare physician or non-physician practitioner submitting a CMS–855I.
- A prospective or revalidating Medicaid or CHIP provider—
 - ++ Who is an individual physician or non-physician practitioner; or
 - ++ That is enrolled as an institutional provider in Title XVIII of the Act or

another State's title XIX or XXI plan and has paid the application fee to a Medicare contractor or another State.

II. Provisions of the Notice

Section 1866(j)(2)(C)(i)(I) of the Act established a \$500 application fee for institutional providers in CY 2010. Consistent with section 1866(j)(2)(C)(i)(II) of the Act, § 424.514(d)(2) states that for CY 2011 and subsequent years, the preceding year's fee will be adjusted by the percentage change in the consumer price index (CPI) for all urban consumers (all items; United States city average, CPI-U) for the 12-month period ending on June 30 of the previous year. Consequently, each year since 2011 we have published in the **Federal Register** an announcement of the application fee amount for the forthcoming CY based on this formula. Most recently, in the November 7, 2023 **Federal Register** (88 FR 76754), we published a notice announcing a fee amount for the period of January 1, 2024 through December 31, 2024 of \$709.00. The \$709.00 fee amount for CY 2024 was used to calculate the fee amount for 2025 as specified in § 424.514(d)(2).

According to Bureau of Labor Statistics (BLS) data, the CPI-U increase for the period of July 1, 2023 through June 30, 2024 was 3.0 percent. (See https://www.bls.gov/news.release/archives/cpi_07112024.htm.) As required by § 424.514(d)(2), the preceding year's fee of \$709 will be adjusted by 3.0 percent. This results in a CY 2025 application fee amount of \$730.27 ($\$709 \times 1.03$). As we must round this to the nearest whole dollar amount, the resultant application fee amount for CY 2025 is \$730.

III. Collection of Information Requirements

This document does not impose information collection requirements (that is, reporting, recordkeeping, or third-party disclosure requirements). Accordingly, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995. However, it does reference previously approved information collections. The CMS-855A, CMS-855B, CMS-855I, and CMS-855S applications are approved under, respectively, OMB control numbers 0938-0685, 0938-1377, 0938-1355, and 0938-1056.

IV. Regulatory Impact Statement

A. Overall Impact

We have examined the impacts of this notice 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), Executive Order 14094 titled "Modernizing Regulatory Review" (April 6, 2023), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354), section 1102(b) of the Social Security 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). The Executive Order 14094 titled "Modernizing Regulatory Review" amends section 3(f)(1) of Executive Order 12866 (Regulatory Planning and Review). The amended section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a rule (notice) that may: (1) have an annual effect on the economy of \$200 million or more in any 1 year, (adjusted every 3 years by the Administrator of OMB's Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in this Executive order, as specifically authorized in a timely manner by OIRA in each case.

A regulatory impact analysis (RIA) must be prepared for notices with significant regulatory action/s and/or with significant effects as per section 3(f)(1) of Executive Order 12866 (\$200 million or more in any 1 year). Based on our estimates, OIRA has determined that this rulemaking is not significant per section 3(f)(1) as measured by the \$200 million or more in any 1 year.

As explained in this section of the notice, we estimate that the total cost of

the increase in the application fee will not exceed \$200 million. Therefore, this notice does not reach the \$200 million economic threshold and is not considered a significant notice.

B. Cost

The costs associated with this notice involve the increase in the application fee amount that certain providers and suppliers must pay in CY 2025. The CY 2025 cost estimates are as follows:

1. Medicare

Based on CMS data, we estimate that in CY 2025 approximately—

- 13,151 newly enrolling institutional providers will be subject to and pay an application fee; and
- 37,224 revalidating institutional providers will be subject to and pay an application fee.

Using a figure of 50,375 (13,151 newly enrolling + 37,224 revalidating) institutional providers, we estimate an increase in the cost of the Medicare application fee requirement in CY 2025 of \$1,057,875 (or $50,375 \times \$21$ (or \$730 minus \$709)) from our CY 2024 projections.

2. Medicaid and CHIP

Based on CMS and State statistics, we estimate that approximately 30,000 (9,000 newly enrolling + 21,000 revalidating) Medicaid and CHIP institutional providers will be subject to an application fee in CY 2025. Using this figure, we project an increase in the cost of the Medicaid and CHIP application fee requirement in CY 2025 of \$630,000 (or $30,000 \times \$21$ (or \$730 minus \$709)) from our CY 2024 projections.

3. Total

Based on the foregoing, we estimate the total increase in the cost of the application fee requirement for Medicare, Medicaid, and CHIP providers and suppliers in CY 2025 to be \$1,687,875 ($\$1,057,875 + \$630,000$) from our CY 2024 projections.

We do not anticipate any negative impact on equity from the increase in the application fee amount, which we calculated in accordance with the requirements specified in statute and regulation. Prior application fee increases have had no such discernable effect, and we reiterate that the fee requirement does not apply to individual physicians and non-physician practitioners completing the CMS-855I, who represent the overwhelming preponderance of the more than 2 million Medicare-enrolled providers and suppliers.

The RFA requires agencies to analyze options for regulatory relief of small businesses. 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 \$9 million to \$47 million in any 1 year. Individuals and States are not included in the definition of a small entity. As we stated in the RIA for the February 2, 2011 final rule (76 FR 5952), we do not believe that the application fee will have a significant impact on small entities.

In addition, section 1102(b) of the Act requires us to prepare an RIA if a rule (notice) 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 and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act, because the Secretary has certified that this notice will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 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 2024, that threshold is approximately \$183 million. This notice would not impose a mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than \$183 million in any 1 year.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) (in this case a notice) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. Since this notice does not impose substantial direct costs on State or local governments, the requirements of Executive Order 13132 are not applicable.

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

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document,

authorizes Chyana Woodyard, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Chyana Woodyard,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2024–28127 Filed 11–29–24; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10371]

Agency Information Collection Activities: Proposed Collection; Comment Request

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

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by January 31, 2025.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to <http://www.regulations.gov>. Follow the instructions for "Comment or Submission" or "More Search Options"

to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing>.

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10371 State-based Exchange, SBE, SBE Budget Template, SBE Enrollment Metrics, Open Enrollment

Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term "collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires Federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collections

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* State-based Exchange, SBE, SBE Budget Template, SBE Enrollment Metrics, Open Enrollment; *Use:* The Patient Protection

and Affordable Care Act, Public Law 111–148, enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, Public Law 111–152, enacted on March 30, 2010 collectively, “Affordable Care Act”, expanded access to health insurance for individuals and employees of small businesses through the establishment of new Affordable Insurance Exchanges (Exchanges), including the Small Business Health Options Program (SHOP). Beginning January 1, 2014, the Exchanges became operational. The Exchanges enhance competition in the health insurance market, expand access to affordable health insurance for millions of Americans, and provide consumers with a place to easily compare and shop for health insurance coverage.

States can choose to establish and operate a State-based Exchange (SBE) or a State-based Exchange on the Federal Platform (SBE–FP). States electing to operate as an SBE–FP rely on the Federal Healthcare.gov platform to carry out eligibility and enrollment functions. For states that do not elect to operate either an SBE or SBE–FP, the Secretary of the U.S. Department of Health and Human Services (HHS) will establish and operate a Federally-facilitated Exchange (FFE) in those states. *Form Number:* CMS–10371 (OMB control number: 0938–1119; *Frequency:* Occasionally; *Affected Public:* State, Local or Tribal Government; *Number of Respondents:* 23; *Total Annual Responses:* 343; *Total Annual Hours:* 7,317. (For policy questions regarding this collection contact Tiffany Y. Animashaun at Tiffany.Animashaun@cms.hhs.gov).

William N. Parham, III,

Director, Division of Information Collections and Regulatory Impacts, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2024–28083 Filed 11–29–24; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Low Income Home Energy Assistance Program (LIHEAP) Performance Data Form (Office of Management and Budget #0970–0449)

AGENCY: Office of Community Services, Administration for Children and Families, U.S. Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Administration for Children and Families (ACF) Office of Community Services (OCS) within the U.S. Department of Health and Human Services (HHS) is requesting an extension without change to the current version of the Low Income Home Energy Assistance Program (LIHEAP) Performance Measures (Office of Management and Budget (OMB) #0970–0449) for use through June 30, 2025, and for approval of a revised version to use beginning July 1, 2025.

DATES: *Comments due* January 31, 2025. In compliance with the requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: You can obtain copies of the proposed collection of information and submit comments by emailing infocollection@acf.hhs.gov. Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: OCS administers LIHEAP at the Federal level. The *LIHEAP Performance Data Form* (LPDF) is an annual report in response to section 2610(b) of the Low-Income Home Energy Assistance Act of 1981 (42 U.S.C. 8629(b)(2)) (LIHEAP statute), which requires the Secretary of HHS to submit, no later than June 30 of each Federal fiscal year, a report to Congress on LIHEAP for the prior Federal fiscal year. The completeness, accuracy, consistency, and timeliness of responses to data collections are needed for HHS to do the following:

- Provide reliable and complete fiscal and household data to Congress in the Department’s *LIHEAP Report to Congress* for the Federal fiscal year; and
- Respond to questions from the Congress, Department, OMB, White House, and other interested parties in a timely manner; and
- Report LIHEAP performance results as part of the Administration’s annual Congressional Justification.

In response to the 2010 Government Accountability Office (GAO) report, *Low Income Home Energy Assistance Program—Greater Fraud Prevention Controls are Needed* (GAO–10–621), and in consideration of the recommendations issued by the LIHEAP Performance Measures Implementation Work Group, OCS required the collection and reporting of these performance measures by State LIHEAP grant recipients, including the District of Columbia. The original LPDF was approved by OMB in November 2014

and has been in use since. The LPDF provides for the collection of data on State grant recipients’ sources and uses of LIHEAP funds, including average benefit amounts, as well as data for the following performance measures:

1. The benefit targeting index for high burden households receiving LIHEAP fuel assistance;
2. The burden reduction targeting index for high burden households receiving LIHEAP fuel assistance;
3. The number of households where LIHEAP prevented a potential home energy crisis; and
4. The number of households where LIHEAP benefits restored home energy.

All State LIHEAP grant recipients, including the District of Columbia, are required to complete the LPDF on an annual basis through ACF’s web-based data collection and reporting system, the Online Data Collection, which is available at the GrantSolutions homepage (<https://home.grantsolutions.gov/home>). The reporting requirements will be described through the LIHEAP Forms and Funding Applications page (<https://www.acf.hhs.gov/ocs/form/liheap-forms-and-funding-applications>) of ACF’s website.

This request will (1) continue approval to collect information using the currently approved version of the LPDF through June 30, 2025; and (2) incorporate changes to the LPDF designed to collect performance data on the impacts of supplemental Federal LIHEAP funds and to improve form fields and language. The changes proposed would go into effect in July 2025 and consist of (1) changing the name of Module 1 of the form from “Grantee Survey” to “Grant Recipient Survey”; (2) adding an item for reporting carryover of Residential Energy Assistance Challenge (REACH) funds to the following FY; (3) adding an item for reporting non-administrative information technology enhancements; (4) removing maximum income cutoffs from funding uses; (5) replacement of sources and uses of Coronavirus Aid, Relief, and Economic Security Act (CARES Act) funds and American Rescue Plan Act of 2021 (ARPA) funds with the Infrastructure Investment and Jobs Act (IIJA) funds; and (6) minor wording and structural changes.

Module 1 Grant Recipient Survey

Module 1 of the LPDF will continue to require the following data from each State for the Federal fiscal year:

- Grant recipient information.
- Sources and uses of LIHEAP funds, by funding type.

- Average LIHEAP household benefits, by funding type.

Modules 2, 2A, and 2B Required LIHEAP Performance Measures

Modules 2, 2A, and 2B of the LPDF will continue to require the following data from each State for the Federal fiscal year:

- Grant recipient information;
- Energy burden targeting;
- Restoration of home energy service; and
- Prevention of loss of home energy.

Modules 2, 2A, and 2B require reporting on households that received benefits from, respectively, non-

supplemental funds, CARES Act funds, and ARPA funds.

Module 3 LIHEAP Performance Measures (Optional Reporting)

Module 3 of the LIHEAP LPDF will continue to voluntarily collect the following additional information from each interested grant recipient for the Federal fiscal year:

- Average annual energy usage;
- Unduplicated number of households using supplemental heating fuel and air conditioning;
- Unduplicated number of households that had restoration of home energy service, and

- Unduplicated number of households that had prevention of loss of home energy.

LIHEAP grant recipients will be able to compare their own results to the results for other States, as well as to regional and national results, through the Data Warehouse of the LIHEAP Performance Management website as they manage their programs.

Respondents

State governments, including the District of Columbia; the largest five electricity and natural gas vendors by State; the largest ten fuel oil and propane vendors by State; and State sub-grant recipients.

ANNUAL BURDEN ESTIMATES

LIHEAP performance data form	Total number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual burden hours
State Grant Recipients—Module I	51	1	30	1,530
State Grant Recipients—Modules II and III	51	1	158.6	8,088.6
Sub-Grant Recipients (in States with sub-grant recipient managed systems)—Modules II and III	100	1	6.3	630
Energy Vendors (largest 5 electric, 5 natural gas, 10 fuel oil, and 10 propane vendors per State-average)—Modules II and III	1,530	1	8.5	13,005

Estimated Total Annual Burden Hours: 23,253.6.

Comments

The Department specifically requests comments on (a) whether the proposed 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 proposed collection of information; (c) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 42 U.S.C. 8629(b); 42 U.S.C. 8624(b); 42 U.S.C. 8623(c).

Mary C. Jones,
ACF/OPRE Certifying Officer.

[FR Doc. 2024-28152 Filed 11-29-24; 8:45 am]

BILLING CODE 4184-80-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2024-N-1636]

Issuance of Priority Review Voucher; Rare Pediatric Disease Product; KEBILIDI (eladocagene exuparvovec-tneq)

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the issuance of a priority review voucher to the sponsor of a rare pediatric disease product application. The Federal Food, Drug, and Cosmetic Act (FD&C Act) authorizes FDA to award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA is required to publish notice of the award of the priority review voucher. FDA has determined that KEBILIDI (eladocagene exuparvovec-tneq), approved on November 13, 2024, manufactured by PTC Therapeutics Inc., meets the criteria for a priority review voucher.

FOR FURTHER INFORMATION CONTACT: Myrna Hanna, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New

Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993-0002, 240-402-7911.

SUPPLEMENTARY INFORMATION: FDA is announcing the issuance of a priority review voucher to the sponsor of an approved rare pediatric disease product application. Under section 529 of the FD&C Act (21 U.S.C. 360ff), FDA will award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA has determined that KEBILIDI (eladocagene exuparvovec-tneq), manufactured by PTC Therapeutics Inc., meets the criteria for a priority review voucher. KEBILIDI (eladocagene exuparvovec-tneq) is indicated for treatment of adult and pediatric patients with aromatic L-amino acid decarboxylase deficiency.

For further information about the Rare Pediatric Disease Priority Review Voucher Program and for a link to the full text of section 529 of the FD&C Act, go to <https://www.fda.gov/industry/developing-products-rare-diseases-conditions/rare-pediatric-disease-rpd-designation-and-voucher-programs>. For further information about KEBILIDI (eladocagene exuparvovec-tneq), go to the Center for Biologics Evaluation and Research's Approved Cellular and Gene Therapy Products website at <https://www.fda.gov/vaccines-blood-biologics/>

*cellular-gene-therapy-products/
approved-cellular-and-gene-therapy-
products.*

Dated: November 26, 2024.

P. Ritu Nalubola,

Associate Commissioner for Policy.

[FR Doc. 2024–28206 Filed 11–29–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2024–N–5253]

Anesthetic and Analgesic Drug Products Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments— Biologics License Application 761393 for Condoliase Injection

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Anesthetic and Analgesic Drug Products Advisory Committee (the Committee). The general function of the Committee is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on January 10, 2025, from 9 a.m. to 4:30 p.m. Eastern Time.

ADDRESSES: The public may attend the meeting at the FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. The public will also have the option to participate, and the advisory committee meeting will be heard, viewed, captioned, and recorded through an online teleconferencing and/or video conferencing platform.

Answers to commonly asked questions about FDA advisory committee meetings, including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: <https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm>.

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2024–N–5253. The docket will close on January 9, 2025. Please note that late, untimely filed comments will not be considered.

The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 9, 2025. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Comments received on or before December 26, 2024, will be provided to the Committee. Comments received after that date will be taken into consideration by FDA. In the event that the meeting is canceled, FDA will continue to evaluate any relevant applications or information, and consider any comments submitted to the docket, as appropriate.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2024–N–5253 for “Anesthetic and Analgesic Drug Products Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments—Biologics License Application (BLA) 761393 for Condoliase Injection.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” FDA will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify the information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: LaToya Bonner, Center for Drug Evaluation and Research, Food and

Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993-0002, 301-796-2855, email: AADPAC@fda.hhs.gov, or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-0572 in the Washington, DC area). A notice in the **Federal Register** about last-minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check FDA's website at <https://www.fda.gov/AdvisoryCommittees/default.htm> and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing and/or video conferencing platform. The Committee will discuss BLA 761393, condoliase injection submitted by Seikagaku Corp., for the proposed indication of the treatment of radicular leg pain associated with lumbar disc herniation in adults.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting. Background material and the link to the online teleconference and/or video conference meeting will be available at the location of the advisory committee meeting and at <https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm>. Scroll down to the appropriate advisory committee meeting link. The online presentation of materials will include slide presentations with audio and video components to allow the presentation of materials in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the Committee. All electronic and written submissions to the Docket (see **ADDRESSES**) on or before December 26, 2024, will be provided to the Committee. Oral presentations from the public will be scheduled between approximately 1:15 p.m. and 2:15 p.m. Eastern Time. Those individuals

interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, whether they would like to present online or in-person, and an indication of the approximate time requested to make their presentation on or before December 17, 2024. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. Similarly, room for interested persons to participate in-person may be limited. If the number of registrants requesting to speak in-person during the open public hearing is greater than can be reasonably accommodated in the venue for the in-person portion of the advisory committee meeting, FDA may conduct a lottery to determine the speakers who will be invited to participate in-person. The contact person will notify interested persons regarding their request to speak by December 18, 2024. Persons attending FDA's advisory committee meetings are advised that FDA is not responsible for providing access to electrical outlets.

For press inquiries, please contact the Office of Media Affairs at fdaoma@fda.hhs.gov or 301-796-4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact LaToya Bonner (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at <https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm> for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. 1001 *et seq.*). This meeting notice also serves as notice that, pursuant to 21 CFR 10.19, the requirements in 21 CFR 14.22(b), (f), and (g) relating to the location of advisory committee meetings are hereby waived to allow for this meeting to take place using an online meeting platform in conjunction with the physical meeting room (see location). This waiver is in the interest of allowing greater transparency and

opportunities for public participation, in addition to convenience for advisory committee members, speakers, and guest speakers. The conditions for issuance of a waiver under 21 CFR 10.19 are met.

Dated: November 25, 2024.

P. Ritu Nalubola,

Associate Commissioner for Policy.

[FR Doc. 2024-28210 Filed 11-29-24; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2024-N-4085]

Advancing Smoking Cessation: Food and Drug Administration and National Institutes of Health Priorities; Public Meeting; Request for Comments; Reopening of Public Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; reopening of public comment period.

SUMMARY: The Food and Drug Administration (FDA or Agency) published in the **Federal Register** of September 23, 2024, a notice of public meeting scheduled for October 21, 2024, and solicited comments from interested parties. FDA requested that all electronic and written comments be submitted by November 21, 2024. FDA is reopening the public comment period until December 20, 2024, in response to feedback received from interested parties. This action will allow for interested parties additional time to review the meeting transcript and recording to prepare information and comments.

DATES: The comment period for the notice of public meeting published on September 23, 2024, (89 FR 77521) is reopened. Either electronic or written comments must be received on or before December 20, 2024.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of December 20, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2024-N-4085 for "Advancing Smoking Cessation: Food and Drug Administration and National Institutes of Health Priorities." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two

copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

FOR FURTHER INFORMATION CONTACT: Laura Chilaka, Center for Tobacco Products, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 877-287-1373, TobaccoCessation@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: On September 23, 2024, FDA published in the **Federal Register** a notice announcing a public meeting entitled "Advancing Smoking Cessation: Food and Drug Administration and National Institutes of Health Priorities." Jointly convened by FDA and the National Institutes of Health, this public meeting addressed the need for novel smoking cessation products to help individuals of all ages, including underserved and vulnerable populations, stop smoking.

Interested persons were originally given until November 21, 2024, to submit comments on the public meeting.

FDA has received requests for additional time in submitting comments. Due to the significant

interest in the topic and to allow interested parties time to review the meeting transcript and recording, FDA has reopened the comment period until December 20, 2024.

Dated: November 25, 2024.

P. Ritu Nalubola,

Associate Commissioner for Policy.

[FR Doc. 2024-28205 Filed 11-29-24; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Recharter for the National Advisory Council on Nurse Education and Practice

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, HHS is hereby giving notice that the National Advisory Council on Nurse Education and Practice (NACNEP or Council) is rechartered.

DATES: The effective date of the recharter is November 30, 2024.

FOR FURTHER INFORMATION CONTACT: Justin Bala-Hampton, Bureau of Health Workforce, HRSA, 5600 Fishers Lane, Rockville, Maryland 20857; 301-443-2765 or BHWNAACNEP@hrsa.gov.

SUPPLEMENTARY INFORMATION: NACNEP provides advice and recommendations to the Secretary of HHS and Congress on policy matters and the preparation of general regulations concerning activities under title VIII of the Public Health Service Act, including the range of issues relating to the nurse workforce, education, and practice improvement. NACNEP also prepares and submits an annual report to the Secretary of HHS and Congress describing its activities, including NACNEP's findings and recommendations concerning activities under title VIII, as required by the Public Health Service Act. The recharter of NACNEP was approved on October 31, 2024. The filing date for the NACNEP recharter is November 30, 2024. The recharter of NACNEP gives authorization for the Council to operate until November 30, 2026.

A copy of the NACNEP charter is available on the NACNEP website at <https://www.hrsa.gov/advisorycommittees/nursing/about.html>. A copy of the charter can also be obtained by accessing the FACA database that is

maintained by the Committee Management Secretariat under the General Services Administration. The website address for the FACA database is <https://www.facadatabase.gov/>.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2024-28087 Filed 11-29-24; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the Advisory Committee on Infant and Maternal Mortality

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice announces that the Advisory Committee on Infant and Maternal Mortality (ACIMM or Committee) has scheduled a public meeting. Information about ACIMM and the agenda for this meeting can be found on the ACIMM website at <https://www.hrsa.gov/advisory-committees/infant-mortality/index.html>.

DATES: January 7, 2025, from 12:00 p.m. to 5:00 p.m. Eastern Time and January 8, 2025, from 12:00 p.m. to 5:00 p.m. Eastern Time.

ADDRESSES: This meeting will be held by webinar. *The webinar link and log-in information will be available at the ACIMM website before the meeting:* <https://www.hrsa.gov/advisory-committees/infant-mortality/index.html>.

FOR FURTHER INFORMATION CONTACT:

Vanessa Lee, MPH, Designated Federal Official, Maternal and Child Health Bureau, HRSA, 5600 Fishers Lane, Rockville, Maryland, 20857; 301-443-0543; or SACIM@hrsa.gov.

SUPPLEMENTARY INFORMATION: ACIMM is authorized by section 222 of the Public Health Service Act (42 U.S.C. 217a), as amended. The Committee is governed by provisions of the Federal Advisory Committee Act (5 U.S.C. Chapter 10), as amended.

ACIMM advises the Secretary of Health and Human Services on department activities, partnerships, policies, and programs directed at reducing infant mortality, maternal mortality, and severe maternal morbidity and improving the health status of infants and women before, during, and after pregnancy. The

Committee provides advice on how to coordinate federal, state, local, tribal, and territorial governmental efforts designed to improve infant mortality; related adverse birth outcomes; and maternal health; as well as influence similar efforts in the private and voluntary sectors. The Committee provides guidance and recommendations on the policies, programs, and resources required to address the disparities and inequities in infant mortality; related adverse birth outcomes and maternal health outcomes, including maternal mortality and severe maternal morbidity. With its focus on underlying causes of the disparities and inequities seen in birth outcomes for women and infants, the Committee advises the Secretary of Health and Human Services on the health, social, economic, and environmental factors contributing to the inequities and proposes structural, policy, and/or systems level changes.

The agenda for the January 7–8, 2025, meeting is being finalized and may include the following topics: federal updates; Committee operations updates; discussion of draft recommendations for the Secretary on achieving optimal maternal health and overall birth outcomes for underserved populations, including Black/African-American families; and a vote on whether to send the draft recommendations forward. Agenda items are subject to change as priorities dictate. Refer to the ACIMM website listed above for any updated information concerning the meeting.

Members of the public will have the opportunity to provide written or oral comments. Public participants may submit written statements in advance of the scheduled meeting by emailing SACIM@hrsa.gov. Oral comments will be presented in the order they are requested and may be limited as time allows. Requests to submit a written statement or make oral comments to ACIMM should be sent to Vanessa Lee, Designated Federal Official, using the email address above, at least 3 business days prior to the meeting.

Individuals who plan to attend and need special assistance or another reasonable accommodation should notify Vanessa Lee at the contact information listed above at least 10 business days prior to the meeting.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2024-28155 Filed 11-29-24; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Advisory Committee on Minority Health

AGENCY: Office of Minority Health, Office of the Secretary, U.S. Department of Health and Human Services.

ACTION: Notice of meeting.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services (HHS) is hereby giving notice that the Advisory Committee on Minority Health (ACMH) will hold a meeting conducted as a webcast on December 16, 2024. This virtual meeting will be open to the public. Registration is required for the public to attend the meeting, provide comment, and/or distribute material(s) to ACMH members.

DATES: The virtual ACMH meeting will be held on December 16, 2024, from 2 p.m. to 3:30 p.m. eastern standard time (EST). If the Committee completes its work before 3:30 p.m. EST, the meeting will adjourn early.

ADDRESSES: The meeting will be held virtually and will be accessible by webcast. Instructions regarding webcast access and providing written public comments will be given after meeting registration occurs.

Any individual who wishes to participate in the virtual meeting should register using the Zoom registration link provided below by 5 p.m. EST on December 12, 2024. Instructions regarding participating in the call and providing written or verbal public comments will be provided after meeting registration occurs. Information about the meeting will be posted on the HHS Office of Minority Health (OMH) website: www.minorityhealth.hhs.gov. Information about ACMH activities can be found on the OMH website under the heading *About OMH, Committees and Working Groups*.

FOR FURTHER INFORMATION CONTACT:

Violet Woo, Designated Federal Officer, Advisory Committee on Minority Health, OMH, HHS, Tower Building, 1101 Wootton Parkway, Suite 100, Rockville, Maryland 20852. Phone: 240-453-6816; email: OMH-ACMH@hhs.gov.

SUPPLEMENTARY INFORMATION: In accordance with Public Law 105-392, the ACMH was established to provide advice to the Deputy Assistant Secretary for Minority Health on the development of goals and program activities related to OMH's duties.

The topics to be discussed during the virtual meeting include finalizing: (1)

meeting notes of the November 14–15, 2024 ACMH open meeting; and (2) recommendations on the implementation of the updated Office of Management and Budget (OMB) Federal race and ethnicity data collection standards (SPD 15) that is focused on opportunities for engagement with racial, ethnic, and Tribal community level organizations to support increased awareness of OMB SPD 15 and their intended goals within their communities. The final recommendations will be given to the Deputy Assistant Secretary for Minority Health to inform efforts related to engagement with racial, ethnic, and Tribal community level organizations to support increased awareness of OMB SPD 15 and their intended goals within their communities.

Any individual who wishes to attend the meeting must register via the Zoom registration link, https://www.zoomgov.com/webinar/register/WN_iZGnp8BWRQORITiqVcThzA, by 5 p.m. EST on December 12, 2024. Each registrant should provide their name, affiliation, phone number, email address, if they plan to provide either written or verbal comment, and whether they have requests for special accommodations, including sign language interpretation. After registering, registrants will receive an automated email response with the meeting connection link. The meeting connection link is unique to each registrant and should not be shared.

Members of the public will have an opportunity to provide comments at the meeting. Individuals should indicate during registration whether they intend to provide written or verbal comment. Public comments will be limited to two minutes per speaker during the time allotted. Individuals of the public may also submit and distribute electronic or printed statements or material(s) related to this meeting's topic. Written statements or material(s) should be double-spaced with one-inch margins and not exceed two pages in length. Any content beyond the two-page limit will not be presented to the Committee. Registered members of the public who plan to submit electronic and distribute electronic or printed public statements or material(s) related to the meeting's topic should email the material to OMH-ACMH@hhs.gov at least two (2) business days prior to the meeting.

Violet Woo,

Designated Federal Officer, Advisory Committee on Minority Health.

[FR Doc. 2024–28167 Filed 11–29–24; 8:45 am]

BILLING CODE 4150–29–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of an Exclusive Patent License: Vaccine Augmented Tumor Infiltrating Lymphocytes for the Treatment of Cancer

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Cancer Institute, an institute of the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an Exclusive Patent License to practice the inventions embodied in the Patents and Patent Applications listed in the Supplementary Information section of this Notice to Iovance Biotherapeutics, Inc. (“Iovance”), headquartered in San Carlos, CA.

DATES: Only written comments and/or applications for a license which are received by the National Cancer Institute’s Technology Transfer Center on or before December 17, 2024 will be considered.

ADDRESSES: Requests for copies of the patent applications, inquiries, and comments relating to the contemplated Exclusive Patent License should be directed to: Andrew Burke, Ph.D., Senior Technology Transfer Manager, NCI Technology Transfer Center, Telephone: (240)–276–5484; Email: andy.burke@nih.gov.

SUPPLEMENTARY INFORMATION:

Intellectual Property

1. United States Provisional Patent Application No. 63/295,762 filed December 31, 2021, entitled “T Cell Therapy with Vaccination as a Combination Immunotherapy Against Cancer” [HHS Reference No. E–046–2022–0–US–01];
2. International Patent Application No. PCT/US2022/082579 filed December 29, 2022, entitled “T Cell Therapy with Vaccination as a Combination Immunotherapy Against Cancer” [HHS Reference No. E–046–2022–0–PCT–02];
3. Australian Patent Application No. 2022425620 filed June 25, 2024, entitled “T Cell Therapy with Vaccination as a Combination Immunotherapy Against Cancer” [HHS Reference No. E–046–2022–0–AU–01];
4. Canadian Patent Application No. 3241588 filed June 18, 2024, entitled “T Cell Therapy with Vaccination as a Combination Immunotherapy Against Cancer” [HHS Reference No. E–046–2022–0–CA–01];

5. Chinese Patent Application No. 202280092973.5 filed August 30, 2024, entitled “T Cell Therapy with Vaccination as a Combination Immunotherapy Against Cancer” [HHS Reference No. E–046–2022–0–CN–01];

6. European Patent Application No. 22854399.7 filed June 25, 2024, entitled “T Cell Therapy with Vaccination as a Combination Immunotherapy Against Cancer” [HHS Reference No. E–046–2022–0–EP–01];

7. Japanese Patent Application No. 2024–539628 filed June 28, 2024, entitled “T Cell Therapy with Vaccination as a Combination Immunotherapy Against Cancer” [HHS Reference No. E–046–2022–0–JP–01]; and

8. United States Patent Application No. 18/720,347 filed June 14, 2024, entitled “T Cell Therapy with Vaccination as a Combination Immunotherapy Against Cancer” [HHS Reference No. E–046–2022–0–US–02].

The patent rights in these inventions have been assigned and/or exclusively licensed to the Government of the United States of America.

The prospective exclusive license territory may be “worldwide”, and the field of use may be limited to the following:

“Development, manufacture and commercialization of combination immunotherapies for the treatment of cancer in humans, comprising at least the following elements:

1. An autologous tumor infiltrating lymphocyte (TIL) T cell product; and
2. A neoantigen cancer vaccine.”

The E–046–2022 patent family is primarily directed to a combination immunotherapy comprising a population of antigen-specific immune cells (e.g., T cells) and a vaccine targeting the same antigen(s). In oncology, many adoptive cell therapies rely on antigen-specific T cells isolated from the patient in need of treatment. However, these cells often exist in a terminally differentiated and exhausted state and are unable to mount a robust immune response following reinfusion. Recent evidence suggests that administration of a vaccine in parallel with the T cell product can ameliorate this performance defect when the vaccine targets antigen(s) recognized by the T cells. This two-part approach may enhance treatment efficacy.

It is noted that the exclusive field of use which may be granted to Iovance applies to only certain autologous T cell products and vaccination strategies and does not include, for example, any non-TIL-based applications. Accordingly, the scope of rights which may be conveyed under the proposed license

covers a portion of the possible applications of E-046-2022.

This Notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive license will be royalty bearing, and the prospective exclusive license may be granted unless within fifteen (15) days from the date of this published Notice, the National Cancer Institute receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

In response to this Notice, the public may file comments or objections. Comments and objections, other than those in the form of a license application, will not be treated confidentially and may be made publicly available.

License applications submitted in response to this Notice will be presumed to contain business confidential information and any release of information from these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Dated: November 25, 2024.

Richard U. Rodriguez,

Associate Director, Technology Transfer Center, National Cancer Institute.

[FR Doc. 2024-28081 Filed 11-29-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of HHS-Certified Laboratories and Instrumented Initial Testing Facilities Which Meet Minimum Standards To Engage in Urine and Oral Fluid Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies Federal agencies of the laboratories and Instrumented Initial Testing Facilities (IITFs) currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines) using Urine and the laboratories currently certified to meet the standards of the Mandatory Guidelines using Oral Fluid.

FOR FURTHER INFORMATION CONTACT:

Anastasia Flanagan, Division of Workplace Programs, SAMHSA/CSAP,

5600 Fishers Lane, Room 16N06B, Rockville, Maryland 20857; 240-276-2600 (voice); *Anastasia.Flanagan@samhsa.hhs.gov* (email).

SUPPLEMENTARY INFORMATION: The Department of Health and Human Services (HHS) publishes a notice listing all HHS-certified laboratories and Instrumented Initial Testing Facilities (IITFs) in the **Federal Register** during the first week of each month, in accordance with section 9.19 of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines) using Urine and section 9.17 of the Mandatory Guidelines using Oral Fluid. If any laboratory or IITF certification is suspended or revoked, the laboratory or IITF will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any laboratory or IITF has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end and will be omitted from the monthly listing thereafter.

This notice is also available on the internet at <https://www.samhsa.gov/workplace/drug-testing-resources/certified-lab-list>.

HHS separately notifies Federal agencies of the laboratories and IITFs currently certified to meet the standards of the Mandatory Guidelines using Urine and of the laboratories currently certified to meet the standards of the Mandatory Guidelines using Oral Fluid.

The Mandatory Guidelines using Urine were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908); September 30, 1997 (62 FR 51118); April 13, 2004 (69 FR 19644); November 25, 2008 (73 FR 71858); December 10, 2008 (73 FR 75122); April 30, 2010 (75 FR 22809); January 23, 2017 (82 FR 7920); and on October 12, 2023 (88 FR 70768).

The Mandatory Guidelines using Oral Fluid were first published in the **Federal Register** on October 25, 2019 (84 FR 57554) with an effective date of January 1, 2020, and subsequently revised in the **Federal Register** on October 12, 2023 (88 FR 70814).

The Mandatory Guidelines were initially developed in accordance with Executive Order 12564 and section 503 of Public Law 100-71 and allowed urine drug testing only. The Mandatory Guidelines using Urine have since been revised, and new Mandatory Guidelines allowing for oral fluid drug testing have been published. The Mandatory

Guidelines require strict standards that laboratories and IITFs must meet in order to conduct drug and specimen validity tests on specimens for Federal agencies. HHS does not allow IITFs to conduct oral fluid testing.

To become certified, an applicant laboratory or IITF must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a laboratory or IITF must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories and IITFs in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines using Urine and/or Oral Fluid. An HHS-certified laboratory or IITF must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA), which attests that the test facility has met minimum standards. HHS does not allow IITFs to conduct oral fluid testing.

HHS-Certified Laboratories Approved to Conduct Oral Fluid Drug Testing

In accordance with the Mandatory Guidelines using Oral Fluid effective October 10, 2023 (88 FR 70814), the following HHS-certified laboratories meet the minimum standards to conduct drug and specimen validity tests on oral fluid specimens:

At this time, there are no laboratories certified to conduct drug and specimen validity tests on oral fluid specimens.

HHS-Certified Instrumented Initial Testing Facilities Approved To Conduct Urine Drug Testing

In accordance with the Mandatory Guidelines using Urine effective February 1, 2024 (88 FR 70768), the following HHS-certified IITFs meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

Dynacare *, 6628 50th Street NW, Edmonton, AB Canada T6B 2N7, 780-784-1190, (Formerly: Gamma-Dynacare Medical Laboratories).

HHS-Certified Laboratories Approved to Conduct Urine Drug Testing

In accordance with the Mandatory Guidelines using Urine effective February 1, 2024 (88 FR 70768), the following HHS-certified laboratories meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

Alere Toxicology Services, 1111 Newton St., Gretna, LA 70053, 504-361-8989/800-433-3823. (Formerly: Kroll Laboratory Specialists, Inc., Laboratory Specialists, Inc.)

Alere Toxicology Services, 450 Southlake Blvd., Richmond, VA 23236, 804-378-9130. (Formerly: Kroll Laboratory Specialists, Inc., Scientific Testing Laboratories, Inc.; Kroll Scientific Testing Laboratories, Inc.)

Clinical Reference Laboratory, Inc., 8433 Quivira Road, Lenexa, KS 66215-2802, 800-445-6917.

Desert Tox, LLC, 5425 E Bell Rd., Suite 125, Scottsdale, AZ 85254, 602-457-5411/623-748-5045.

DrugScan, Inc., 200 Precision Road, Suite 200, Horsham, PA 19044, 800-235-4890.

Dynacare *, 245 Pall Mall Street, London, ONT, Canada N6A 1P4, 519-679-1630. (Formerly: Gamma-Dynacare Medical Laboratories)

ElSohly Laboratories, Inc., 5 Industrial Park Drive, Oxford, MS 38655, 662-236-2609.

LabOne, Inc. d/b/a Quest Diagnostics, 10101 Renner Blvd., Lenexa, KS 66219, 913-888-3927/800-873-8845. (Formerly: Quest Diagnostics Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.)

Laboratory Corporation of America, 1225 NE 2nd Ave., Portland, OR 97232, 503-413-5295/800-950-5295. (Formerly: Legacy Laboratory Services Toxicology MetroLab)

Laboratory Corporation of America Holdings, 7207 N Gessner Road, Houston, TX 77040, 713-856-8288/800-800-2387.

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908-526-2400/800-437-4986. (Formerly: Roche Biomedical Laboratories, Inc.)

Laboratory Corporation of America Holdings, 1904 TW Alexander Drive, Research Triangle Park, NC 27709, 919-572-6900/800-833-3984. (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.)

CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group), Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671, 866-827-8042/800-233-6339. (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center)

MedTox Laboratories, Inc., 402 W County Road D, St. Paul, MN 55112, 651-636-7466/800-832-3244.

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, MN 55417, 612-725-

2088. Testing for Veterans Affairs (VA) Employees Only.

Omega Laboratories, Inc.*, 2150 Dunwin Drive, Unit 1 & 2, Mississauga, ON, Canada L5L 5M8, 289-919-3188.

Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311, 800-328-6942. (Formerly: Centinela Hospital Airport Toxicology Laboratory)

Phamatech, Inc., 15175 Innovation Drive, San Diego, CA 92128, 888-635-5840.

US Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755-5235, 301-677-7085. Testing for Department of Defense (DoD) Employees Only

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories continued under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory as meeting the minimum standards of the current Mandatory Guidelines published in the **Federal Register**. After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program. DOT established this process in July 1996 (61 FR 37015) to allow foreign laboratories to participate in the DOT drug testing program.

Anastasia D. Flanagan,

Public Health Advisor, Division of Workplace Programs.

[FR Doc. 2024-28147 Filed 11-29-24; 8:45 am]

BILLING CODE 4160-20-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276-0361.

Comments are invited on: (a) Whether the proposed collections of information are 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 proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: 988 Suicide & Crisis Lifeline and Crisis Services Program Evaluation—New Package

The Substance Abuse and Mental Health Services Administration (SAMHSA) 988 & Behavioral Health Crisis Coordinating Office (BHCCO)) is requesting clearance for the new data collection associated with the evaluation of the SAMHSA 988 Suicide and Crisis Lifeline and Crisis Services Program Evaluation (988 Suicide and Crisis Lifeline Evaluation). The collection of this information is critical to successfully oversee operational response and quality of service through the 988 Suicide and Crisis Lifeline to ensure connections to care for individuals in suicidal crisis or emotional distress contacting in for 988 phone, chat, and text support for connecting local, state/territory, and national outcomes and monitoring contractual obligations for current and future 988 Suicide and Crisis Lifeline grant programs. Much of the information is already embedded in the current 988 Suicide and Crisis Lifeline

network administrator grants, the 988 state and territory grant program, or the 988 Tribal Response grant program.

In 2020, Congress designated the three-digit number, 9–8–8 for the Suicide and Crisis Lifeline, and the Suicide and Crisis Lifeline transitioned to the 3-digit number in July 2022. As a part of the federal government's commitment to addressing the mental health and opioid crises in America, unprecedented Federal resources have been invested to expand crisis centers in support of 988. Since its launch in July 2022, the 988 Suicide & Crisis Lifeline has answered over 9.6 million contacts (SAMHSA, 2024). Progress recognized in 2023 continues in all areas including crisis line features, crisis center supports, and funding. In FY2024, the Biden-Harris administration appropriated nearly \$500 million in new funding opportunities for the 988 Lifeline Administrator and other grantees on State territorial, Tribal and center levels, as part of the commitment to strengthen crisis care nationally. In section 1103(a)(2)(B) of the Consolidated Appropriations Act, 2023 (Pub. L. 117–328), Congress called for enhanced program evaluation, including performance measures to assess program response and improve readiness and performance of the service, including review of each contact to ensure timely connection of service and quality provision in line with evidence-based care. To meet the standards and requirements set forth in the statute, ongoing communication of key outcomes within this OMB request must be received and reviewed to ensure connection and quality of care through the 988 Suicide and Crisis Lifeline.

The information collected will be used by SAMHSA to conduct an evaluation of the 988 Suicide & Crisis Lifeline and Crisis Services, to ensure individuals in suicidal, mental health and/or substance use crisis can contact 988 Suicide and Crisis Lifeline and are connected to crisis centers providing evidence-based care and are able to receive critical resource referral and linkage, including opportunities for mobile crisis support, crisis receiving and stabilizing facilities, peer respite centers and withdrawal management services. The purpose of the 988 Lifeline and Crisis Services Program Evaluation is to assess the implementation and expansion of the 988 Lifeline in the U.S. The evaluation will provide SAMHSA, grantees, and other interested parties with the information needed to strengthen the Behavioral Health Crisis Services Continuum (BHSCS) for all

people in crisis. The evaluation utilizes multiple studies to conduct the evaluation of the 988 Lifeline and Crisis Services across a 5-year period. The 988 Lifeline and Crisis Services Program Evaluation includes three levels: system-level, client-level, and impact. Embedded within each of the three evaluation levels are inquiries into behavioral health equity to investigate disparities in utilization of 988 Lifeline and BHSCS services and outcomes.

The System-level Evaluation examines the characteristics, collaborations, and structures of the crisis services infrastructure within states, territories, and Tribal jurisdictions that support improved client outcomes. The Systems-level Evaluation includes two studies: the System Composition and Collaboration Study and the System-Level Service Utilization Study. The System Composition and Collaboration Study examines the structure of the 988 Lifeline and the BHSCS at the national, state, territory, and Tribal levels, and the extent to which crisis service agencies work together. The System-level Service Utilization Study investigates whether the 988 Lifeline and BHSCS are successful in creating a behavioral-health-system-first response to crisis events and the resulting reduction in use of non-behavioral health crisis services (e.g., 911, law enforcement, emergency medical services).

The Client-level Evaluation provides critical information about the ways in which the 988 Lifeline and crisis services fulfill their mission to connect those in crisis with the services and supports needed to reduce crisis risk and improve overall behavioral health outcomes. The Client-level Evaluation consists of two studies: The Client-level Service Utilization and Outcome Study and the Client-level Risk Reduction Study. The Client-Level Service Utilization and Outcome Study explores the effectiveness of 988 Lifeline and BHSCSs in linking individuals to referral services following their contact with the crisis system and assesses the relationship between engagement with crisis services and behavioral health outcomes. The Client-Level Risk Reduction Study assesses the efficacy of 988 Lifeline and BHSCS contacts on immediate reductions in risks of suicide, violence toward others, and overdose.

The Impact Evaluation informs SAMHSA's efforts to continue to build the evidence base for suicide prevention and crisis programming. Specifically,

this evaluation will examine the impact of 988 Lifeline and BHSCS on suicide and overdose morbidity and mortality. A quasi-experimental interrupted time series (ITS) design using extant, secondary data sources (e.g., CDC mortality data, Medicaid claims data, data from Healthcare Cost and Utilization Project (HCUP), data from the NSDUH, and SAMHSA's Performance and Accountability Reporting System [SPARS] data) gathered across multiple years to establish longitudinal state-level trends before and after major milestones in the implementation of the 988 Lifeline and BHSCS.

The 988 Lifeline and Crisis Services Program Evaluation engages with the following SAMHSA grant-funded programs that make up the core of the crisis care continuum: 988 State/Territory; 988 Tribal nations; Community Crisis Response Program (CCRP); Crisis Center Follow-Up (CCFU); 988 Administrator; and Certified Community Behavioral Health Clinics (CCBHCs). Additional grant programs which are relevant to the BHSCS, such as the Mental Health Services Block Grant (MHBG), State Opioid Response (SOR), Tribal Opioid Response (TOR), Substance Use Prevention, Treatment and Recovery Services Block Grant (SUPTRS BG), will be included in portions of the evaluation as relevant. In addition, crisis-providing organizations that are not SAMHSA grantees, especially mobile crisis programs, crisis stabilization units, and CCBHCs will also be engaged to participate in the evaluation.

Ultimately, the purpose of the SAMHSA 988 Suicide & Crisis Lifeline and Crisis Services Program is to build the program's knowledge base of effectiveness by thoroughly describing the implementation, outcomes, and impact of a program meant to reduce deaths by suicide.

The total annualized burden is an estimated 16,724 respondents for the 988 Lifeline and Crisis Services Program Evaluation instruments, with a combined hourly estimate to be 8,006.10 hours. Burden estimates are based on the data collection requirements and the number of respondents. The estimated response burden to collect this information associated with the 988 Lifeline and Crisis Services Program Evaluation is as follows annualized over the requested 3-year clearance period is presented below:

TOTAL ANNUALIZED BURDEN HOURS AND COSTS
[Across the 3-year clearance period]

Type of respondent	Instrument	Number of respondents per year	Responses per respondent	Total number of responses	Burden per response (hours)	Annual burden (hours)	Hourly wage rate (\$)	Total annualized cost (\$)
System Composition and Collaboration Study								
Organizational Staff/Crisis System Administrator ¹ .	SIS	73	1	73	0.75	54.75	\$78.06	\$4,273.79
Organizational Staff/Crisis Agency Manager ² .	CCPS	1034	1	1034	1.00	1,034.00	58.80	60,799.20
Organizational Staff/Crisis Agency Staff ³ .	KII-CS	35	1	35	1.00	35.00	27.46	961.10
Organizational Staff/Crisis Agency Staff ³ .	KII-CS-CSS	13	1	13	0.50	6.50	27.46	178.49
Client-Level Service Utilization and Outcome Study								
Organizational Staff/Crisis Agency Staff ³ .	CCDF	6,000	1	6,000	0.15	900.00	27.46	24,714.00
Parents/Caregivers ⁴	CCDF Parent Supplement.	⁵ 1,560	1	1,560	0.10	156.00	7.25	1,131.00
Client ⁴	CES—Baseline	6,000	1	6,000	0.75	4,500.00	7.25	32,625.00
Client ⁴	CES—3 months	1,500	1	1,500	0.65	975.00	7.25	7,068.75
Client ⁴	CES—6 months	375	1	375	0.65	243.75	7.25	1,767.19
Client ⁴	CES—12 months	94	1	94	0.65	61.10	7.25	442.98
Client-Level Risk Reduction Study								
Client ⁴	C-KII-DC	30	1	30	1.00	30.00	7.25	217.50
Client ⁴	C-KII-TPC	10	1	10	1.00	10.00	7.25	72.50
Total .....	.....	16,724	.....	.....	.....	8,006.10	.....	134,251.49

¹ BLS OES May 2022 National Industry-Specific Occupation Employment and Wage Estimates mean hourly salary for General and Operations Managers (code 11-1021), <https://www.bls.gov/oes/current/oes111021.htm>.

² BLS OES May 2022 National Industry-Specific Occupation Employment and Wage Estimates mean hourly salary for Social and Community Service Managers (code 11-9151), <https://www.bls.gov/oes/current/oes119151.htm>.

³ BLS OES May 2022 National Industry-Specific Occupation Employment and Wage Estimates mean hourly salary for Counselors, Social Workers, and Other Community and Social Service Specialists (code 21-1000), https://www.bls.gov/oes/current/naics5_541720.htm#29-0000.

⁴ <https://www.usa.gov/minimum-wage>.

⁵ This number represents an estimate based on the average distribution of monthly contacts by modality, cited in Lifeline Performance Metrics (SAMHSA, April 2024), and assumes that 40% of all individuals who contact 988 through chat or text (as cited in Gould et al., 2021 and Pisani et al., 2022) and 20% of those who contact 988 through phone call are below the age of 18.

Send comments to SAMHSA Reports Clearance Officer, 5600 Fisher Lane, Room 15E45, Rockville, MD 20852 OR email a copy at samhsapra@samhsa.hhs.gov. Written comments should be received by January 31, 2025.

Alicia Broadus,
Public Health Advisor.

[FR Doc. 2024-28136 Filed 11-29-24; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Immigration and Customs Enforcement

[OMB Control Number 1653-0042]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection; Obligor Change of Address

AGENCY: U.S. Immigration and Customs Enforcement, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995 the Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE) will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance. This information collection was previously published in the **Federal Register** on September 18, 2024, allowing for a 60-day comment period. ICE received one unrelated comment. The purpose of this notice is to allow an additional 30 days for public comments. The burden was updated from the 60-day notice due to adjustments in the Agency estimates.

DATES: Comments are encouraged and will be accepted until January 2, 2025.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of the 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: For specific question related to collection activities, please contact Carl Albritton, ERO, (202-497-6755), carl.a.albritton@ice.dhs.gov, U.S. Immigration and Customs Enforcement.

SUPPLEMENTARY INFORMATION: Comments

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information 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 agencies 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:* Obligor Change of Address.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* I-333, U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State, Local, or Tribal Government. The data collected for this information collection is used by ICE to ensure accuracy in correspondents between ICE and the Obligor. The form serves the purpose of standardizing obligor notification of any changes in their address and will facilitate communications with the Obligor.

(5) *An estimate of the total number of responses and the amount of time estimated for an average respondent to respond:* ICE estimates a total of 5,282 responses at 15 minutes (.25 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 1,321 annual burden hours.

Dated: November 25, 2024.

Scott Elmore,

ICE PRA Clearance Officer, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. 2024-28131 Filed 11-29-24; 8:45 am]

BILLING CODE 9111-28-P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA-2011-0008]

Aviation Security Advisory Committee; Public Meeting; Correction

AGENCY: Transportation Security Administration, DHS.

ACTION: Committee management; notice of open Federal advisory committee meeting; correction.

SUMMARY: This document makes a correction to a notice published in the **Federal Register** on November 22, 2024, which included an incorrect date for an upcoming public meeting of the

Aviation Security Advisory Committee (ASAC). TSA erroneously stated that the meeting would be held on Thursday, December 11, 2024. TSA is revising the date to Wednesday, December 11, 2024.

DATES: Applicable December 2, 2024.

FOR FURTHER INFORMATION CONTACT:

Tamika McCree Elhilali, Aviation Security Advisory Committee, Designated Federal Officer, U.S. Department of Homeland Security, Transportation Security Administration, 6595 Springfield Center Drive, (TSA-28), Springfield, Virginia 20598, ASAC@tsa.dhs.gov, 571-227-2632.

SUPPLEMENTARY INFORMATION: On November 22, 2024 (89 FR 92699), TSA published a notice which involves a public meeting of the ASAC. In the first sentence after the **DATES** section, TSA erroneously stated that the meeting would take place on Thursday, December 11, 2024. TSA is revising the date to read Wednesday, December 11, 2024. Accordingly, the sentence has been revised to correct the date of the meeting.

Correction

In the **Federal Register** of November 22, 2024, in FR Doc. 2024-27441, on page 92700, in the first column, line 17, correct the **DATES** discussion paragraph to read:

The meeting will take place on Wednesday, December 11, 2024. The meeting will begin at 10:00 a.m. and adjourn at 1:00 p.m., Eastern Standard Time (EST). As listed in the Public Participation section below, requests to attend the meeting, to address the ASAC, and/or for accommodations because of a disability, must be received by November 29, 2024.

Dated November 25, 2024.

Eddie D. Mayenschein,

Assistant Administrator, Policy, Plans, and Engagement.

[FR Doc. 2024-28162 Filed 11-29-24; 8:45 am]

BILLING CODE 9110-05-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_CO_FRN_MO4500182533]

Notice of Northwest Resource Advisory Council Schedule of Public Meetings, Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 and the Federal Advisory

Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Colorado's Northwest Resource Advisory Council (RAC) will hold the following public meetings in 2025.

DATES: The RAC will hold a meeting on February 6, 2025, from 8 a.m. to 4 p.m. mountain time (MT). The RAC will participate in a field tour on May 6, 2025, from 10 a.m. to 3 p.m. MT, and hold a meeting on May 7, 2025, from 8 a.m. to 4 p.m. MT. The RAC will participate in a field tour on August 19, 2025, from 10 a.m. to 3 p.m. MT, and hold a meeting on August 20, 2025, from 8 a.m. to 4 p.m. MT. All meetings and field tours are open to the public and a virtual participation option will be available on the Zoom platform for the business meetings.

ADDRESSES: The February 6, 2025, meeting will be held at the BLM White River Field Office, 220 E. Market St., Meeker, CO 81641.

The May 6, 2025, meeting will consist of a field tour, and the May 7, 2025, meeting will be held at the Grand Junction Field Office, 2815 H Road, Grand Junction, CO 81506.

The August 19, 2025, meeting will consist of a field tour, and the August 20, 2025 meeting will be held at the Little Snake Field Office, 455 Emerson Street, Craig CO 81625.

Virtual registration information, field tour details, and final agendas will be posted online 30 days in advance of the meeting dates at <https://www.blm.gov/get-involved/resource-advisory-council/near-you/colorado/northwest-rac>.

FOR FURTHER INFORMATION CONTACT:

Heather Marsh, 2815 H Road, Grand Junction, CO 81506; telephone: 970-244-3000; email: BLM_CO_NWRAC@blm.gov.

Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: Through the BLM, the 15-member RAC advises the Secretary of the Interior on the planning and management of the public land resources located within the Northwest District, which includes the Kremmling, Little Snake, and White River Field Offices; and the Upper Colorado River District, which includes the Grand Junction and Colorado River Valley Field Offices along with the

Dominguez-Escalante and McInnis Canyons National Conservation Areas.

Agenda items for the February 6, 2025, meeting include a discussion of the North Sandhills Recreation Area business plan, carbon sequestration, methane capture, and field manager updates. The RAC will participate in a field tour on May 6, 2025, to sites located within the Grand Junction Field Office. Agenda items for the May 7, 2025, meeting include a discussion of shooting sports, a Solar Programmatic Environmental Impact Statement update, and field manager updates. The RAC will participate in a field tour on August 19, 2025, to the Sand Wash Basin area. Agenda items for the August 20, 2025, meeting include a discussion of fuels projects, Gateway South Reclamation, a TransWest Express Transmission Project update, and field manager updates. A public comment period will be offered at the business meetings. The public may present written comments at least two weeks in advance of the meetings to the contact listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Please include "RAC Comment" in your submission. All comments received will be provided to the RAC.

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.

Members of the public are welcome to attend field tours but must provide their own transportation and meals. Individuals who plan to attend must RSVP to at least two weeks in advance of the field tours to the contact listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Requests for Accommodations: Please make requests in advance for sign language interpreter services, assistive listening devices, language translation services, or other reasonable accommodations. We ask that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice at least 14 business days prior to the meeting to give the Department of the Interior sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Meeting minutes will be maintained in the Upper Colorado River District Office and will be available for public

inspection and reproduction during regular business hours within 90 days following the meeting. Previous minutes and agendas are also available on the RAC's web page.

(Authority: 43 CFR 1784.4-2)

Douglas J. Vilsack,

BLM Colorado State Director.

[FR Doc. 2024-28207 Filed 11-29-24; 8:45 am]

BILLING CODE 4331-16-P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701-TA-612-613 and 731-TA-1429-1430 (Review)]

Polyester Textured Yarn From China and India; Notice of Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 ("the Act"), as amended, to determine whether revocation of the antidumping and countervailing duty orders on polyester textured yarn from China and India would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Instituted December 2, 2024. To be assured of consideration, the deadline for responses is January 2, 2025. Comments on the adequacy of responses may be filed with the Commission by February 12, 2025.

FOR FURTHER INFORMATION CONTACT: Camille Bryan (202-205-2811), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000. General information concerning the Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION:

Background.—On January 10, 2020, the Department of Commerce

("Commerce") issued antidumping and countervailing duty orders on imports of polyester textured yarn from China and India (85 FR 1298 and 1301). The Commission is conducting reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR part 201, subparts A and B, and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Countries* in these reviews are China and India.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise*. In its original determinations, the Commission defined a single *Domestic Like Product* consisting of all polyester textured yarn, coextensive with Commerce's scope.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product*, or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, the Commission defined the *Domestic Industry* as all U.S. producers of polyester textured yarn, except for one firm that was excluded as a related party. Certain Commissioners defined the *Domestic Industry* differently.

(5) The *Order Date* is the date that the antidumping and countervailing duty orders under review became effective. In these reviews, the *Order Date* is January 10, 2020.

(6) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign

manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post-employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties

authorized to receive BPI under the APO.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. appendix 3; or (ii) by U.S. Government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to § 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is on or before 5:15 p.m. on January 2, 2025. Pursuant to § 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is on or before 5:15 p.m. on February 12, 2025. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of § 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures*, available on the Commission's website at https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf, elaborates upon the Commission's procedures with respect to filings. Also, in accordance with § 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, <https://edis.usitc.gov>). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

No response to this request for information is required if a currently valid Office of Management and Budget ("OMB") number is not displayed; the OMB number is 3117 0016/USITC No. 24–5–627, expiration date June 30, 2026. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

Inability to provide requested information.—Pursuant to § 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to § 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information to Be Provided in Response to this Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country*; or produce *Subject Merchandise* in more than one *Subject Country*, you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country*. As used below, the term "firm" includes any related firms.

Those responding to this notice of institution are encouraged, but not required, to visit the USITC's website at https://usitc.gov/reports/response_noi_worksheet, where one can download and complete the "NOI worksheet" Excel form for the subject proceeding, to be included as attachment/exhibit 1 of your overall response.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product*, a U.S. union or worker group, a U.S. importer of the *Subject Merchandise*, a foreign producer or exporter of the *Subject Merchandise*, a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping and countervailing duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in § 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry*.

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product*. Identify any known related parties and the nature of the relationship as defined in § 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries since the *Order Date*.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product*, provide the

following information on your firm's operations on that product during calendar year 2023, except as noted (report quantity data in pounds and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from any *Subject Country*, provide the following information on your firm's(s') operations on that product during calendar year 2023 (report quantity data in pounds and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or

countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country*; and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country*.

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in any *Subject Country*, provide the following information on your firm's(s') operations on that product during calendar year 2023 (report quantity data in pounds and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* since the *Order Date*, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the

ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country*, and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry*; if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of Title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.61 of the Commission's rules.

By order of the Commission.

Issued: November 25, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024-28057 Filed 11-29-24; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1369]

Certain Icemaking Machines and Components Thereof; Notice of a Commission Determination To Review a Final Initial Determination Finding a Violation of Section 337; Request for Written Submissions on the Issues Under Review and on Remedy, the Public Interest, and Bonding; Extension of the Target Date

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission ("Commission") has determined to review a final initial determination ("ID") of the chief administrative law judge ("CALJ"), finding a violation of section 337 in this investigation. The Commission requests written submissions from the parties on the issues under review and submissions from the parties, interested government agencies, and other interested persons on the issues of remedy, the public interest, and bonding, under the schedule set forth below. The Commission has also determined to extend the target date for

completion of this investigation to February 13, 2025.

FOR FURTHER INFORMATION CONTACT:

Benjamin S. Richards, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708-5453. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205-1810.

SUPPLEMENTARY INFORMATION: On August 16, 2023, the Commission instituted this investigation based on a complaint filed by Hoshizaki America, Inc. of Peachtree City, Georgia ("Hoshizaki"). 88 FR 55721-22 (Aug. 16, 2023). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation into the United States, the sale for importation, or the sale within the United States after importation of certain icemaking machines and components thereof by reason of the infringement of one or more of claims 1-3, 6-8, and 11-20 of U.S. Patent No. 10,107,538 ("the '538 patent"); claims 1-4, 10-13, and 16 of U.S. Patent No. 10,113,785 ("the '785 patent"); and claims 1, 2, 5-9, and 11-14 of U.S. Patent No. 10,458,692 ("the '692 patent"). *Id.* at 5572. The Commission's notice of investigation named as respondents Blue Air FSE LLC of Gardena, California; and Bluenix Co., Ltd. of Gyeonggi-do, Republic of Korea (collectively, "Bluenix"). The Office of Unfair Import Investigations was also named as a party in this investigation, but ceased participating on October 13, 2023. *Id.*; see also EDIS Doc. ID 805894.

The CALJ issued IDs terminating the following claims from the investigation at Hoshizaki's request: claims 2, 8, 11-18, and 20 of the '538 patent; claims 2-4, 11-13, and 16 of the '785 patent; and claims 2, 6-8, and 11-14 of the '692 patent. Order No. 9 (Dec. 19, 2023), *unreviewed*, Comm'n Notice, EDIS Doc. ID 811832 (Jan. 11, 2024); Order No. 15 (Apr. 8, 2024), *unreviewed*, Comm'n Notice, EDIS Doc. ID 819782 (Apr. 26, 2024).

On April 25, 2024, the CALJ issued an ID granting Hoshizaki's unopposed motion for summary determination that

Hoshizaki satisfied the domestic industry requirement. Order No. 16 (Apr. 25, 2024). The Commission reviewed and then affirmed that ID. Comm'n Notice, EDIS Doc. ID 822414 (May 29, 2024).

The CALJ conducted an evidentiary hearing from May 6, 2024, through May 10, 2024.

On August 30, 2024, the CALJ issued his final ID on violation. That ID found that a violation of section 337 had occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain icemaking machines and components thereof that infringe certain claims of the '538, '785, and '692 patents. On September 16, 2024, Bluenix filed a petition for review of the ID, and Hoshizaki filed a contingent petition for review of the ID. On September 23, 2024, Bluenix filed a response to Hoshizaki's contingent petition for review. On September 24, 2024, Hoshizaki filed a response to Bluenix's petition for review.

Having reviewed the record of the investigation, including the final ID, the parties' submissions to the CALJ, the evidentiary record, and the parties' petitions for review and responses thereto, the Commission has determined to review the ID in part. Specifically, the Commission has determined to review the ID's infringement findings for the '785 and '692 patents.

In connection with its review, the Commission requests responses to the following questions. The parties are requested to brief their positions with reference to the applicable law and the existing evidentiary record.

(1) For the '785 and '692 patents, please address whether the "function" of the "inner flat portion" limitation for purposes of the doctrine of equivalents analysis should include the overall function of making ice or be more narrowly defined to just the separation of active and passive cavities. As a legal matter, should the doctrine of equivalents analysis focus on the specific function of the claim limitation or the overall function of the claimed invention? See *AquaTex Indus., Inc. v. Techniche Sols.*, 479 F.3d 1320, 1326-27 (Fed. Cir. 2007) (finding error where the identified function of promoting evaporation was for the filler layer as a whole rather than the specific function of the "fiberfill batting material" limitation). As a factual matter, please address what role, if any, the inner flat portions play with respect to the formation and harvesting of ice in the claimed invention. See, e.g., '785 patent at 5:23-27 ("The degree to which ice extends over the inner flat portions 30

and the adjacent second protrusions 38 is determined, at least in part, by the length of time that water is applied to the front and rear plates 14, 16 during the ice forming cycle.”).

(2) Please address whether the difference between an inner flat portion (as claimed) and a slightly curved inner portion (as found in the accused products) will affect the “way” in which ice is formed (*i.e.*, by preventing the formation of “boundary layers,” or due to less surface area of contact between the plates and the water that forms ice during the cooling and harvesting cycles, or due to the shape of the surrounding tubing coil). *See* RRB at 18–20.

(3) Please address the “result” that should be considered for purposes of the doctrine of equivalents analysis, *e.g.*, the efficiency of the icemaking process or the quantity or quality of ice produced from the icemaking machine. Please address whether the difference between an inner flat portion (as claimed) and a slightly curved inner portion (as found in the accused products) will affect that result.

(4) Assuming that the icemaking function should be considered in determining equivalency, please address the expert testimony and other supporting evidence for or against your positions in response to the questions above (and in particular why the final ID found Dr. Tanbour’s testimony to be more credible than Bluenix’s expert). *See* ID at 72 n.20.

(5) Please address any evidence of record indicating what constitutes “slightly curved inner portions” in the accused products as characterized in the ID. ID at 69. Will the degree of curvature of the inner portion make a difference in an assessment of whether an accused product is equivalent to the claimed “inner flat portion”?

(6) For purposes of applying the function-way-result test for equivalence, if you contend that that function of the claimed “inner flat portions” is something other than “separat[ing] active and passive cavities, which are, in turn, interspersed so as to define ice forming sites,” ID at 70, indicate whether and where you raised that contention in the post-hearing briefing before the CALJ. Similarly, indicate whether and where you raised that contention in your petition for review of the ID. If you did not contend before the CALJ or in a petition for review that the function of the “inner flat portions” is something other than the function identified in the ID, explain why that contention has or has not now been forfeited, waived, or abandoned.

(7) Do you contend that the asserted claims of the ’785 and ’692 patents are limited to evaporators comprising oval-shaped refrigerant conduits? If so, explain where that limitation appears in the ’785 and ’692 patents.

(8) Do you contend that the asserted claims of the ’785 and ’692 patents limit the surface area of the claimed “inner flat portions” to a particular size or range of sizes? If so, explain where that limitation appears in the ’785 and ’692 patents.

(9) Do you contend that the asserted claims of the ’785 and ’692 patents are limited to evaporators that meet a certain efficiency threshold? If so, explain where that limitation appears in the ’785 and ’692 patents.

(10) Do you contend that the evaporators claimed in the asserted claims of the ’785 and ’692 patents are limited to the dimensions shown in figure 2 of those patents? If so, explain why your contention is not in conflict with *Hockerson-Halberstadt, Inc. v. Avia Grp. Int’l, Inc.*, 222 F.3d 951, 956 (Fed. Cir. 2000) (“[I]t is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.”).

(11) In testifying regarding a lack of equivalence between the claimed “inner flat portions” of the ’785 and ’692 patents and the accused structures in the accused products, *see* tr. 521:2–526:13, did Bluenix’s expert witness treat the dimensions shown in figure 2 of the ’785 and ’692 patents as limiting?

The parties are invited to brief only the discrete issues requested above. The parties are not to brief other issues on review, which are adequately presented in the parties’ existing filings.

In connection with the final disposition of this investigation, the statute authorizes issuance of, *inter alia*, (1) an exclusion order that could result in the exclusion of the subject articles from entry into the United States; and/or (2) cease and desist orders that could result in the respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see Certain Devices for*

Connecting Computers via Telephone Lines, Inv. No. 337–TA–360, USITC Pub. No. 2843, Comm’n Op. at 7–10 (Dec. 1994).

The statute requires the Commission to consider the effects of that remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on: (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve, disapprove, or take no action on the Commission’s determination. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the CALJ on remedy and bonding.

In its initial submission, Complainant is also requested to identify the remedy sought and to submit proposed remedial orders for the Commission’s consideration. Complainant is further requested to state the dates that the Asserted Patents expire, to provide the HTSUS subheadings under which the accused products are imported, and to supply the identification information for all known importers of the products at issue in this investigation. The initial written submissions and proposed remedial orders must be filed no later than close of business on December 9, 2024. Reply submissions must be filed no later than the close of business on December 16, 2024. No further

submissions on these issues will be permitted unless otherwise ordered by the Commission. Opening submissions are limited to 75 pages. Reply submissions are limited to 60 pages. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (Mar. 19, 2020). Submissions should refer to the investigation number (Inv. No. 337-TA-1369) in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary, (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. Any non-party wishing to submit comments containing confidential information must serve those comments on the parties to the investigation pursuant to the applicable Administrative Protective Order. A redacted non-confidential version of the document must also be filed with the Commission and served on any parties to the investigation within two business days of any confidential filing. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. appendix 3; or (ii) by U.S. Government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written

submissions will be available for public inspection on EDIS.

The Commission has also determined to extend the target date for completion of this investigation to February 13, 2025.

The Commission vote for this determination took place on November 25, 2024.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: November 25, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024-28146 Filed 11-29-24; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701-TA-750 and 731-TA-1728 (Preliminary)]

Sol Gel Alumina-Based Ceramic Abrasive Grains From China; Notice of Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping and countervailing duty investigation Nos. 701-TA-750 and 731-TA-1728 (Preliminary) pursuant to the Tariff Act of 1930 ("the Act") to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of sol gel alumina-based ceramic abrasive grains from China, provided for in subheading 2818.10.20 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value and alleged to be subsidized by the Government of China. Unless the Department of Commerce ("Commerce") extends the time for initiation, the Commission must reach a preliminary determination in antidumping and countervailing duty investigations in 45 days, or in this case by January 9, 2025.

The Commission's views must be transmitted to Commerce within five business days thereafter, or by January 16, 2025.

DATES: November 25, 2024.

FOR FURTHER INFORMATION CONTACT:

Keysha Martinez ((202) 205-2136), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000. General information concerning the Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)), in response to petitions filed on November 25, 2024, by Saint-Gobain Ceramics & Plastics, Inc., Malvern, Pennsylvania.

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

Participation in the investigations and public service list.—Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in §§ 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping duty and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to § 207.7(a) of the Commission's rules, the

Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Office of Investigations will hold a staff conference in connection with the preliminary phase of these investigations beginning at 9:30 a.m. on Monday, December 16, 2024. Requests to appear at the conference should be emailed to preliminaryconferences@usitc.gov (DO NOT FILE ON EDIS) on or before Thursday, December 12, 2024. Please provide an email address for each conference participant in the email. Information on conference procedures, format, and participation, including guidance for requests to appear as a witness via videoconference, will be available on the Commission's Public Calendar (Calendar (USITC) | United States International Trade Commission). A nonparty who has testimony that may aid the Commission's deliberations may request permission to participate by submitting a short statement.

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, <https://edis.usitc.gov>). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Written submissions.—As provided in §§ 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before 5:15 p.m. on December 19, 2024, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties shall file written testimony and supplementary material in connection with their presentation at the conference no later than 4:00 p.m. on December 13, 2024. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures*, available on the Commission's website at https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,

elaborates upon the Commission's procedures with respect to filings.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these investigations must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that any information that it submits to the Commission during these investigations may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of these or related investigations or reviews, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. appendix 3; or (ii) by U.S. Government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.12 of the Commission's rules.

By order of the Commission.

Issued: November 25, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024–28126 Filed 11–29–24; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–610 and 731–TA–1425 and 1427 (Review)]

Refillable Stainless Steel Kegs From China and Mexico; Notice of Termination of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission instituted the subject five-year reviews on September 3, 2024 to determine whether revocation of the countervailing duty

order on refillable stainless steel kegs from China and the antidumping duty orders on refillable stainless steel kegs from China and Mexico would be likely to lead to continuation or recurrence of material injury. On November 21, 2024, the Department of Commerce published a notice in the **Federal Register** that it was revoking the order on Mexico effective October 10, 2024, and the orders on China effective December 16, 2024, because no domestic interested party filed a timely notice of intent to participate. Accordingly, the subject reviews are terminated.

DATES: October 10, 2024 and December 16, 2024.

FOR FURTHER INFORMATION CONTACT:

Alexis Yim (202–708–1446), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

Authority: These reviews are being terminated under authority of title VII of the Tariff Act of 1930 and pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)). This notice is published pursuant to section 207.69 of the Commission's rules (19 CFR 207.69).

By order of the Commission.

Issued: November 25, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024–28129 Filed 11–29–24; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Z-Wave Alliance, Inc.

Notice is hereby given that, on October 4, 2024, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (the “Act”), Z-Wave Alliance, Inc. (the “Joint Venture”) filed written notifications simultaneously

with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, Wesco International/ General Lock, Pittsburgh, PA; Natur-IT Kft, Budapest, HUNGARY; DECH-X Aps, Roennede, DENMARK; Sercomm Corporation, Taipei City, TAIWAN; Gentex Corporation, Zeeland, MI; TechniSat Digital GmbH, Daun, GERMANY; Sustainable Architecture LLC, Westminster, CO; Protek Security Systems, Warwick, RI; Philio Technology Corporation, New Taipei City, TAIWAN; Joshua Gogo (Keyano College), Fort McMurray, CANADA; and EUROtronic Technology GmbH, Steinau, GERMANY have joined as parties to the venture.

Also, Golden Mark (HK) Limited, Tsim Sha Tsui, Kowloon, HONG KONG; Lexi Devices, Inc., Oslo, NORWAY; and ComfortClick d.o.o., Ljubljana, SLOVENIA have withdrawn as parties to the venture.

Also, the following each joined as parties to the venture on the corresponding date indicated, were inadvertently not included in the applicable notice filings, and have withdrawn as parties to the venture: Net Vision Communications, LLC, Singapore, SINGAPORE (7-14-2022); Solutions for IoT LLC, Mendham, NJ (1-1-2023); Exegin Technologies Limited, Port Coguitlam, CANADA (5-6-2023); and FPT Software, Hanoi City, VIETNAM (7-20-23).

No other changes have been made in either the membership or the planned activity of the venture. Membership in this venture remains open, and the Joint Venture intends to file additional written notifications disclosing all changes in membership.

On November 19, 2020, the Joint Venture filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on December 1, 2020 (85 FR 77241).

The last notification was filed with the Department on July 15, 2024. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 11, 2024 (89 FR 82628).

Suzanne Morris,
Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2024-28209 Filed 11-29-24; 8:45 am]

BILLING CODE 4410-11-P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant To the National Cooperative Research and Production Act of 1993—Medical CBRN Defense Consortium

Notice is hereby given that, on October 2, 2024, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Medical CBRN Defense Consortium ("MCDC") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, AIVOT Robotics, Inc., Seattle, WA; Appili Therapeutics USA, Inc., Frederick, MD; READDI, Inc., Chapel Hill, NC; Scorpius BioManufacturing, Inc., San Antonio, TX; Shionogi, Florham Park, NJ; and VeriSIM, Inc., San Francisco, CA, have been added as parties to this venture.

Also, QuickSilver Analytics, Inc., Hampstead, NC; and World Wide Technology, LLC, St. Louis, MO have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and MCDC intends to file additional written notifications disclosing all changes in membership.

On November 13, 2015, MCDC filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on January 6, 2016 (81 FR 513).

The last notification was filed with the Department on July 2, 2024. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 26, 2024 (89 FR 78901).

Suzanne Morris,
Deputy Director Civil Enforcement Operations, Antitrust Division.
[FR Doc. 2024-28197 Filed 11-29-24; 8:45 am]

BILLING CODE 4410-11-P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Mobile Satellite Services Association

Notice is hereby given that, on October 3, 2024, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Mobile Satellite Services Association ("MSSA") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, Apex Technology, Inc., Los Angeles, CA; and Ericsson AB, Stockholm, SWEDEN, have been added as parties to this venture.

No other changes have been made in either the membership or the planned activity of the venture. Membership in MSSA remains open, and MSSA intends to file additional written notifications disclosing all changes in membership.

On April 26, 2024, the Joint Venture filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on June 21, 2024 (89 FR 52089).

The last notification was filed with the Department on July 23, 2024. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 11, 2024 (89 FR 82634).

Suzanne Morris,
Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2024-28191 Filed 11-29-24; 8:45 am]

BILLING CODE 4410-11-P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Customer Experience Hub

Notice is hereby given that, on October 1, 2024, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), The Customer Experience Hub ("CX Hub") has filed written notifications simultaneously with the Attorney General and the

Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, Alethium Technologies, Inc., West Hollywood, CA; Alliance for Cancer Gene Therapy, Inc., Stamford, CT; Areté Associates, Northridge, CA; Arsenal Medical, Inc., Waltham, MA; ASC Biosciences, Inc., Scottsdale, AZ; Association of University Research Parks Bio Health Caucus, College Park, MD; Barrow Wise Consulting LLC, Rockville, MD; Baylor College of Medicine, Houston, TX; Bio-Tech Pharmacal, Inc., Fayetteville, AR; BLEN, Inc., Washington, DC; Boise State University, Boise, ID; Caelum Diagnostic Solutions, Inc., Marina Del Rey, CA; Care+ Ventures LLC dba Naveon, Baton Rouge, LA; Clinical Data Interchange Standards Consortium, Inc., Austin, TX; CommunicateHealth, Inc., Rockville, MD; Community Health Design Corps LLC, Nashua, NH; Curavit Clinical Research Corp., Scarsdale, NY; Darena Solutions LLC, Chesterfield, MO; Eggschain, Inc., Austin, TX; Evernorth Health Services, Morris Plains, NJ; Exagen, Inc., Vista, CA; Femovate by Guidea, Austin, TX; FemTechnology, Inc., Middletown, DE; Florida State University, Tallahassee, FL; Gigantest, Inc., Baltimore, MD; Good Days, Frisco, TX; Health Evolve Technologies LLC, Columbia, SC; Health Tech Alley, Inc., Columbia, MD; Icarus Therapeutics, San Diego, CA; ICF Incorporated LLC, Reston, VA; Ignite Health, Houston, TX; Imaginostics, Orlando, FL; Imago Rehab, Inc., Lowell, MA; Immersion, Phoenix, AZ; InsiteOne LLC, Wallingford, CT; InvivoSciences, Inc., Madison, WI; JEEVA Clinical Trials, Inc., Manassas, VA; Kaiser Foundation Research Institute, Oakland, CA; Langrand and Company LLC, Houston, TX; Leva LLC, Westwood Hills, KS; LexisNexis Risk Solutions, Inc., Alpharetta, GA; MD Health Pathways, Dallas, TX; MedeAnalytics, Inc., Richardson, TX; MediPro Direct, Salt Lake City, UT; MentalHappy, Inc., San Francisco, CA; Metis Foundation, San Antonio, TX; Mike A. Myers Stroke Center, Dallas, TX; Minerva Medical Consulting LLC dba Menrva, Dallas, TX; MyHealth.Us, New York, NY; NanoMood Technologies LLC, La Jolla, CA; Nave Security, Charlotte, NC; OmniNano Pharmaceuticals LLC, Houston, TX; OncoSenX, Seattle, WA; PatientLink Enterprises, Inc., Oklahoma City, OK; Perimeter Medical Imaging Corp., Dallas, TX; Radyus Research, Inc.,

Atlanta, GA; Regents of the University of Michigan, Ann Arbor, MI; Regents of the University of Minnesota, Minneapolis, MN; Saltusbiotech, Pleasanton, CA; Sama Therapeutics, Inc., Cambridge, MA; Sky Solutions LLC, Herndon, VA; Smart Information Flow Technologies LLC, Minneapolis, MN; Society of Physician Entrepreneurs, South Norwalk, CT; Solving MS, Edmonds, WA; Southern Methodist University, Dallas, TX; Syncoro Health LLC, Northville, MI; The Innovation Foundation at Oklahoma State University, Inc., Stillwater, OK; The Ohio State University, Columbus, OH; Third Pole, Inc., Waltham, MA; Tranquil Clinical Research, Webster, TX; Triton Systems, Inc., Chelmsford, MA; University of Connecticut, Storrs, CT; University of Maryland, Baltimore, Baltimore, MD; University of South Florida Institute of Applied Engineering, Inc., Tampa, FL; Virginia Commonwealth University Massey Comprehensive Cancer Center, Richmond, VA; Visilant, Baltimore, MD; and XR 2 LEAD LLC, Dumfries, VA have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and the CX Hub intends to file additional written notifications disclosing all changes in membership.

On January 11, 2024, the CX Hub filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on April 16, 2024 (89 FR 26929).

The last notification was filed with the Department on July 3, 2024. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 26, 2024 (89 FR 78902).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2024–28196 Filed 11–29–24; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Countering Weapons of Mass Destruction

Notice is hereby given that, on October 1, 2024, pursuant to section 6(a) of the National Cooperative Research

and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (“the Act”), Countering Weapons of Mass Destruction (“CWMD”) has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, AIVOT Robotics, Inc., Seattle, WA; APL Engineered Materials, Inc., Urbana, IL; HELM Innovations LLC, McLean, VA; Obsidian Solutions Group LLC, Fredericksburg, VA; and Symbiosis.io LLC, Smyrna, GA, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and CWMD intends to file additional written notifications disclosing all changes in membership.

On January 31, 2018, CWMD filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on March 12, 2018 (83 FR 10750).

The last notification was filed with the Department on July 1, 2024. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 26, 2024 (89 FR 78903).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2024–28184 Filed 11–29–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Resilient Infrastructure + Secure Energy Consortium

Notice is hereby given that, on October 2, 2024, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (“the Act”), Resilient Infrastructure + Secure Energy Consortium (“RISE”) has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages

under specified circumstances. Specifically, Faction Communications Corp., Troy, NY; United States Antimony Corp., Thompson Falls, MT; Symbiosis.io, LLC, Smyrna, GA; Universal Solutions International, Inc., Newport News, VA; Energy Innovation Center Institute, Inc., Pittsburgh, PA; Texas A&M University—ITEC, College Station, TX; EnQuanta, Eden Prairie, MN; RapidEVCharge, Cypress, TX; ElectricFish Energy, Inc., San Carlos, CA; and AIVOT Robotics, Inc., Seattle, WA, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and RISE intends to file additional written notifications disclosing all changes in membership.

On July 2, 2021, RISE filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on August 23, 2021 (86 FR 47155).

The last notification was filed with the Department on July 3, 2024. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 26, 2024 (89 FR 78900).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2024-28180 Filed 11-29-24; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Open Source Imaging Consortium, Inc.

Notice is hereby given that on September 27, 2024, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (“the Act”), Open Source Imaging Consortium, Inc. (“Open Source Imaging Consortium”) filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act’s provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Qureight, Ltd., Cambridge, UNITED KINGDOM, has been added as a party to this venture.

No other changes have been made in either the membership or the planned activity of the group research project. Membership in this group research project remains open, and Open Source Imaging Consortium intends to file additional written notifications disclosing all changes in membership.

On March 20, 2019, Open Source Imaging Consortium filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on April 12, 2019 (84 FR 14973).

The last notification was filed with the Department on March 18, 2024. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on June 21, 2024 (89 FR 52087).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2024-28188 Filed 11-29-24; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[OMB Number 1122-0012]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension of a Previously Approved Collection; Semi Annual Progress Report for Education, Training and Enhanced Services To End Violence Against Abuse of Women With Disabilities Grant Program (Disability Grant Program)

AGENCY: Office on Violence Against Women, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Office on Violence Against Women, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until January 31, 2025.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Catherine Poston, Office on Violence Against Women, at 202-514-5430 or Catherine.poston@usdoj.gov.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the

public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Abstract: The Grants for Training and Services to End Violence Against Individuals with Disabilities and Deaf People Program (Disability Grant Program) seeks to create sustainable change within and between organizations that improves the response to individuals with disabilities and Deaf individuals who are victims of sexual assault, domestic violence, dating violence, and stalking and to hold perpetrators of such crimes accountable. The program was created by Congress to address the pressing need to focus on sexual assault, domestic violence, dating violence, and stalking against individuals with disabilities and Deaf individuals due to the proliferation of such crimes.

Disability Grant Program funds are used to establish and strengthen multidisciplinary collaborative relationships; increase organizational capacity to provide accessible, safe, and effective services to individuals with disabilities and Deaf individuals who are victims of violence and abuse; identify needs within the grantee’s organization and/or service area; and develop a plan to address those identified needs that builds a strong foundation for future work.

Eligible applicants are limited to: States; units of local government; Indian Tribal governments or Tribal organizations; and victim service providers, such as State or Tribal domestic violence or sexual assault coalitions or nonprofit,

nongovernmental organizations serving individuals with disabilities.

Overview of This Information Collection

1. Type of Information Collection: Extension of a previously approved collection.
2. The Title of the Form/Collection: Semi annual Progress Report for Education, Training and Enhanced Services to End Violence Against and Abuse of Women with Disabilities Grant Program.
3. The agency form number, if any, and the applicable component of the Department sponsoring the collection: 1122–0012.
4. Affected public who will be asked or required to respond, as well as the obligation to respond: The affected public includes the approximately 18 grantees of the Disability Grant Program. Grantees include States, units of local

- government, Indian Tribal governments or Tribal organizations and non-governmental private organizations. The goal of this program is to build the capacity of such jurisdictions to address such violence against individuals with disabilities through the creation of multi-disciplinary teams. Disability Grant Program recipients will provide training, consultation, and information on domestic violence, dating violence, stalking, and sexual assault against individuals with disabilities and enhance direct services to such individuals.
5. An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that it will take the approximately 18 respondents (grantees from the Disability Grant Program) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is

- divided into sections that pertain to the different types of grantee activities.
6. An estimate of the total annual burden (in hours) associated with the collection: The total annual hour burden to complete the data collection forms is 36 hours, that is 18 grantees completing a form twice a year with an estimated completion time for the form being one hour.
7. The total annual hour burden to complete the data collection forms is 36 hours, that is 18 grantees completing a form twice a year with an estimated completion time for the form being one hour.
8. An estimate of the total annual cost burden associated with the collection, if applicable: The annualized costs to the Federal Government resulting from the OVW staff review of the progress reports submitted by grantees are estimated to be \$2016.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency semiannually	Total annual responses	Time per response (hours)	Total annual burden (hours)
Progress Report Form	18	2	36	1	36
Unduplicated Totals	18	.....	36	.....	36

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC.

Dated: November 26, 2024.

Darwin Arceo,
Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–28176 Filed 11–29–24; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0020]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension of a Previously Approved Collection

AGENCY: Office on Violence Against Women, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Office on Violence Against Women, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget

(OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until January 31, 2025.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Catherine Poston, Office on Violence Against Women, at 202–514–5430 or Catherine.poston@usdoj.gov.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information,

including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Abstract: The Office on Violence Against Women (OVW) administers financial support and technical assistance to communities around the country that are creating programs, policies, and practices aimed at ending domestic violence, dating violence, sexual assault and stalking. Its mission is to provide national leadership to improve the Nation’s response to these crimes through the implementation of the Violence Against Women Act of 1994 (VAWA) as amended and reauthorized in 2000, 2005, 2013 and 2022. OVW pursues this mission by supporting community efforts, enhancing education and training, disseminating best practices, launching

special initiatives, and leading the Nation's efforts to end violence against women.

Currently, OVW administers discretionary grant programs and formula grant programs, all of which were established under VAWA and subsequent legislation. Since its inception in 1995, OVW has awarded billions in grant funding and cooperative agreements and has launched a multifaceted approach to implementing VAWA. These grant programs are designed to develop the nation's capacity to reduce domestic violence, dating violence, sexual assault, and stalking by strengthening services to victims and holding offenders accountable for their action. OVW posts notice of funding opportunities (NOFO) (previously referred to as solicitations), closes NOFO periods, performs initial internal reviews, conducts peer reviews, makes funding decisions and ultimately makes awards on a staggered basis by grant program according to a master calendar that ensures that grant awards are made in a timely manner in a specific fiscal year. The date of the posting of a NOFO is set by working backwards from the date that OVW is required to award grant funds.

OVW developed a NOFO template and an accompanying NOFO Guide to assist potential grantees in applying for current OVW programs. The NOFO template ensures that all applicants to OVW grant programs will be asked to provide uniform information in a consistent manner. The information addressed in the template includes: Application for Federal Assistance; Summary Data Sheet; Proposal Abstract; Summary of Other Federal Funding; Proposal Narrative; Budget Worksheet and Narrative; Memorandum of Understanding (MOU); Letter of Nonsupplanting; Financial Capability Questionnaire; and Indirect Cost Rate Agreement and additional items. Each NOFO is tailored to address the specific OVW grant program so that

identification of eligible applicants, availability of funds, award period, award amount, program scope, activities that may compromise victim safety and recovery or undermine offender accountability and unallowable activities will be consistent with the statutory requirements and funding amounts authorized for each particular grant program.

The purpose of the NOFO template is to provide a framework to develop program-specific announcements soliciting applications for funding. A program NOFO outlines the specifics of the funding program; describes the requirements for eligibility; instructs an applicant on the necessary components of an application under a specific program (e.g. project activities and timeline, proposed budget); and provides registration dates, due dates, and instructions on how to apply within the designated application system.

Overview of This Information Collection

1. *Type of Information Collection:*

Extension of a previously approved collection.

2. *The Title of the Form/Collection:*

OVW Notice of Funding Opportunity Template.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* 1122-0020.

4. *Affected public who will be asked or required to respond, as well as the obligation to respond:* The affected public includes applicants to OVW grant programs authorized under the Violence Against Women Act of 1994 as amended. These include States, territories, Tribes or units of local government, institutions of higher education including colleges and universities, Tribal organizations, Federal, State, Tribal, territorial or local courts or court-based programs, State sexual assault coalitions, State domestic violence coalitions; territorial domestic violence or sexual assault coalitions, Tribal coalitions, community-based

organizations, and non-profit, nongovernmental organizations. The purpose of the NOFO template is to provide a framework to develop program-specific announcements soliciting applications for funding. A program NOFO outlines the specifics of the funding program; describes the requirements for eligibility; instructs an applicant on the necessary components of an application under a specific program (e.g., project activities and timeline, proposed budget); and provides registration dates, due dates, and instructions on how to apply within the designated application system.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that information will be collect annually from the approximately 1,800 respondents (applicants to the OVW grant programs). The public reporting burden for this collection of information is estimated at up to 30 hours per application. The 30-hour estimate is based on the amount of time to prepare a narrative, budget and other materials for the application and, if required, to coordinate with and develop a memorandum of understanding with requisite project partners.

6. *An estimate of the total annual burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 54,000 hours, that is 1,800 applicants completing an application for funding which is estimated to take 30 hours.

7. The total annual hour burden to complete the data collection forms is 54,000 hours, that is 1,800 applicants completing a form twice a year with an estimated completion time for the form being 30 hours.

8. *An estimate of the total annual cost burden associated with the collection, if applicable:* The annualized costs to the Federal Government resulting from the OVW staff review of the progress reports submitted by grantees are estimated to be \$201,600.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency (semiannually)	Total annual responses	Time per response (hours)	Total annual burden (hours)
Progress Report Form	1,800	2	1,800	30	54,000
Unduplicated Totals	1,800	.....	1,800	.....	54,000

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States

Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution

Square, 145 N Street NE, 4W-218, Washington, DC.

Dated: November 26, 2024.
Darwin Arceo,
*Department Clearance Officer for PRA, U.S.
Department of Justice.*
[FR Doc. 2024–28175 Filed 11–29–24; 8:45 am]
BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0008]

**Agency Information Collection
Activities; Proposed eCollection
eComments Requested; Extension of a
Previously Approved Collection;
Semiannual Progress Report for
Enhanced Training and Services To
End Abuse in Later Life Program
(Abuse in Later Life Program)**

AGENCY: Office on Violence Against
Women, Department of Justice.
ACTION: 60-Day notice.

SUMMARY: The Office on Violence
Against Women, Department of Justice
(DOJ), will be submitting the following
information collection request to the
Office of Management and Budget
(OMB) for review and approval in
accordance with the Paperwork
Reduction Act of 1995.

DATES: Comments are encouraged and
will be accepted for 60 days until
January 31, 2025.

FOR FURTHER INFORMATION CONTACT: If
you have additional comments
especially on the estimated public
burden or associated response time,
suggestions, or need a copy of the
proposed information collection
instrument with instructions or
additional information, please contact
Catherine Poston, Office on Violence
Against Women, at 202–514–5430 or
Catherine.poston@usdoj.gov.

SUPPLEMENTARY INFORMATION: Written
comments and suggestions from the
public and affected agencies concerning
the proposed collection of information
are encouraged. Your comments should
address one or more of the following
four points:

—Evaluate whether the proposed
collection of information is necessary
for the proper performance of the
functions of the Bureau of Justice

Statistics, including whether the
information will have practical utility;
—Evaluate the accuracy of the agency’s
estimate of the burden of the
proposed collection of information,
including the validity of the
methodology and assumptions used;
—Evaluate whether and if so how the
quality, utility, and clarity of the
information to be collected can be
enhanced; and
—Minimize the burden of the collection
of information on those who are to
respond, including through the use of
appropriate automated, electronic,
mechanical, or other technological
collection techniques or other forms
of information technology, *e.g.*,
permitting electronic submission of
responses.

Abstract: The Abuse in Later Life
Program funds projects that support a
comprehensive approach to addressing
elder abuse in their communities. These
projects provide training to criminal
justice professionals to enhance their
ability to address elder abuse, neglect,
and exploitation; provide cross-training
opportunities to professionals working
with older victims; establish or support
a coordinated community response to
elder abuse; and provide or enhance
services for victims who are 50 years of
age or older. Eligible applicants are
limited to: States, units of local
government, Tribal governments or
Tribal organizations, population specific
organizations with demonstrated
experience in assisting individuals over
50 years of age, victim service providers
with demonstrated experience in
addressing domestic violence, dating
violence, sexual assault, and stalking,
and State, Tribal, or territorial domestic
violence or sexual assault coalitions.

**Overview of This Information
Collection**

1. *Type of Information Collection:*
Extension of a previously approved
collection.
2. *The Title of the Form/Collection:*
Semiannual Progress Report for
Enhanced Training and Services to End
Abuse in Later Life Program.
3. *The agency form number, if any,
and the applicable component of the
Department sponsoring the collection:*
1122–0008.

4. *Affected public who will be asked
or required to respond, as well as the
obligation to respond:* Grantees from the
Abuse in Later Life Program. The
affected public includes the
approximately 15 grantees of the Abuse
in Later Life Program. Abuse in Later
Life Program grants may be used for
training programs to assist law
enforcement officers, prosecutors, and
relevant officers of Federal, State,
Tribal, and local courts in recognizing,
addressing, investigating, and
prosecuting instances of elder abuse,
neglect, and exploitation and violence
against individuals with disabilities,
including domestic violence and sexual
assault, against older or disabled
individuals. Grantees fund projects that
focus on providing training for criminal
justice professionals to enhance their
ability to address elder abuse, neglect
and exploitation in their communities
and enhanced services to address these
crimes.

5. *An estimate of the total number of
respondents and the amount of time
estimated for an average respondent to
respond:* It is estimated that it will take
the approximately 15 respondents
(grantees from the Abuse in Later Life
Program) approximately one hour to
complete a semi-annual progress report.
The semi-annual progress report is
divided into sections that pertain to the
different types of grantee activities.

6. An estimate of the total annual
burden (in hours) associated with the
collection: The total annual hour burden
to complete the data collection forms is
30 hours, that is 15 grantees completing
a form twice a year with an estimated
completion time for the form being one
hour.

7. The total annual hour burden to
complete the data collection forms is 30
hours, that is 15 grantees completing a
form twice a year with an estimated
completion time for the form being one
hour.

8. *An estimate of the total annual cost
burden associated with the collection, if
applicable:* The annualized costs to the
Federal Government resulting from the
OVW staff review of the progress reports
submitted by grantees are estimated to
be \$2016.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency (semiannually)	Total annual responses	Time per response (hour)	Total annual burden (hours)
Progress Report Form	15	2	30	1	30

TOTAL BURDEN HOURS—Continued

Activity	Number of respondents	Frequency (semiannually)	Total annual responses	Time per response (hour)	Total annual burden (hours)
Unduplicated Totals	15	.....	30	.....	30

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC.

Dated: November 26, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–28177 Filed 11–29–24; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–0312]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Currently Approved Collection: Survey of State Criminal History Information Systems (SSCHIS)

AGENCY: Bureau of Justice Statistics, Office of Justice Programs, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 30 days until January 2, 2025.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Devon Adams, Deputy Director, Bureau of Justice Statistics, 999 N Capitol St. NE, Washington, DC 20531 (email: devon.adams@usdoj.gov; telephone: 202–305–0765).

SUPPLEMENTARY INFORMATION: The proposed information was previously published in the **Federal Register** allowing for both a 60-day (88 FR 17017,

March 31, 2023) and 30-day (88 FR 35929, June 1, 2023) comment period. The Bureau of Justice Statistics received no comments during the comment period. This 30-day notice is being published to announce a substantive change to the collection. BJS is conducting this survey again for year-end 2024.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function and entering either the title of the information collection or the OMB Control Number 1121–0312. This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3)

years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *The Title of the Form/Collection:* Survey of State Criminal History Information Systems (SSCHIS), 2024.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is N/A. The applicable component within the Department of Justice is the Bureau of Justice Statistics, in the Office of Justice Programs.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Affected Public: State, Local and Tribal governments. Abstract: The SSCHIS report, the most comprehensive data available on the collection and maintenance of information by State criminal history record systems, describes the status of such systems and record repositories on a biennial basis. Data collected from State record repositories serves as the basis for estimating the percentage of total State records that are immediately available through the FBI's Interstate Identification Index (III), and the percentage of arrest records that include dispositions. Other data presented include the number of records maintained by each State, the percentage of automated records in the system, and the number of States participating in the National Fingerprint File and the National Crime Prevention and Privacy Compact which authorizes the interstate exchange of criminal history records for noncriminal justice purposes. The SSCHIS also contains information regarding the timeliness and completeness of data in State record systems and procedures employed to improve data quality.

(5) *Obligation to Respond:* Voluntary.

(6) *Total Estimated Number of Respondents:* 56.

(7) *Estimated Time per Respondent*: 4 hours.

(8) *Frequency*: Biennially.

(9) *Total Estimated Annual Time Burden*: 224 hours.

(10) *Total Estimated Annual Other Costs Burden*: \$84,440.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W-218, Washington, DC.

Dated: November 26, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024-28169 Filed 11-29-24; 8:45 am]

BILLING CODE 4410-18-P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219-0095]

Proposed Extension of Information Collection; Explosive Materials and Blasting Units (Pertains Only to Category III Metal and Nonmetal Mines Deemed To Be Gassy)

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor (DOL), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed collections of information, in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Mine Safety and Health Administration (MSHA) is soliciting comments on the information collection entitled Explosive Materials and Blasting Units (Pertains only to Category III Metal and Nonmetal Mines Deemed to be Gassy).

DATES: All comments must be received on or before January 31, 2025.

ADDRESSES: Comments concerning the information collection requirements of this notice may be sent by any of the methods listed below. Please note that

late comments received after the deadline will not be considered.

• **Federal E-Rulemaking Portal:**

<https://www.regulations.gov>. Follow the on-line instructions for submitting comments for docket number MSHA-2024-0034.

• **Mail/Hand Delivery:** DOL-MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, 4th Floor West, Arlington, VA 22202-5452. Before visiting MSHA in person, call 202-693-9455 to make an appointment.

• MSHA will post all comments as well as any attachments, except for information submitted and marked as confidential, in the docket at <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: S.

Aromie Noe, Director, Office of Standards, Regulations, and Variances, MSHA, at MSHA.information.collections@dol.gov (email); (202) 693-9440 (voice); or (202) 693-9441 (facsimile). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

I. Background

A. Legal Authority

Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act) as amended, 30 U.S.C. 813(h), authorizes the Mine Safety and Health Administration (MSHA) to collect information necessary to carry out its duty in protecting the safety and health of miners. Further, section 101(a) of the Mine Act, 30 U.S.C. 811(a), authorizes the Secretary of Labor (Secretary) to develop, promulgate, and revise, as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal, metal and nonmetal mines.

B. Information Collection

In order to fulfill the statutory mandates to promote miners' health and safety, MSHA requires the collection of information under the information collection request entitled Explosive Materials and Blasting Units (Pertains only to Category III Metal and Nonmetal Mines Deemed to be Gassy). The information collection is intended to determine whether nonapproved explosive materials and blasting units and procedures are safe for use in Category III mines.

All mines must use approved blasting units and explosives to ensure miner health and safety. If mine operators choose to use unapproved blasting units and explosives, they must obtain approval from MSHA before doing so. Under title 30 of the Code of Federal

Regulations (30 CFR) 57.22003(a) and (a)(3), mine category III applies to all underground metal and nonmetal mines and the surface mills of Subcategory I-C mines (gilsonite) in which noncombustible ore is extracted and which liberate a concentration of methane that is explosive, or is capable of forming explosive mixtures with air, or have the potential to do so based on the history of the mine or the geological area in which the mine is located. The concentration of methane in such mines is explosive or is capable of forming explosive mixtures if mixed with air at certain composition.

1. Notifying MSHA Prior to Using Nonapproved Explosive Materials and Blasting Units

Under 30 CFR 7.4 and 15, MSHA tests and approves blasting units and explosive materials as permissible for use in mines, respectively. Under 30 CFR 57.22606(a), mine operators of Category III metal and nonmetal mines must notify the appropriate MSHA District Manager of all nonapproved explosive materials and blasting units prior to their use. Explosive materials used for blasting must be approved by MSHA under 30 CFR part 15, or nonapproved explosive materials must be evaluated and determined by the District Manager to be safe for blasting in a potentially gassy environment. The notice must also include the millisecond-delay interval between successive shots and between the first and last shot in a round.

II. Desired Focus of Comments

MSHA is soliciting comments concerning the proposed information collection entitled Explosive Materials and Blasting Units (Pertains only to Category III Metal and Nonmetal Mines Deemed to be Gassy). MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information has practical utility;
- Evaluate the accuracy of MSHA's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Suggest methods to enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology,

e.g., permitting electronic submission of responses.

The information collection request will be available on <https://www.regulations.gov>. MSHA cautions the commenter against providing any information in the submission that should not be publicly disclosed. Full comments, including personal information provided, will be made available on <https://www.regulations.gov> and <https://www.reginfo.gov>.

The public may also examine publicly available documents at DOL-MSHA, Office of Standards, Regulations and Variances, 201 12th Street South, 4th Floor West, Arlington, VA 22202-5452. Sign in at the receptionist's desk on the 4th Floor via the West elevator. Before visiting MSHA in person, call 202-693-9455 to make an appointment.

Questions about the information collection requirements may be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

III. Current Actions

This information collection request concerns provisions for Explosive Materials and Blasting Units (Pertains only to Category III Metal and Nonmetal Mines Deemed to be Gassy). MSHA has updated the data with respect to the number of respondents, responses, time burden, and burden costs supporting this information collection request from the previous information collection request.

Type of Review: Extension, without change, of a currently approved collection.

Agency: Mine Safety and Health Administration.

OMB Number: 1219-0095.

Affected Public: Business or other for-profit.

Number of Annual Respondents: 1.

Frequency: On occasion.

Number of Annual Responses: 1.

Annual Time Burden: 1 hours.

Annual Other Burden Costs: \$6.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the proposed information collection request; they will become a matter of public record and be available at <https://www.reginfo.gov>.

Song-ae Aromie Noe,

Certifying Officer, Mine Safety and Health Administration.

[FR Doc. 2024-28164 Filed 11-29-24; 8:45 am]

BILLING CODE 4510-43-P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA-2011-0032]

Construction Standards on Posting Emergency Telephone Numbers and Floor Load Limits; Extension of the 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 the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Construction Standards on Posting Emergency Telephone Numbers and Maximum Safe Floor Load Limits.

DATES: Comments must be submitted (postmarked, sent, or received) by January 31, 2025.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at <https://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 <https://www.regulations.gov>. Documents in the docket are listed in the <https://www.regulations.gov> index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the websites. 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 OSHA docket number (OSHA-2011-0032) for the Information Collection Request (ICR). OSHA will place all comments, including any personal information, in the public docket, which may be made 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, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693-2222.

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 consultation program 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, the 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 that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

The following sections describe who uses the information collected under each requirement, as well as how they use it. The purpose of these requirements is to reduce employees' risk of death and serious injury by ensuring that employment has been tested and is in safe operating condition.

Two construction standards, "Medical Services and First Aid" (section 1926.50), and "General Requirements for Storage" (section 1926.250), contain posting provisions. Paragraph (f) of section 1926.50 requires employers to conspicuously post emergency telephone numbers for physicians, hospitals, or ambulances at their worksites if 911 emergency telephone service is not locally available; in the event that a worker has a serious injury at a worksite, this posting requirement helps expedite emergency medical treatment of the worker. Paragraph (a)(2) of section 1926.250 specifies that employers must post the maximum safe load limits of floors located in storage areas inside buildings or other structures under construction, unless

the floors or slabs are on grade (sitting on the ground). This provision prohibits employers from overloading floors in areas used to store material and equipment where a structure's floors are not supported directly by the ground. This requirement is intended to prevent floor collapses which could seriously injure or kill workers.

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 to protect workers, 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, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the information collection requirements contained in the Construction Standards on Posting Emergency Telephone Numbers and Maximum Safe Floor Load Limits. The agency is requesting an adjustment increase in burden from 55,184 to 65,283 hours, a difference of 10,099 hours. This increase is due to an increase in the number of construction sites, going from 885,922 to 937,602.

OSHA will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements.

Type of Review: Extension of a currently approved collection.

Title: Construction Standards on Posting Emergency Telephone Numbers and Maximum Safe Floor Load Limits.

OMB Control Number: 1218-0093.

Affected Public: Business or other for-profits.

Number of Respondents: 937,602.

Number of Responses: 181,198.

Frequency of Responses: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 65,283.

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; or (2) by facsimile (fax), if your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693-1648. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA-2011-0032). You may supplement electronic submission by uploading document files electronically.

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 from this website. All submission, 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 at (202) 693-2350, (TTY) (877) 889-5627 for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy 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. 8-2020 (85 FR 58393).

Signed at Washington, DC, on November 22, 2024.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2024-28055 Filed 11-29-24; 8:45 am]

BILLING CODE 4510-26-P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Requests: Studies To Support Institute of Museum and Library Services' Learning Agendas for Libraries and Museums

AGENCY: Institute of Museum and Library Services, National Foundation on the Arts and the Humanities.

ACTION: Notice, request for comments, collection of information.

SUMMARY: The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments about the proposed data collection for "Studies to Support IMLS's Learning Agendas for Libraries and Museums." A copy of the proposed information collection request can be obtained using the contact information listed below in the **ADDRESSES** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before January 02, 2025.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this Notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection request by selecting "Institute of Museum and Library Services" under "Currently Under Review;" then check "Only Show ICR for Public Comment" checkbox. Once you have found this information collection request, select "Comment," and enter or upload your comment and information. Alternatively, please mail your written comments to Office of Information and Regulatory Affairs, Attn.: OMB Desk Officer for Education, Office of Management and Budget,

Room 10235, Washington, DC 20503, or call (202) 395-7316.

OMB is particularly interested in comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- 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).

FOR FURTHER INFORMATION CONTACT: Lisa Hechtman, Ph.D., Social Science Research Analyst, Office of Research and Evaluation, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington DC 20024-2135. Dr. Hechtman can be reached by telephone at 202-653-4724, or by email at lhechtman@imls.gov. Persons who are deaf or hard of hearing (TTY users) can contact IMLS at 202-207-7858 via 711 for TTY-Based Telecommunications Relay Service.

SUPPLEMENTARY INFORMATION: The Institute of Museum and Library Services is the primary source of Federal support for the nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. To learn more, visit www.imls.gov.

Current Actions: This notice proposes the clearance of information collection instruments that support IMLS's Learning Agenda for Libraries and Museums. The 60-day notice was published in the **Federal Register** on May 22, 2024 (89 FR 45029) (Document Number 2024-11217). IMLS received and responded to one comment requesting a copy of the proposed information collection and expressing interest in providing input. IMLS provided a summary of the research plan, planned activities, and study design.

Agency: Institute of Museum and Library Services.

Title: Studies to Support IMLS's Learning Agendas for Libraries and Museums.

OMB Control Number: 3137-NEW.

Agency Number: 3137.

Respondents/Affected Public:

Museum staff, library staff, IMLS awardees, library community partners.

Total Number of Annual

Respondents: 234.

Frequency of Response: Once per request.

Average Hours/Minutes per Response: 59 minutes.

Total Estimated Annual Burden Hours: 230.

Total Annual Cost Burden (dollars): \$8,397.19.

Total Annual Federal Cost (dollars): \$202,582.68.

Dated: November 26, 2024.

Suzanne Mbollo,

Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2024-28202 Filed 11-29-24; 8:45 am]

BILLING CODE 7036-01-P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings

The National Science Board's Committee on Awards and Facilities (A&F) hereby gives notice of the scheduling of meetings for the transaction of National Science Board business pursuant to the National Science Foundation Act and the Government in the Sunshine Act.

TIME AND DATE: The A&F meeting session will be held on Tuesday, December 3, 2024. The open session will be from 2:00 p.m.-3:00 p.m. The closed session will be from 3:00 p.m.-5:00 p.m.

PLACE: The meetings will be held at NSF headquarters, 2145 Eisenhower Ave., Alexandria, VA 22314, and by videoconference.

STATUS: One session is open, and one session is closed.

MATTERS TO BE CONSIDERED:

A&F open session agenda: Opening Remarks Regarding the Agenda; Discussion and Vote on Provisional Resolution related to Antarctic Science and Engineering Support Contract Update; Information Item: Indigenous Community Engagement.

A&F closed session agenda: Opening Remarks; Information Item: Annual Report of the Chief Officer for Research Facilities; Information Item: Briefing on U.S. Extremely Large Telescope Program Report from the External Panel.

CONTACT PERSON FOR MORE INFORMATION: Point of contact for this meeting is:

Michelle McCrackin, mmccrack@nsf.gov, (703) 292-7000. Members of the public can observe the public portion of this meeting through a YouTube livestream, which may be found at www.nsf.gov/nsb.

Ann E. Bushmiller,

Senior Legal Counsel to the National Science Board.

[FR Doc. 2024-28265 Filed 11-27-24; 11:15 am]

BILLING CODE 7555-01-P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings

The National Science Board hereby gives notice of the scheduling of a teleconference of the National Science Board/National Science Foundation Commission on Merit Review (MRX) for the transaction of National Science Board business pursuant to the NSF Act and the Government in the Sunshine Act.

TIME AND DATE: The MRX meeting is scheduled for Tuesday, December 3, 2024, from 9:00 a.m.-12:00 p.m. Eastern.

PLACE: This meeting will be held at the National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314.

STATUS: Closed.

MATTERS TO BE CONSIDERED: The agenda is: Commission Chair's opening remarks about the agenda; Discussion of Final Recommendations and Guidance, Vote for Approval of Final Recommendations and Guidance; and Commission Chair's closing remarks.

CONTACT PERSON FOR MORE INFORMATION: Point of contact for this meeting is: Chris Blair, cblair@nsf.gov, 703/292-7000. Meeting information and updates may be found at www.nsf.gov/nsb.

Ann E. Bushmiller,

Senior Counsel to the National Science Board.

[FR Doc. 2024-28266 Filed 11-27-24; 11:15 am]

BILLING CODE 7555-01-P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Seek Approval To Establish an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and request for comments.

SUMMARY: Under the Paperwork Reduction Act of 1995, and as part of its continuing effort to reduce paperwork and respondent burden, the National Science Foundation (NSF) is inviting the general public or other Federal

agencies to comment on this proposed continuing information collection.

DATES: Written comments on this notice must be received by January 31, 2025 to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to address below.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Suite E6300, Alexandria, Virginia 22314; telephone (703) 292-7556; or send email to splimpto@nsf.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

SUPPLEMENTARY INFORMATION:

Comments: Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Foundation, including whether the information will have practical utility; (b) the accuracy of the Foundation's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Title of Collection: 2026 U.S. NSF Integrated Data and Evidence Maturity and Capacity (IDEMC) Assessment.

OMB Number: 3145-NEW.

Expiration Date of Approval: Not applicable.

Type of Request: Intent to seek approval to establish an information collection.

Abstract: The "2026 NSF Integrated Data and Evidence Maturity and Capacity (IDEMC) Assessment" encompasses planning, execution, and reporting to evaluate NSF's data and evidence capabilities. Conducted periodically, this assessment supports compliance with the Foundations for Evidence-Based Policymaking Act (Evidence Act) and promotes continuous improvement in evidence-based decision-making. Building on the 2022 baseline assessment, the 2026 IDEMC Assessment will refine the evaluation framework to align with updated Office of Management and Budget (OMB) guidance.

The project will assess strengths, gaps, and opportunities across NSF's evidence and data capabilities by:

1. Conducting a review of agency artifacts;
2. Administering a survey to all NSF staff;
3. Organizing focus groups and individual interviews; and
4. Deploying interactive, real-time dashboards for decision-making.

The findings will be summarized in detailed reports and data briefs, offering actionable insights to enhance evidence capacity, maturity of foundational capabilities, and a culture of continuous learning and innovation. Additionally, the project will deliver a repeatable methodology, tools, and templates to support NSF in independently conducting the IDEMC Assessment in future years, if desired.

Expected Respondents: A census survey will be distributed to all 1,600 NSF staff, with a response burden of 30 minutes per respondent. Focus groups and interviews will be conducted with representative subsets of the population. Based on NSF's workforce size, approximately 10 focus groups (each with 6-8 participants, totaling ~70 participants) and 30 interviews will be conducted to ensure a range of perspectives and sufficient qualitative data.

Estimate of Burden: The overall annualized cost to the respondents is estimated to be \$46,750. The following table shows the estimated burden and costs to respondents:

Collection title	Total number of respondents	Burden hours per respondent	Total hour burden	Average hourly rate	Estimated annual cost
Census Survey	1,600	0.5	800	\$50	\$40,000
Focus Groups	70	1.5	105	50	5,250
Interviews	30	1	30	50	1,500
Total	1,700	.....	935	.....	46,750

Justification for \$50/hour Average Rate: The estimated average hourly rate of \$50 reflects data from the Bureau of Labor Statistics (BLS) and Office of Personnel Management (OPM). Comparable Federal roles, such as "Management Analysts," have an average hourly rate of approximately \$50 (BLS, May 2022 National Occupational Employment and Wage Estimates). Additionally, General Schedule (GS) rates for GS-12 and GS-13 employees, typical of NSF staff roles, average around \$50/hour when factoring in locality adjustments for the Washington, DC area.

Use of the Information: Aggregate findings will inform NSF's strategic planning, management, and evaluation efforts. Reports summarizing the results will support compliance with Evidence Act requirements and enhance NSF's

capacity for evidence-based decision-making.

Dated: November 25, 2024.

Suzanne H. Plimpton,
Reports Clearance Officer, National Science Foundation.
[FR Doc. 2024-28137 Filed 11-29-24; 8:45 am]

BILLING CODE 7555-01-P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings

The National Science Board (NSB) hereby gives notice of the scheduling of meetings for the transaction of National Science Board business pursuant to the National Science Foundation Act and the Government in the Sunshine Act.

TIME AND DATE: Wednesday, December 3, 2024, from 8:45 a.m.-5:25 p.m. and

Thursday, December 5, 2024, from 9:00 a.m.-2:25 p.m. Eastern.

PLACE: These meetings will be held at NSF headquarters, 2415 Eisenhower Avenue, Alexandria, VA 22314, and by videoconference. All open sessions of the meeting will be webcast live on the NSB YouTube channel.

December 4, 2024: <https://youtube.com/live/auhWaHXqe9w?feature=share>

December 5, 2024: <https://youtube.com/live/3yUcMZ2hsU0?feature=share>

STATUS: Parts of these meetings will be open to the public. The rest of the meetings will be closed to the public. See the full description below.

MATTERS TO BE CONSIDERED:

Wednesday, December 4, 2024*Plenary Board meeting*

Open Session: 10:00 a.m.–1:05 p.m.

- NSB Chair's Opening Remarks
 - Welcome and Agenda Preview
 - NSB Swearing-in Ceremony
- NSF Director's Presentation on Multi-sector Partnerships and Investments
 - Taking stock of NSF's progress to date
- NSB External Panel—*Vision for American Science and Technology/ Science & Technology Action Committee*
 - Panelists: France Cordova, President of the Science Philanthropy Alliance, 14th Director of the NSF
 - Monica Dus, Associate Professor in the Department of Molecular, Cellular, and Developmental Biology, University of Michigan
 - Darío Gil, NSB Chair
 - Marcia McNutt, President of the National Academy of Sciences
 - Sudip Parikh, American Association for the Advance of Science, Chief Executive Officer and Executive Publisher of Science Journals
- NSB External Panel—*A New National Defense Education Act for a Changed Landscape*
 - Panelists: Maria Klawe, President of Math for America
 - Tsu-Jae King Liu, Dean of the UC Berkeley College of Engineering
 - Nick Moore, Director of Governor's Office of Education and Workforce Transformation, State of Alabama

Plenary Board Meeting

Open Session: 1:50 p.m.–3:00 p.m.

- Approval of July 2024 Open Meeting Minutes
- NSB Committee Reports
 - Committee on Strategy
 - Development of NSF's 2026–2030 Strategic Plan and Learning Agenda
 - Committee on External Engagement
 - NSF 75th Anniversary Planning
 - Committee on National Science and Engineering Policy
 - *Science & Engineering Indicators 2026*
- NSF Director's Remarks
 - Engagement, Updates, and Senior Staff introductions

Plenary Board Meeting

Closed Session: 3:00 p.m.–4:00 p.m.

- Strategic-Level Thinking and Discussion about the NSF Budget

Thursday, December 5, 2024*Plenary Board Meeting*

Open Session: 9:00 a.m.–11:10 a.m.

- NSB Chair's Welcome
- NSB External Panel—*The Center for Strategic and International Studies, Institution Building as it Relates to Multi-sectoral Partnerships and Investments*
 - Panelists: Erica Fuchs, Professor, Department of Engineering and Public Policy, Carnegie Mellon University
 - Navin Girishankar, President of the Economic Security and Technology Department at the CSIS
 - Andrew Reamer, Research Professor at the George Washington University, Institute for Public Policy
- Commission Reports
- Committee on Awards & Facilities
- Indigenous community engagement
- Antarctic Engineering and Science Support Contract—Discussion and vote on resolution
- NSB–NSF Commission on Merit Review
- High-level summary of activities

Plenary Board Meeting

Closed Session: 11:10 a.m.–12:45 p.m.

- NSB Chair's Remarks and Welcome
 - Approval of closed meeting minutes July and September 2024
- NSF Director's Remarks
 - Agency Operations updates
- Committee Reports
 - NSB–NSF Commission on Merit Review
 - Presentation and discussion of final recommendations and guidance
 - Committee on Awards & Facilities
 - Annual Report of the Chief Officer for Research Facilities
 - U.S. Extremely Large Telescope report
- Vote to enter Executive Plenary Closed Session

Executive Closed Session: 1:30 p.m.–2:25 p.m.

- NSB Chair's Remarks and Welcome
 - Approval of May 2024 Executive Plenary Closed Minutes
- NSB honorary Awards—Discussion and Vote
 - 2025 Vannevar Bush and Science and Society Awards
- NSB Chair's closing remarks

Plenary Meeting Adjourns: 2:25 p.m.

Portions Open to the Public

Wednesday, December 4, 2024

10:00 a.m.–1:05 p.m. Plenary NSB
1:50 p.m.–3:00 p.m. Plenary NSB

Thursday, December 5, 2024

9:00 a.m.–11:10 a.m. Plenary NSB

Portions Closed to the Public

Wednesday, December 4, 2024

3:00 p.m.–4:00 p.m. Plenary NSB

Thursday, July 25, 2024

11:10 a.m.–12:45 p.m. Plenary NSB

1:30 p.m.–2:25 p.m. Executive Plenary closed

Members of the public are advised that the NSB provides some flexibility around start and end times. A session may be allowed to run over by as much as 15 minutes if the Chair decides the extra time is warranted. The next session will start no later than 15 minutes after the noticed start time. If a session ends early, the next meeting may start up to 15 minutes earlier than the noticed start time. Sessions will not vary from the times noticed by more than 15 minutes.

CONTACT PERSON FOR MORE INFORMATION:

The NSB Office contact is Christopher Blair, cblair@nsf.gov, 703–292–7000. The NSB Public Affairs contact is Nadine Lymn, nlymn@nsf.gov, 703–292–2490. Please refer to the NSB website for additional information: <https://www.nsf.gov/nsb>.

Ann E. Bushmiller,

Senior Legal Counsel to the National Science Board.

[FR Doc. 2024–28291 Filed 11–27–24; 11:15 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION**[NRC–2024–0001]****Sunshine Act Meetings**

TIME AND DATE: Weeks of December 2, 9, 16, 23, 30, 2024 and January 6, 2025. The schedule for Commission meetings is subject to change on short notice. The NRC Commission Meeting Schedule can be found on the internet at: <https://www.nrc.gov/public-involve/public-meetings/schedule.html>.

PLACE: The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (e.g., braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at Anne.Silk@nrc.gov. Determinations on

requests for reasonable accommodation will be made on a case-by-case basis.

STATUS: Public.

Members of the public may request to receive the information in these notices electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555, at 301-415-1969, or by email at Betty.Thweatt@nrc.gov or Samantha.Miklaszewski@nrc.gov.

MATTERS TO BE CONSIDERED:

Week of December 2, 2024

Thursday, December 5, 2024

10:00 a.m. Briefing on Equal Employment Opportunity, Affirmative Employment, and Small Business (Public Meeting) (Contact: Erin Deeds: 301-415-2887)

Additional Information: The meeting will be held in the Commissioners' Hearing Room, 11555 Rockville Pike, Rockville, Maryland. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—<https://video.nrc.gov/>.

Week of December 9, 2024—Tentative

There are no meetings scheduled for the week of December 9, 2024.

Week of December 16, 2024—Tentative

There are no meetings scheduled for the week of December 16, 2024.

Week of December 23, 2024—Tentative

There are no meetings scheduled for the week of December 23, 2024.

Week of December 30, 2024—Tentative

There are no meetings scheduled for the week of December 30, 2024.

Week of January 6, 2025—Tentative

There are no meetings scheduled for the week of January 6, 2025.

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Wesley Held at 301-287-3591 or via email at Wesley.Held@nrc.gov.

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: November 27, 2024.

For the Nuclear Regulatory Commission.

Wesley W. Held

Policy Coordinator, Office of the Secretary.

[FR Doc. 2024-28296 Filed 11-27-24; 11:15 am]

BILLING CODE 7590-01-P

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee Virtual Public Meeting

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: According to the provisions of section 10 of the Federal Advisory Committee Act, notice is hereby given that a virtual meeting of the Federal Prevailing Rate Advisory Committee will be held on Thursday, December 19, 2024. There will be no in-person gathering for this meeting.

DATES: The virtual meeting will be held on December 19, 2024, beginning at 10 a.m. (ET).

ADDRESSES: The meeting will convene virtually.

FOR FURTHER INFORMATION CONTACT: Ana Paunoiu, 202-606-2858, or email paypolicy@opm.gov.

SUPPLEMENTARY INFORMATION: The Federal Prevailing Rate Advisory Committee is composed of a Chair, five representatives from labor unions holding exclusive bargaining rights for Federal prevailing rate employees, and five representatives from Federal agencies. Entitlement to membership on the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the Office of Personnel Management.

Annually, the Chair compiles a report of pay issues discussed and concluded recommendations. These reports are available to the public. Reports for calendar years 2008 to 2023 are posted at <https://www.opm.gov/fprac>. Previous reports are also available, upon written request to the Committee.

The public is invited to submit material in writing to the Chair on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on these meetings may be obtained by contacting the Committee at Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 7H31, 1900 E Street NW, Washington, DC 20415, (202) 606-2858.

This meeting is open to the public, with an audio option for listening. This notice sets forth the participation guidelines for the meeting.

Meeting Agenda. The committee meets to discuss various agenda items

related to the determination of prevailing wage rates for the Federal Wage System. The committee's agenda is approved one week prior to the public meeting and will be available upon request at that time.

Public Participation: The December 19, 2024, meeting of the Federal Prevailing Rate Advisory Committee is open to the public through advance registration. Public participation is available for the meeting. All individuals who plan to attend the virtual public meeting to listen must register by sending an email to paypolicy@opm.gov with the subject line "December 19, 2024" no later than Tuesday, December 17, 2024.

The following information must be provided when registering:

- Name.
- Agency and duty station.
- Email address.
- Your topic of interest.

Members of the press, in addition to registering for this event, must also RSVP to media@opm.gov by December 17, 2024.

A confirmation email will be sent upon receipt of the registration. Audio teleconference information for participation will be sent to registrants the morning of the virtual meeting.

Office of Personnel Management.

Kayyonne Marston,
Federal Register Liaison.

[FR Doc. 2024-28132 Filed 11-29-24; 8:45 am]

BILLING CODE 6325-39-P

POSTAL REGULATORY COMMISSION

[Docket No. CP2025-1; Order No. 8131]

Competitive Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is recognizing a recently filed Postal Service document with the Commission concerning changes in rates of general applicability for Competitive products. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 13, 2024.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <https://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT:

David A. Trissell, General Counsel, at 202-789-6820.

SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Introduction
- II. Summary of Changes
- III. Initial Administrative Actions
- IV. Ordering Paragraphs

I. Introduction

On November 15, 2024, the Postal Service filed notice with the Commission concerning changes in rates and classifications of general applicability for Competitive products.¹ The Postal Service represents that, as required by 39 CFR 3035.102(b) and 39 CFR 3035.104(b), the Notice includes an explanation and justification for the changes, the effective date, and a schedule of the changed rates. Notice at 1. The changes are scheduled to take effect on January 19, 2025. *Id.*

Attached to the Notice is Governors' Decision No. 24-7, which states the new prices are in accordance with 39 U.S.C. 3632 and 3633 and 39 CFR 3035.102-104.² The Governors' Decision provides an analysis of the Competitive products' price and classification changes intended to demonstrate that the changes comply with 39 U.S.C. 3633 and 39 CFR part 3035. Governors' Decision No. 24-7 at 1. The Attachment to the Governors' Decision No. 24-7 sets forth the classification and price changes and includes draft Mail Classification Schedule (MCS) language for Competitive products of general applicability.

In addition, the Notice includes a non-public annex showing FY 2025 projected volumes, revenues, attributable costs, contribution, and cost coverage for each product. *See* Notice at 1. The Postal Service also filed supporting forecast data and price adjustment calculations for each affected product as required by Order No. 1062. *Id.*

The Notice also includes an application for non-public treatment of the unredacted version of the annex to the Governors' Decision, as well as the supporting materials for the data. *Id.* at 1-2.

II. Summary of Changes

The Notice proposes price changes to Priority Mail Express, Priority Mail, Parcel Select, and USPS Ground Advantage, and several International Products. *Id.* at 2. Additionally, the proposed changes include price adjustments to Domestic Extra Services, including Premium Forwarding Service, Competitive Post Office Boxes, and Adult Signature Service among others. *Id.* The Postal Service proposes one classification change consisting of a new Live Animal and Perishable Handling Fee under the Priority Mail Express, Priority Mail, and USPS Ground Advantage products. *Id.* at 2-3. The Postal Service states that the Live Animal and Perishable Handling Fee is a change in rates of general applicability for Competitive products within the meaning of 39 CFR 3035.102. *Id.* at 3. No other price or classification changes are proposed in this docket. *Id.*; *See* Governors' Decision No. 24-7 at 2-5. The changes are summarized below and condensed to Table I-1.

A. Price changes**1. Domestic**

Priority Mail Express changes. The proposed changes to the MCS in the Governors' Decision No. 24-7 show the Postal Service's planned price changes for Priority Mail Express. On average, Priority Mail Express prices are proposed to increase 3.2 percent. *See id.* at 2. For January 2025, the Postal Service will maintain the consolidation of Commercial Base and Commercial Plus price categories into one Commercial price category and the differentiated "Local, 1, 2" Zone prices and dimensional weighting for all zones. *Id.* The retail prices for Priority Mail Express will increase an average of 3.2 percent. *Id.* On average, commercial prices will increase by 3.2 percent and reflect an average of 12.4 percent discount off of retail prices. *Id.* For January 2025, the Postal Service proposes a Live Animal and Perishable Handling Fee of \$7.50. *Id.*

Priority Mail changes. The proposed changes to the MCS in the Governors' Decision No. 24-7 show the Postal Service's planned price changes for Priority Mail. On average, Priority Mail prices are proposed to increase 3.2 percent. *See id.* For January 2025, the Postal Service will maintain the consolidation of Commercial Base and Commercial Plus price categories into one Commercial price category and the differentiated "Local, 1, 2" Zone prices and dimensional weighting for all zones. *Id.* On average, the retail prices will increase by 3.2 percent. *Id.* The

commercial prices will increase by an average of 3.2 percent and reflect an average of 20.8 percent discount off retail prices. *Id.* For January 2025, the Postal Service proposes a Live Animal and Perishable Handling Fee of \$15.00. *Id.* at 2-3.

Parcel Select. The proposed changes to the MCS in the Governors' Decision No. 24-7 show the Postal Service's planned price changes for Parcel Select. On average, Parcel Select prices are proposed to increase 9.2 percent. *See id.* at 3. The average price increase for parcels entered in destination delivery units is 10.3 percent and the average price increase for parcels entered at destination hubs is not changing. *Id.* The average price increase for parcels entered at destination sectional center facilities and destination network distribution centers and is 7.1 percent and 9.7 percent, respectively. *Id.* For USPS Connect Local, introduced in 2022, the average increase is 5.4 percent. *Id.* The Postal Service proposes to maintain dimensional weighting which was introduced for all zones in 2019. *Id.* The fee for Forward and Return to Sender will be increased to \$3.60 and the fee for Address Correction Service with Shipper Paid Forwarding/Returns will be increased to \$3.00. *Id.*

USPS Ground Advantage. The proposed changes to the MCS in the Governors' Decision No. 24-7 show the Postal Service's planned price changes for USPS Ground Advantage overall will increase an average of 3.9 percent. *Id.* The retail prices will increase an average of 4.9 percent and commercial will increase an average of 3.2 percent. *Id.* The Alaska Limited Overland Routes price category will increase an average of 9.0 percent. *Id.* For January 2025, the Postal Service proposes a Live Animal and Perishable Handling Fee of \$7.50. *Id.*

Domestic Extra Services. The proposed changes to the MCS in the Governors' Decision No. 24-7 show the Postal Service's planned price changes for Premium Forwarding Service will increase an average of 6.1 percent. *Id.* Prices for Adult Signature service will decrease to \$8.40 for basic service and \$8.65 for person-specific service. *Id.* On average, prices for Address Enhancement Service are proposed to increase 8.9 percent. *Id.* Competitive Post Office Box prices will increase an average of 5.7 percent. *Id.* at 3-4. Package Intercept Services prices will increase to \$18.35. *Id.* at 4. Premium Data Retention and Retrieval Service (USPS Tracking Plus) will increase 86.3 percent. *Id.* The fee for overweight/oversized items will increase from \$100 to \$200. *Id.* The Postal Service also

¹ USPS Notice of Changes in Rates and Classifications of General Applicability for Competitive Products, November 15, 2024 (Notice). Pursuant to 39 U.S.C. 3632(b)(2), the Postal Service is obligated to publish the Governors' Decision and record of proceedings in the **Federal Register** at least 30 days before the effective date of the new rates.

² Notice, Decision of the Governors of the United States Postal Service on Changes in Rates and Classifications of General Applicability for Competitive Products (Governors' Decision No. 24-7), at 1 (Governors' Decision No. 24-7).

proposes to increase the “upper bounds” of the price ranges for Greeting Cards and Stationery and Officially Licensed Retail Products to accommodate current and future offerings. *Id.*

2. International

Expedited Services. The proposed changes to the MCS in the Governors’ Decision No. 24–7 show the Postal Service’s planned price changes for Priority Mail Express International will increase an average of 4.9 percent with Commercial Plus equivalent to Commercial Base. *Id.*

Priority Mail International. The proposed changes to the MCS in the Governors’ Decision No. 24–7 show the Postal Service’s planned price changes for Priority Mail International will increase an average of 4.9 percent with Commercial Plus prices equivalent to Commercial Base. *Id.*

International Priority Airmail and International Surface Air Lift. The proposed changes to the MCS in the Governors’ Decision No. 24–7 show the Postal Service’s planned published price changes for International Priority Airmail and International Surface Air Lift will have an average increase of 4.9 percent and 28.9 percent, respectively. *Id.*

Airmail M-Bags. The published price changes for Airmail M-Bags will remain the same on average “although a few prices will change slightly.” *Id.*

First-Class Package International Service. The proposed changes to the MCS in the Governors’ Decision No. 24–7 show the Postal Service’s planned price changes for First-Class Package International Service will increase an average of 4.9 percent with Commercial Plus prices equivalent to Commercial Base. *Id.*

International Ancillary Service and Special Services. The proposed changes to the MCS in the Governors’ Decision No. 24–7 show the Postal Service’s planned price changes for several international ancillary services. *Id.* at 5. The price for International Certificate of Mailing will increase by 5.0 percent, while the price for International Registered Mail will increase by an average of 4.8 percent. *Id.* Lastly, the price for International Insurance will decrease by 10.0 percent and the price for Customs and Clearance Delivery Fee will increase by an average of 3.5 percent. *Id.*

B. Classification Changes

Live Animal and Perishable Handling Fee. For January 2025, the Postal Service proposes a Live Animal and Perishable Handling Fee for Priority

Mail Express, Priority Mail, and USPS Ground Advantage to cover the additional costs associated with handling and transporting these items. Notice at 2–3.

TABLE I—1 PROPOSED PRICE CHANGES

Product name	Average price increase (percent)
Domestic Competitive Products	
Priority Mail Express	3.2
Retail	3.2
Commercial	3.2
Priority Mail	3.2
Retail	3.2
Commercial	3.2
Parcel Select	9.2
Destination Delivery Unit	10.3
Destination Hub	0.0
Destination Sectional Center Facility	7.1
Destination Network Distribution Center	9.7
Connect Local	5.4
USPS Ground Advantage	3.9
Retail	4.9
Commercial	3.2
Domestic Extra Services	
Premium Forwarding Service	6.1
Adult Signature Service.	
Basic	– 10.2
Person-Specific	– 10.4
Competitive Post Office Box	5.7
Package Intercept Service	4.9
Address Enhancement Service ..	8.9
Premium Data Retention and Retrieval	86.3
Other Domestic	
Overweight Item Charge	3 100
International Competitive Products	
Priority Mail Express International	4.9
Priority Mail International	4.9
International Priority Airmail	4.9
International Surface Air Lift	28.9
Airmail M-Bags	4 0.0
First-Class Package International Service	4.9
International Ancillary Services and Special Services	
International Certificate of Mailing	5.0
International Insurance	– 10.0
International Registered Mail	4.8

³ The Postal Service describes the Overweight Item Charge as “the fee for deterring overweight/oversized items found in the system.” Governors’ Decision 24–7 at 4.

⁴ The Postal Service states that for Airmail M-Bags “a few prices will change slightly.” *Id.*

TABLE I—1 PROPOSED PRICE CHANGES—Continued

Product name	Average price increase (percent)
Customs and Clearance Delivery Fee	3.5

Source: See Governors’ Decision No. 24–7 at 2–5. Percentage increases for Adult Signature Service and Package Intercept Service are calculated based on the proportional difference between current rates as shown in the MCS and the proposed rates specified in Governors’ Decision No. 24–7.

III. Initial Administrative Actions

The Commission establishes Docket No. CP2025–1 to consider the Postal Service’s Notice. Interested persons may express views and offer comments on whether the planned changes are consistent with 39 U.S.C. 3632, 3633, and 3642, 39 CFR part 3035, and 39 CFR 3040 subparts B and E. Comments are due no later than December 13, 2024. For specific details of the planned price changes, interested persons are encouraged to review the Notice, which is available on the Commission’s website at www.prc.gov.

Pursuant to 39 U.S.C. 505, Samuel J. Robinson is appointed to serve as Public Representative to represent the interests of the general public in this docket.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2025–1 to provide interested persons an opportunity to express views and offer comments on whether the planned changes are consistent with 39 U.S.C. 3632, 3633, and 3642, 39 CFR part 3035, and 39 CFR part 3040 subparts B and E.

2. Comments are due no later than December 13, 2024.

3. Pursuant to 39 U.S.C. 505, the Commission appoints Samuel J. Robinson to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Erica A. Barker,
Secretary.

[FR Doc. 2024–28100 Filed 11–29–24; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35399; 812–15651]

Callodine Specialty Income Fund and Callodine Capital Management, LP

November 26, 2024.

AGENCY: Securities and Exchange Commission (“Commission” or “SEC”).

ACTION: Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (the “Act”) for an exemption from sections 18(a)(2), 18(c) and 18(i) of the Act, under sections 6(c) and 23(c) of the Act for an exemption from rule 23c–3 under the Act, and for an order pursuant to section 17(d) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain registered closed-end investment companies to issue multiple classes of shares and to impose asset-based distribution and/or service fees and early withdrawal charges.

APPLICANTS: Callodine Specialty Income Fund and Callodine Capital Management, LP.

FILING DATES: The application was filed on October 25, 2024.

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 on any application by emailing the SEC’s Secretary at *Secretaries-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on December 20, 2024, and should be accompanied by proof of service on the Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer’s interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission’s Secretary.

ADDRESSES: The Commission: *Secretaries-Office@sec.gov*. Applicants: Joshua B. Deringer, Esq., Faegre Drinker Biddle & Reath LLP, *joshua.deringer@faegredrinker.com*, with a copy to Callodine Capital Management, LP., Attention: James Morrow, Two

International Place, Suite 1830, Boston, Massachusetts 02110.

FOR FURTHER INFORMATION CONTACT:

Trace W. Rakestraw, Senior Special Counsel, at (202) 551–6825 (Division of Investment Management, Chief Counsel’s Office).

SUPPLEMENTARY INFORMATION: For Applicants’ representations, legal analysis, and conditions, please refer to Applicants’ application, dated October 25, 2024, which may be obtained via the Commission’s website by searching for the file number at the top of this document, or for an Applicant using the Company name search field on the SEC’s EDGAR system. The SEC’s EDGAR system may be searched at <https://www.sec.gov/edgar/searchedgar/legacy/companysearch.html>. You may also call the SEC’s Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–28193 Filed 11–29–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101734; File No. SR–Phlx–2024–64]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 9, Section 13, Position Limits, and Options 8, Section 34, FLEX Trading, Regarding Options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF

November 25, 2024.

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 November 21, 2024, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Options 9, Section 13, Position Limits, and Options 8, Section 34, FLEX Trading.

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: (1) amend Options 9, Section 13, Position Limits, to limit the position limits for options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF (collectively “Bitcoin Trusts”); and (2) except FLEX options on the Bitcoin Trusts from trading as a FLEX option contract.

Options 9, Section 13

Recently, Cboe Exchange, Inc. (“Cboe”) received approvals to list options on the Fidelity Wise Origin Bitcoin Fund, and the ARK21Shares Bitcoin ETF.³ Also, recently, NYSE American LLC (“NYSE American”) received approvals to list options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and

³ See Securities Exchange Act Release No. 101387 (October 18, 2024), 89 FR 84948 (October 24, 2024) (SR–Cboe–2024–035) (Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds) (“Cboe Approval Order”).

the Bitwise Bitcoin ETF.⁴ Nasdaq ISE, LLC (“ISE”) filed a rule change to also list and trade options on the Bitcoin Trusts.⁵ Phlx’s Options 4 Rules were amended by the ISE rule change as those Rules are incorporated by reference to ISE’s Options 4 Rules, so Phlx has the ability to list the options on the Bitcoin Trusts. The Cboe Approval Order and the NYSE American Approval Order stated that the position and exercise limits for each of the Bitcoin Trusts shall be 25,000 contracts. At this time, the Exchange proposes to amend Phlx Option 9, Section 13 to similarly note that options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF shall have position limits of 25,000 contracts to mirror the Cboe Approval Order and the NYSE American Approval Order, respectively. Phlx Options 9, Section 15(a) provides that the exercise limits shall be determined in the manner described in Options 9, Section 13, therefore the exercise limits would also be 25,000 contracts for each of the Bitcoin Trusts.

Options 8, Section 34

Today, all options series listed on Phlx may trade as a FLEX Order on Phlx’s trading floor.⁶ At this time, the Exchange proposes to note within Options 8, Section 34(a) that it will not authorize for trading a FLEX option on each of the Bitcoin Trusts. The Exchange proposes this amendment in light of the position and exercise limits of 25,000 contracts that were set for the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF in the Cboe Approval Order and the NYSE American Approval Order, respectively. If the Exchange were to permit trading

in a FLEX option for any of the Bitcoin Trusts, it would establish different position and exercise limits than those set forth in the Cboe Approval Order and the NYSE American Approval Order, respectively.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁸ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange’s proposal to amend Options 9, Section 13, Position Limits, to provide that the position and exercise limits for each of the Bitcoin Trusts shall be 25,000 contracts is consistent with the Act as it will conform Phlx’s options position and exercise limits with ISE’s options position and exercise limits for the Bitcoin Trusts in order that there would be the same position and exercise limits on Phlx and ISE.⁹ Phlx Options 9, Section 15(a) provides that the exercise limits shall be determined in the manner described in Options 9, Section 13, therefore the exercise limits would also be 25,000 contracts and also consistent with ISE’s options position and exercise limits for the Bitcoin Trusts.

The Exchange’s proposal to amend Options 8, Section 34 to note that it will not authorize for trading a FLEX option on each of the Bitcoin Trusts is consistent with the spirit of the Cboe Approval Order and the NYSE American Approval Order, respectively, that limited the position and exercise limits for the Bitcoin Trusts to 25,000 contracts. The proposal will protect investors and the general public because without this prohibition, trading a FLEX option on the Bitcoin Trusts would otherwise establish different position and exercise limits than those set by Cboe Approval Order and the NYSE American Approval Order, respectively.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that

is not necessary or appropriate in furtherance of the purposes of the Act.

Amending Options 9, Section 13 to provide that the position and exercise limits for options on each of the Bitcoin Trusts shall be 25,000 contracts does not impose an undue burden on competition as the position and exercise limits will apply to all trading for options on the Bitcoin Trusts trading on the Exchange as well as those trading on other exchanges that file a similar proposal.¹⁰

The Exchange’s proposal to note that it will not authorize for trading a FLEX option on any of the Bitcoin Trusts does not impose an undue burden on competition as no Phlx member will be able to transact a FLEX option on any of Bitcoin Trusts

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act¹¹ and Rule 19b–4(f)(6) thereunder.¹² 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 Act¹³ and subparagraph (f)(6) of Rule 19b–4 thereunder.¹⁴

A proposed rule change filed under Rule 19b–4(f)(6)¹⁵ under the Act does not normally become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),¹⁶ the Commission may designate a shorter time if such action

⁴ See Securities Exchange Act Release No. 101386 (October 18, 2024), 89 FR 84960 (October 24, 2024) (SR–NYSEAMER–2024–49) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds) (“NYSE American Approval Order”).

⁵ See SR–ISE–2024–54.

⁶ Phlx Options 8, Section 34 rule text was previously amended by two rule changes which are effective, but not yet operative. These two prior rule changes will be implemented at the same time as the rule changes proposed herein. See Securities Exchange Act Release Nos. 97658 (June 7, 2023), 88 FR 38562 (June 13, 2023) (SR–Phlx–2023–22); and 100321 (June 12, 2024), 89 FR 51580 (June 18, 2024) (SR–Phlx–2024–24). Phlx further delayed the implementation so that it could implement SR–Phlx–2023–22 while also completing an OCC industry rule change prior.

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).

⁹ The Exchange believes that other exchanges will adopt position and exercise limits of 25,000 contracts for each of the Bitcoin Trusts. All Nasdaq affiliated markets are filing to adopt a 25,000 contract position and exercise limit for options on the Bitcoin Trusts.

¹⁰ All Nasdaq affiliated markets are filing to adopt a 25,000 contract position and exercise limit for options on the Bitcoin Trusts.

¹¹ 15 U.S.C. 78s(b)(3)(A)(iii).

¹² 17 CFR 240.19b–4(f)(6).

¹³ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁴ 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission waives this requirement.

¹⁵ 17 CFR 240.19b–4(f)(6).

¹⁶ 17 CFR 240.19b–4(f)(6)(iii).

is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission previously approved the listing of options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF.¹⁷ As noted above, Phlx's Options 4 Rules were amended by an ISE rule change¹⁸ as those Rules are incorporated by reference to ISE's Options 4 Rules, so Phlx has the ability to list the options on the Bitcoin Trusts. This proposal establishes position and exercise limits for options on the Bitcoin Trusts. The Commission believes that waiver of the operative delay could benefit investors by assuring that trading in Bitcoin Trust options are subject to the same position and exercise limits in place on other exchanges. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.¹⁹

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings

to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-Phlx-2024-64 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-2024-64. 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number

SR-Phlx-2024-64 and should be submitted on or before December 23, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-28104 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-029, OMB Control No. 3235-0037]

Submission for OMB Review; Comment Request; Extension: Rule 17f-1(c) and Form X-17F-1A

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for approval of extension of the previously approved collection of information provided for in Rule 17f-1(c) (17 CFR 240.17f-1(c) and Form X-17F-1A (17 CFR 249.100) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 17f-1(c) requires approximately 9,500 entities in the securities industry to report lost, stolen, missing, or counterfeit securities certificates to the Commission or its designee, to a registered transfer agent for the issue, and, when criminal activity is suspected, to the Federal Bureau of Investigation. Such entities are required to use Form X-17F-1A to make such reports. Filing these reports fulfills a statutory requirement that reporting institutions report and inquire about missing, lost, counterfeit, or stolen securities. Since these reports are compiled in a central database, the rule facilitates reporting institutions to access the database that stores information for the Lost and Stolen Securities Program ("Program").

²⁰ 17 CFR 200.30-3(a)(12), (59).

¹⁷ See Securities Exchange Act Release No. 101387 (October 18, 2024), 89 FR 84948 (October 24, 2024) (SR-Cboe-2024-035) (Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds). See also Securities Exchange Act Release No. 101386 (October 18, 2024), 89 FR 84960 (October 24, 2024) (SR-NYSEAMER-2024-49) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds).

¹⁸ See SR-ISE-2024-54.

¹⁹ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

We estimate that the total reporting burden for Regulation 17f-1(c), as adopted, for all respondents is approximately 2,937.5 hours. These burdens consist of a one-time burden in connection with Accenture Federal Services LLC ("Accenture") becoming the new Program operator of approximately 2,000 hours for set-up, and annual burdens thereafter of approximately 25 hours for maintenance and 287.5 hours for reporting. $[2,000 + 3(25 + 287.5) = 2,937.5 \text{ hours}]$.

- The Commission estimates that approximately 50 reporting institutions will be subject to this one-time burden, which corresponds to 40 hours for each of the applicable reporting institutions. Further, the Commission estimates that updates in the applicable reporting institutions' systems to maintain this connectivity will impose an aggregate ongoing annualized burden of 25 burden hours, which corresponds to 30 minutes for each of the applicable reporting institutions. Accordingly, this estimated burden to establish and maintain connectivity with Accenture over three years results in an aggregate burden of 691.67 hours per year or 13.83 hours per applicable reporting institution per year. $[(50 \text{ Respondents} \times 1 \text{ Responses over 3 years}) = 50 \times (40 \text{ hour}) = 2,000 \text{ hours} / 3 \text{ years} = 666.67 \text{ hours per year}; (50 \text{ Respondents} \times 1 \text{ Responses}) = 50 \times (.5 \text{ hours}) = 25 \text{ hours}; 666.67 \text{ hours} + 25 \text{ hours} = 691.67 \text{ hours}; 691.67 \text{ hours} / 50 \text{ Respondents} = 13.83 \text{ hours/Respondent}]$.

- In addition, we estimate that approximately 115 reporting institutions will submit a report on average 30 times each year. The staff estimates that the average amount of time necessary for each reporting institution to comply with the Rule 17f-1(c) and Form X-17F-1A is five minutes. As a result, the total hourly burden for the periodic reporting burden under Rule 17f-1(c) is approximately 287.5 hours $[(115 \text{ Respondents} \times 30 \text{ Responses}) \times (5 \text{ minutes} / 60 \text{ minutes/hour})]$.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The 30-day public comment period for this information collection request opens on December 3, 2024 and ends on January 2, 2025. View the full information request and submit comments at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202409-3235-021 or email comments to MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov.

Dated: November 26, 2024.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-28223 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-451, OMB Control No. 3235-0763]

Proposed Collection; Comment Request; Extension: Rule 304 of Regulation ATS

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the existing collection of information provided for in Rule 304 of Regulation ATS (17 CFR 242.304) and Form ATS-N under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) ("Exchange Act"). The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Regulation ATS provides a regulatory structure for alternative trading systems. Rule 304 of Regulation ATS provides conditions for NMS Stock ATSs seeking to rely on the exemption from the definition of "exchange" provided by Rule 3a1-1(a) of the Exchange Act, including to file a Form ATS-N, and for that Form ATS-N to become effective. Form ATS-N requires NMS Stock ATSs to provide information about their manner of operations, the broker-dealer operator, and the ATS-related activities of the broker-dealer operator and its affiliates to comply with the conditions provided under Rule 304. Form ATS-N promotes more efficient and effective market operations by providing more transparency to market participants about the operations of NMS Stock ATSs and the potential conflicts of interest of the controlling broker-dealer operator and its affiliates, and helps brokers meet their best execution obligations to their customers. Operational transparency rules, including Form ATS-N, are designed to increase competition among trading centers in regard to order routing and execution quality.

The Commission staff estimates that entities subject to the requirements of Rule 304 and Form ATS-N will spend

a total of approximately 1,901 hours a year to comply with the Rule.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by January 31, 2025. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: Austin Gerig, Director/Chief Data Officer, Securities and Exchange Commission, c/o Tanya Ruttenberg, 100 F Street NE, Washington, DC 20549, or send an email to: PRA_Mailbox@sec.gov.

Dated: November 25, 2024.

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-28122 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35400; 812-15646]

Hamilton Lane Private Assets Fund, Hamilton Lane Private Infrastructure Fund, Hamilton Lane Private Secondary Fund and Hamilton Lane Advisors, L.L.C.

November 26, 2024.

AGENCY: Securities and Exchange Commission ("Commission" or "SEC").

ACTION: Notice.

Notice of application for an order under section 6(c) of the Investment Company Act of 1940 (the "Act") granting an exemption from section 23(a)(1) of the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain registered closed-end management investment companies and business development companies (as defined under section 2(a)(48) of the Act) to pay investment advisory fees (as described

in the application) in shares of their common stock.

APPLICANTS: Hamilton Lane Private Assets Fund, Hamilton Lane Private Infrastructure Fund, Hamilton Lane Private Secondary Fund and Hamilton Lane Advisors, L.L.C.

FILING DATES: The application was filed on October 18, 2024, and amended on November 8, 2024.

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 on any application by emailing the SEC's Secretary at Secretarys-Office@sec.gov and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on December 20, 2024, and should be accompanied by proof of service on the Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary.

ADDRESSES: The Commission: Secretarys-Office@sec.gov. Applicants: Keith Kleinman, Esq., Hamilton Lane Advisors, L.L.C., kkleinman@hamiltonlane.com, with a copy to Ryan P. Brizek, Esq., Simpson Thacher & Bartlett LLP, Ryan.Brizek@stblaw.com.

FOR FURTHER INFORMATION CONTACT: Trace W. Rakestraw, Senior Special Counsel, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' application, dated November 8, 2024, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field on the SEC's EDGAR system. The SEC's EDGAR system may be searched at <https://www.sec.gov/edgar/searchedgar/legacy/companysearch.html>. You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024–28194 Filed 11–29–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–421, OMB Control No. 3235–0481]

Submission for OMB Review; Comment Request Extension: Rule 15c2–8

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (“PRA”) (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (“Commission”) has submitted to the Office of Management and Budget (“OMB”) a request for approval of extension of the existing collection of information provided for in the following rule: Rule 15c2–8 (17 CFR 240.15c2–8), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 15c2–8 requires broker-dealers to deliver preliminary and/or final prospectuses to certain people under certain circumstances. In connection with securities offerings generally, including initial public offerings (“IPOs”), the rule requires broker-dealers to take reasonable steps to distribute copies of the preliminary or final prospectus to anyone who makes a written request, as well as any broker-dealer who is expected to solicit purchases of the security and who makes a request. In connection with IPOs, the rule requires a broker-dealer to send a copy of the preliminary prospectus to any person who is expected to receive a confirmation of sale (generally, this means any person who is expected to actually purchase the security in the offering) at least 48 hours prior to the sending of such confirmation. This requirement is sometimes referred to as the “48-hour rule.”

Additionally, managing underwriters are required to take reasonable steps to ensure that all broker-dealers participating in the distribution of or trading in the security have sufficient copies of the preliminary or final prospectus, as requested by them, to enable such broker-dealer to satisfy their

respective prospectus delivery obligations pursuant to Rule 15c2–8, as well as Section 5 of the Securities Act of 1933.

Rule 15c2–8 implicitly requires that broker-dealers collect information, as such collection facilitates compliance with the rule. There is no requirement to submit collected information to the Commission. In order to comply with the rule, broker-dealers participating in a securities offering must keep accurate records of persons who have indicated interest in an IPO or requested a prospectus, so that they know to whom they must send a prospectus.

The Commission estimates that the time broker-dealers will spend complying with the collection of information required by the rule is 8,550 hours for equity IPOs and 23,970 hours for other offerings. The Commission estimates that the total annualized cost burden (copying and postage costs) is \$17,100,000 for IPOs and \$958,800 for other offerings.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The 30-day public comment period for this information collection request opens on December 3, 2024 and ends on January 2, 2025. View the full information request and submit comments at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202409-3235-013 or email comments to MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov.

Dated: November 26, 2024.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024–28222 Filed 11–29–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101737; File No. SR–NYSEAMER–2024–73]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To List and Trade Option Contracts on the iShares Bitcoin Trust, the Fidelity Wise Origin Bitcoin Fund, and the ARK21Shares Bitcoin ETF

November 25, 2024.

Pursuant to Section 19(b)(1) ¹ of the Securities Exchange Act of 1934

¹ 15 U.S.C. 78s(b)(1).

(“Act”)² and Rule 19b–4 thereunder,³ notice is hereby given that, on November 20, 2024, NYSE American LLC (“NYSE American” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade option contracts on the iShares Bitcoin Trust, the Fidelity Wise Origin Bitcoin Fund, and the ARK21Shares Bitcoin ETF. 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 904 (Position Limits), Rule 915 (Criteria for Underlying Securities), and Rule 916 (Withdrawal of Approval of Underlying Securities) to allow the Exchange to list and trade options on the following exchange-traded products: the iShares Bitcoin Trust (“iShares Bitcoin” or “IBIT”), the Fidelity Wise Origin Bitcoin Fund (“Fidelity Wise” or “FBTC”), and the ARK21Shares Bitcoin ETF (“ARK21” or “ARKB”) (collectively, the “Bitcoin Funds” or “Funds”).

The Exchange notes that this is a competitive filing as the Commission recently approved rule proposals by

Nasdaq ISE, LLC (“ISE”) and Cboe Exchange, Inc. (“Cboe”) to allow the listing and trading of options on IBIT⁴ and on FBTC and ARKB, respectively.⁵ As discussed below, the Exchange believes options on the Bitcoin Funds would permit hedging, and allow for more liquidity, better price efficiency, and less volatility with respect to the underlying Funds. Further, permitting the listing of such options would enhance the transparency and efficiency of markets in these and correlated products.

Rule 915 provides that, subject to certain other criteria set forth in the Rule, securities deemed appropriate for options trading include Exchange-Traded Fund Shares (or ETFs) as defined in Commentary .06, that represent certain types of interests⁶ and

⁴ See Securities Exchange Act Release No. 101128 (September 20, 2024), 89 FR 78942 (September 26, 2024) (SR–ISE–2024–03) (Notice of Filing of Amendment Nos. 4 and 5 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1, 4, and 5, to Permit the Listing and Trading of Options on the iShares Bitcoin Trust) (“IBIT Approval Order”).

⁵ See Securities Exchange Act Release No. 101387 (October 18, 2024), 89 FR 84948 (October 24, 2024) (SE–CBOE–2024–035) (Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds) (“FBTC and ARKB Approval Order”).

⁶ See Rule 915, Commentary .06, which permits options trading on ETFs that are traded on a national securities exchange and are defined as an “NMS stock” in Rule 600(b)(55) of Regulation NMS, that represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that hold portfolios of securities and/or financial instruments including, but not limited to, stock index futures contracts, options on futures, options on securities and indexes, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse purchase agreements (the “Financial Instruments”), and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the “Money Market Instruments”) comprising or otherwise based on or representing investments in indexes or portfolios of securities and/or Financial Instruments and Money Market Instruments (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities and/or Financial Instruments and Money Market Instruments); interests in a trust or similar entity that holds a specified non-U.S. currency deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency and pays the beneficial owner interest and other distributions on deposited non-U.S. currency, if any, declared and paid by the trust (“Currency Trust Shares”); commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency (“Commodity Pool Units”); or represents an interest in a registered

exchange-traded products (“ETPs”) structured as trusts that hold precious metals (which are deemed commodities)⁷ and that hold bitcoin (which is also deemed a commodity).⁸ The Exchange proposes to expand the list of bitcoin-backed ETPs on which it can list options to include the Bitcoin Funds.⁹

The Bitcoin Funds are structured as trusts that hold bitcoin. Like ETFs and ETPs currently deemed appropriate for options trading, the investment objective of each Bitcoin Fund trust is for its shares to reflect the performance of Bitcoin (less the expenses of the trust’s operations), offering investors an opportunity to gain exposure to Bitcoin without the complexities of Bitcoin delivery. Each Bitcoin Fund’s shares represent units of fractional undivided beneficial interest in the trust, the assets of which consist principally of Bitcoin and are designed to track Bitcoin or the performance of the price of Bitcoin and offer access to the Bitcoin market.¹⁰ The Bitcoin Funds provide investors with cost-efficient alternatives that allow a level of participation in the Bitcoin market through the securities market.

The Exchange believes each Bitcoin Fund satisfies the Exchange’s initial listing standards set forth in Commentary .01 to Rule 915.¹¹ The Exchange notes that the Bitcoin Funds also satisfy the listing standard applied to ETFs traded on the Exchange that

investment company (“Investment Company”) organized as an open-end management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies, which is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value (“NAV”), and when aggregated in the same specified minimum number, may be redeemed at a holder’s request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined NAV (“Managed Fund Share”); provided that all of the conditions listed in Rules 915 and 916 are met.

⁷ See Rule 915, Commentary .10 (permitting the listing and trading of options on shares of the following trusts: SPDR Gold Trust, the iShares COMEX Gold Trust the iShares Silver Trust, the ETFS Gold Trust, and the ETFS Silver Trust, pursuant to Rule 915 and 916).

⁸ See Rule 915, Commentary .10a (permitting the listing and trading of options on shares of the following trusts: the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust (BTC), and the Bitwise Bitcoin ETF, pursuant to Rule 915 and 916).

⁹ See proposed Rule 915, Commentary .10(a) (expanded to permit the listing and trading of options on shares of IBIT, FBTC, and ARKB, pursuant to Rule 915 and 916).

¹⁰ The trust may include minimal cash.

¹¹ Commentary .01 to Rule 915 provides for guidelines to be by the Exchange when evaluating potential underlying securities for Exchange option transactions.

² 15 U.S.C. 78a.

³ 17 CFR 240.19b–4.

they be available for creation and redemption each business day as set forth in Commentary .06(a)(ii).¹²

First, each of the Bitcoin Funds satisfy the criteria and guidelines set forth in Rule 915(a). Pursuant to Rule 915(a), a security on which options may be listed and traded on the Exchange must be duly registered with the Commission and be an NMS stock (as defined in Rule 600 of Regulation NMS under the Act) and be characterized by a substantial number of outstanding shares that are widely held and actively traded.¹³ Each of the Bitcoin Funds is an NMS Stock as defined in Rule 600 of Regulation NMS under the Act.¹⁴ The Exchange believes each Bitcoin Fund is characterized by a substantial number of outstanding shares that are widely held and actively traded.

The Bitcoin Funds had the following number of shares outstanding:

Bitcoin Fund	Shares outstanding
IBIT (as of 8/12/24)	611,040,000
FBTC (as of 8/7/24)	201,100,100
ARKB (as of 8/7/24)	45,495,000

As shown above, each of the Bitcoin Funds had significantly more than 7,000,000 shares outstanding, which is the minimum number of shares of a corporate stock that the Exchange generally requires to list options on that stock pursuant to Commentary .01(1) to Rule 915. The Exchange believes this demonstrates that each Bitcoin Fund is characterized by a substantial number of outstanding shares.

Further, the below table contains information regarding the number of beneficial holders of the Bitcoin Funds.

Bitcoin Fund	Number of beneficial holders
IBIT	193,956 (as of 5/22/23).
FBTC	279,656 (as of 6/27/24).
ARKB	69,425 (as of 6/26/24).

Each Bitcoin Fund has significantly more than 2,000 beneficial holders, which is the minimum number of holders the Exchange generally requires for corporate stock in order to list options on that stock pursuant to Commentary .01(2) to Rule 915. Therefore, the Exchange believes the shares of each Bitcoin Fund are widely held.

In addition, the Exchange believes the shares of each Bitcoin Fund are actively traded. The total trading volume (by shares and notional) for these funds since they began trading and the average daily volume ("ADV") over the 30-day period of July 9 through August 7, 2024, was as follows:

Bitcoin Fund	Trading volume (shares)	Trading volume (notional \$)	ADV (shares)
IBIT (as of 5/13/24)	34,825,921	1,246,060,738	26,000,000
FBTC (as of 8/7/24)	1,112,861,581	250,354,755	6,014,335
ARKB (as of 8/7/24)	279,360,739	90,484,307	1,893,335

As demonstrated above, even though these Bitcoin Funds have been trading for less than one year, the trading volume for each is substantially higher than 2,400,000 shares, which is the minimum 12-month volume the Exchange generally requires for a security in order to list options on that security as set forth in Commentary .01 to Rule 915. The Exchange believes this data demonstrates each Bitcoin Fund is characterized by a substantial number of outstanding shares that are actively traded.

In addition to satisfying the Exchange's initial listing standards, options on Bitcoin Funds will be subject

to the Exchange's continued listing standards as set forth in Commentary .07 to Rule 916.¹⁵ Pursuant to Commentary .07 to Rule 916, the Exchange will not open for trading any additional series of option contracts covering a fund traded on the Exchange if such fund ceases to be an "NMS stock" as provided for Commentary .01(5) to Rule 915 or the fund is halted from trading on its primary market.¹⁶ Additionally, options on funds traded on the Exchange may be subject to the suspension of opening transactions as follows: (1) the fund no longer meets the terms of Commentary .01 to Rule 916; (2) following the initial twelve-month

period beginning upon the commencement of trading of the fund, there are fewer than 50 record and/or beneficial holders of the fund for 30 or more consecutive trading days; (3) the value of the underlying commodity is no longer calculated or available; or (4) such other event occurs or condition exists that in the opinion of the Exchange makes further dealing on the Exchange inadvisable.

Options on each Bitcoin Fund will be physically settled contracts with American-style exercise.¹⁷ Consistent with Rule 903, which governs the opening of options series on a specific underlying security (including ETFs and

¹² Commentary .06(a)(ii) requires that ETFs must be available for creation or redemption each business day from or through the issuer in cash or in kind at a price related to net asset value, and the issuer must be obligated to issue ETFs in a specified aggregate number even if some or all of the investment assets required to be deposited have not been received by the issuer, subject to the condition that the person obligated to deposit the investments has undertaken to deliver the investment assets as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the issuer, as provided in the respective prospectus.

¹³ The criteria and guidelines for a security to be considered widely held and actively traded are set

forth in Commentary .01 to Rule 915, subject to exceptions.

¹⁴ An "NMS stock" means any NMS security other than an option, and an "NMS security" means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan (or an effective national market system plan for reporting transaction in listed options). See 17 CFR 242.600(b)(64) (definition of "NMS security") and (65) (definition of "NMS stock").

¹⁵ The Exchange proposes to amend Commentary .11 to Rule 916 to include the Bitcoin Funds in the list of ETPs deemed "Exchange-Traded Fund Shares"—of ETFs—for purposes of the continued listing standards set forth in Commentary .07 to Rule 916. See proposed Commentary .11 to Rule

916. For avoidance of doubt, the Exchange refers "funds" rather than "ETFs" to make clear that the Bitcoin Funds are subject to these continued listing standards.

¹⁶ See Commentary .07 to Rule 916.

¹⁷ See Rule 902 (Rights and Obligations of Holders and Writers), which provides that the rights and obligations of holders and writers of option contracts of any class of options dealt in on the Exchange shall be as set forth in the Rules of the Clearing Corporation. See also OCC Rules, Chapter VIII, which governs exercise and assignment, and Chapter IX, which governs the discharge of delivery and payment obligations arising out of the exercise of physically settled stock option contracts. OCC Rules can be located at: <https://www.theocc.com/getmedia/9d3854cd-b782-450f-bcf7-33169b0576ce/occrules.pdf>.

ETPs), the Exchange will open at least one expiration month for options on each Bitcoin Fund¹⁸ at the commencement of trading on the Exchange and may also list series of options on Bitcoin Funds for trading on a weekly,¹⁹ monthly,²⁰ or quarterly²¹ basis. The Exchange may also list long-term equity option series (“LEAPS”) that expire from twelve to thirty-nine months from the time they are listed.²²

Pursuant to Rule 903, Commentary .05(a), which governs strike prices of series of options on ETFs, the interval between strike prices of series of options on Bitcoin Funds will be \$1 or greater when the strike price is \$200 or less and \$5 or greater where the strike price is over \$200.²³ Additionally, the Exchange may list series of options pursuant to the \$1 Strike Price Interval Program,²⁴ the \$0.50 Strike Program,²⁵ the \$2.50 Strike Price Program,²⁶ and the \$5 Strike Program.²⁷ Pursuant to Rule 960NY, where the price of a series of a Bitcoin Fund option is less than \$3.00, the minimum increment will be \$0.05, and where the price is \$3.00 or higher, the minimum increment will be \$0.10.²⁸

¹⁸ See Rule 903(c), Commentary .03. The monthly expirations are subject to certain listing criteria for underlying securities described within Rule 915. Monthly listings expire the third Friday of the month. The term “expiration date” (unless separately defined elsewhere in the OCC By-Laws), when used in respect of an option contract (subject to certain exceptions), means the third Friday of the expiration month of such option contract, or if such Friday is a day on which the exchange on which such option is listed is not open for business, the preceding day on which such exchange is open for business. See OCC By-Laws Article I, Section 1. Pursuant to Rule 903(d), additional series of options of the same class may be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the market price of the underlying stock moves more than five strike prices from the initial exercise price or prices. New series of options on an individual stock may be added until the beginning of the month in which the options contract will expire. Due to unusual market conditions, the Exchange, in its discretion, may add a new series of options on an individual stock until the close of trading on the business day prior to expiration.

¹⁹ See Rule 903(h).

²⁰ See Rule 903, Commentary .11.

²¹ See Rule 903, Commentary .09.

²² See Rule 903, Commentary .03.

²³ The Exchange notes that for options listed pursuant to the Short Term Option Series Program, the Monthly Options Series Program, and the Quarterly Options Series Program, Rules 903(h) and Commentaries .09 and .03 to Rule 903, specifically set forth intervals between strike prices on Quarterly Options Series, Short Term Option Series, and Monthly Options Series, respectively.

²⁴ See Rule 903, Commentary .06.

²⁵ See Rule 903, Commentary .13.

²⁶ See Rule 903, Commentary .07(a).

²⁷ See Rule 903, Commentary .12.

²⁸ If options on a Bitcoin Fund are eligible to participate in the Penny Interval Program, the minimum increment of \$0.01 below \$3.00 and \$0.50 above \$3.00 would apply. See Rule

Any and all new series of Bitcoin Fund options that the Exchange lists will be consistent and comply with the expirations, strike prices, and minimum increments set forth in Rules 903 and 960NY, as applicable. Further, the Exchange notes that Rule 462, which governs margin requirements applicable to the trading of all options on the Exchange, including options on ETFs and ETPs, will also apply to the trading of Bitcoin Fund options.

Rule 903G(a)(1) permits the Exchange to authorize for trading a FLEX option class on any equity security if it may authorize for trading a non-FLEX option class on that equity security pursuant to Rule 915.²⁹ Consistent with the Exchange’s treatment of bitcoin-backed ETPs available for options trading on the Exchange, the Bitcoin Fund options would not be eligible to trade as FLEX options.³⁰

Position and Exercise Limits

Position and exercise limits for options, including options on Bitcoin Funds, are determined pursuant to Rules 904 and 905. Position and exercise limits for options vary according to the number of outstanding shares and the trading volumes of the underlying security over the past six months, where the largest in capitalization and the most frequently traded funds have an option position and exercise limit of 250,000 contracts (with adjustments for splits, re-capitalizations, etc.) on the same side of the market; and smaller capitalization funds have position and exercise limits of 200,000, 75,000, 50,000 or 25,000 contracts (with adjustments for splits, re-capitalizations, etc.) on the same side of the market.³¹

960NY(a)(3). See also Rule 960.1NY (which describes the requirements for the Penny Interval Program).

²⁹ See Rule 903G(a)(1). See generally Section 15 (Flexible Exchange (“FLEX”) Options).

³⁰ See Rule 903G(a)(1) (which provides, in relevant part, that the Exchange may approve and open for trading any FLEX Equity Options series on any equity security that is eligible for Non-FLEX Options trading under Rule 915 “except those set forth in Commentary .10(a) to Rule 915,” i.e., the Bitcoin Funds). The Exchange will continue ongoing discussions with the Commission regarding appropriate position limits for the Bitcoin Funds and plans to submit a separate rule filing that would permit the Exchange to authorize for trading FLEX options on the Funds (which filing may propose changes to existing FLEX option position limits for such options if appropriate).

³¹ See Commentary .07(a)–(d) to Rule 904. For an option to be eligible for the 50,000-contract limit, the security underlying the option must have most recent six-month trading volume of at least 20,000,000 shares, or most recent six-month trading volume of at least 15,000,000 shares and at least 40,000,000 shares currently outstanding. For an option to be eligible for the 75,000-contract limit, the underlying security must have most recent six-

Position limits are designed to limit the number of options contracts traded on the Exchange in an underlying security that an investor, acting alone or in concert with others directly or indirectly, may control. The purpose of position limits, which are set forth in Rule 904, is to address potential manipulative schemes and adverse market impacts surrounding the use of options, such as disrupting the market in the security underlying the options. Accordingly, position limits must balance concerns regarding mitigating potential manipulation and the cost of inhibiting potential hedging activity that investors may use for legitimate economic purposes. To achieve this balance, the Exchange proposes to set the position and exercise limits for the options on the Bitcoin Funds at 25,000 contracts, which limits are already in place for the Bitcoin Funds as traded on other options exchanges and the bitcoin-backed ETPs available for options trading on the Exchange.³² Capping the position limit at 25,000 contracts, the lowest limit available in options, would address concerns related to manipulation and protection of investors as this number is conservative for the Bitcoin Funds and therefore appropriate given their liquidity. While the Exchange believes that the proposed 25,000-contract position limit is conservative for options on the Bitcoin Funds.³³

month trading volume of at least 40,000,000 shares, or most recent six-month trading volume of at least 30,000,000 shares and at least 120,000,000 shares currently outstanding. For an option to be eligible for the 200,000-contract limit, the underlying security must have most recent six-month trading volume of at least 80,000,000 shares, or most recent six-month trading volume of at least 60,000,000 shares and at least 240,000,000 shares currently outstanding. For an option to be eligible for the 250,000-contract limit, the security underlying the option must have most recent six-month trading volume of at least 100,000,000 shares, or most recent six-month trading volume of at least 75,000,000 shares and at least 300,000,000 shares currently outstanding. The 25,000-contract limit applies to options on underlying securities that do not qualify for a higher contract limit. See Commentary .07(e) to Rule 904. In addition, Commentary .07(f) to Rule 904 establishes higher position limits for options on certain ETFs.

³² See proposed 6.8–O, Commentary .07(f) See *supra* notes 4 and 5 (regarding the IBIT Approval Order and the FBTC and ARKB Approval Order). See also NYSE American Rule 904, Commentary .07(f) (setting 25,000 position limits for the Grayscale Bitcoin Trust (BTC) (symbol: GBTC), the Grayscale Bitcoin Mini Trust (BTC) (symbol: BTC), and the Bitwise Bitcoin ETF (symbol: BITB)).

³³ The Exchange may file a subsequent rule change to amend the position and exercise limit for options on any or all the Bitcoin Funds based on additional data regarding trading activity, to continue to balance any concerns regarding manipulation. A higher position limit would allow institutional investors to utilize options on the Bitcoin Funds for prudent risk management purposes.

Based on the foregoing, the Exchange believes the proposal to list options on the Bitcoin Funds with positions and exercise limits of 25,000 on the same side, the lowest position limit available in the options industry, is conservative and appropriate given the market capitalization, average daily volume, and high number of outstanding shares for each of the Bitcoin Funds. The proposed position and exercise limits reasonably and appropriately balance the liquidity provisioning in the market against the prevention of manipulation. The Exchange believes these proposed limits are effectively designed to prevent an individual customer or entity from establishing options positions that could be used to manipulate the market of the underlying Bitcoin Funds as well as the Bitcoin market.³⁴

As described herein, options on the Bitcoin Funds will trade in the same manner as any other ETF or ETP options on the Exchange, except that the Bitcoin Funds will not be eligible for FLEX options trading. The Exchange Rules that currently apply to the listing and trading of options on the Exchange, including, for example, Rules that govern listing criteria, expiration and exercise prices, minimum increments, margin requirements, customer accounts, and trading halt procedures will apply to the listing and trading of Bitcoin Funds on the Exchange in the same manner as they apply to all other ETFs and ETPs that are listed and traded on the Exchange, including the precious metal-backed commodity ETPs already deemed appropriate for options trading on the Exchange pursuant to Commentary .10 to Rule 915. Further, as described above, Exchange Rules regarding position and exercise limits will likewise apply to options on the Bitcoin Funds except that, as proposed, the position and exercise limits will be set at 25,000 on the same side.

* * * * *

The Exchange notes that options on Bitcoin Funds would not be available for trading until The Options Clearing Corporation (“OCC”) represents to the Exchange that it is fully able to clear and settle such options. The Exchange has also analyzed its capacity and represents that it and The Options Price Reporting Authority (“OPRA”) have the necessary systems capacity to handle the additional traffic associated with the listing of options on Bitcoin Funds. The Exchange believes any additional traffic that would be generated from the trading of options on Bitcoin Funds

would be manageable. The Exchange represents that Exchange members will not have a capacity issue as a result of this proposed rule change.

The Exchange represents that the same surveillance procedures applicable to all other options currently listed and traded on the Exchange will apply to options on Bitcoin Funds, and that it has the necessary systems capacity to support the new option series. The Exchange’s existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing and trading options on ETFs and ETPs, such as (existing) precious metal- and bitcoin-backed ETP options, as well as the proposed options on Bitcoin Funds. The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of options on Bitcoin Funds in all trading sessions and to deter and detect violations of Exchange rules.

Specifically, the Exchange’s market surveillance staff also conducts surveillances with respect to the Bitcoin Funds and, as appropriate, would review activity in the underlying Funds when conducting surveillances for market abuse or manipulation in the options on each Trust. Additionally, the Exchange is a member of the Intermarket Surveillance Group (“ISG”) under the ISG Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. The Exchange will be able to obtain information regarding trading in the shares of the underlying Trusts from Nasdaq, LLC, Cboe Exchange, Inc., and other markets on which the Trusts trade through the ISG. In addition, the Exchange has a Regulatory Services Agreement (“RSA”) with the Financial Industry Regulatory Authority (“FINRA”). Pursuant to a multi-party 17d-2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market surveillances.³⁵ Further,

³⁵ Section 19(g)(1) of the Act, among other things, requires every SRO registered as a national securities exchange or national securities association to comply with the Act, the rules and regulations thereunder, and the SRO’s own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members. See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO. Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO;

the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on the Bitcoin Funds.

The underlying shares of spot bitcoin ETPs, including the Bitcoin Funds, are also subject to safeguards related to addressing market abuse and manipulation. As the Commission stated in its order approving proposals of several exchanges to list and trade shares of spot bitcoin-based exchange-traded products (“Bitcoin ETP Order”³⁶):

Each Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market.³⁷

Given the consistently high correlation between the CME bitcoin futures market and the spot bitcoin market, as confirmed by the Commission through robust correlation analysis, and given that the “CME’s surveillance can assist in detecting [the impact of fraud or manipulation] on CME bitcoin future prices,” the Commission was able to conclude that such surveillance sharing agreements could reasonably be “expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [Bitcoin ETPs].”³⁸

In light of surveillance measures related to both options and futures as well as the underlying Bitcoin Funds,³⁹

or (iii) carry out other specified regulatory responsibilities with respect to such members.

³⁶ See Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (File Nos. SR-NYSEArca-2021-90; SR-NYSEArca-2023-44; SR-NYSEArca-2023-58; SR-NASDAQ-2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SR-CboeBZX-2023-044; and SR-CboeBZX-2023-072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (“Bitcoin ETP Order”).

³⁷ See Bitcoin ETP Order, 89 FR at 3009.

³⁸ See Bitcoin ETP Order, 89 FR at 3010–11.

³⁹ See Amendment No. 1 to Proposed Rule Change to List and Trade Shares of the iShares Bitcoin Trust under Nasdaq Rule 5711(d), Commodity-Based Trust Shares (SR-NASDAQ-2023-016), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-nasdaq-2023-016/srnasdaq2023016-357659-883042.pdf>; Amendment No. 5 to Proposed Rule Change to List and Trade Shares of the ARK 21Shares Bitcoin ETP under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares (SR-CboeBZX-2023-028), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-cboebzx-2023-028/srcboebzx2023028-358679-884202.pdf>; and Amendment No. 3 to Proposed Rule Change to List and Trade Shares of the Fidelity

Continued

³⁴ See Securities Exchange Act Release No. 39489 (December 24, 1997), 63 FR 276 (January 5, 1998) (SR-CBOE-1997-11).

the Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Bitcoin Funds.

Finally, quotation and last sale information for ETFs is available via the Consolidated Tape Association (“CTA”) high speed line. Quotation and last sale information for such securities is also available from the exchange on which such securities are listed. Quotation and last sale information for options on Bitcoin Funds will be available via OPRA and major market data vendors.

The Exchange believes that offering options on the Bitcoin Funds will benefit investors by providing them with an additional, relatively lower cost investing tool to gain exposure to the price of Bitcoin and hedging vehicle to meet their investment needs in connection with Bitcoin-related products and positions. The Exchange expects investors will transact in options on Bitcoin Funds in the unregulated over-the-counter (“OTC”) options market,⁴⁰ but may prefer to trade such options in a listed environment to receive the benefits of trading listed options, including (1) enhanced efficiency in initiating and closing out position; (2) increased market transparency; and (3) heightened contra-party creditworthiness due to the role of OCC as issuer and guarantor of all listed options. The Exchange believes that listing options on the Bitcoin Funds may cause investors to bring this liquidity to the Exchange, would increase market transparency and enhance the process of price discovery conducted on the Exchange through increased order flow. The Exchange notes that the ETPs that hold precious metal commodities on which the Exchange may already list and trade options are trusts structured in substantially the same manner as Bitcoin Funds and essentially offer the same objectives and benefits to investors, just with respect to different assets. The Exchange notes that it has not identified any issues with the continued listing and trading of options on any ETFs or ETPs that hold commodities (*i.e.*, precious metals) that

it currently lists and trades on the Exchange.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Act⁴¹ in general and furthers the objectives of Section 6(b)(5) of the Act⁴² in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes that the proposal to list and trade options on the Bitcoin Funds will remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors because offering options on the Bitcoin Funds will provide investors with an opportunity to realize the benefits of utilizing options on a Bitcoin Fund, including cost efficiencies and increased hedging strategies.

The Exchange believes that offering Bitcoin Fund options will benefit investors by providing them with a relatively lower-cost risk management tool, which will allow them to manage their positions and associated risk in their portfolios more easily in connection with exposure to the price of Bitcoin and with Bitcoin-related products and positions. Additionally, the Exchange’s offering of Bitcoin Fund options will provide investors with the ability to transact in such options in a listed market environment as opposed to in the unregulated OTC market, which would increase market transparency and enhance the process of price discovery conducted on the Exchange through increased order flow to the benefit of all investors. The Exchange also notes that it already lists options on other commodity-based ETPs,⁴³ including on bitcoin-backed ETPs already trading on the Exchange, which, as described above, are trusts structured in substantially the same manner as the Bitcoin Funds and essentially offer the same objectives and benefits to investors.⁴⁴

The Exchange also believes the proposed rule change will remove impediments to and perfect the

mechanism of a free and open market and a national market system, because it is consistent with current Exchange Rules previously filed with the Commission. Options on the Bitcoin Funds satisfy the initial listing standards and continued listing standards currently in the Exchange Rules applicable to options on all ETFs and ETPs, including ETPs that hold other commodities already deemed appropriate for options trading on the Exchange. Additionally, as demonstrated above, each Bitcoin Fund is characterized by a substantial number of shares that are widely held and actively traded. Bitcoin Fund options will trade in the same manner as any other ETF or ETP options—the same Exchange Rules that currently govern the listing and trading of options, including permissible expirations, strike prices, minimum increments, and margin requirements, will govern the listing and trading of options on Bitcoin Funds in the same manner.

The Exchange believes the proposed exclusion of the Bitcoin Funds from being eligible for trading as FLEX options is consistent with the Act, because it will permit the Exchange to continue to participate in ongoing discussions with the Commission regarding appropriate position limits for options on the Bitcoin Funds.⁴⁵

The proposed position and exercise limit for options on the Bitcoin Funds is 25,000 contracts. These position and exercise limits are the lowest position and exercise limits available in the options industry, are extremely conservative and more than appropriate given the Bitcoin Funds’ market capitalization, average daily volume, number of beneficial holders, and high number of outstanding shares. The proposed position and exercise limits are consistent with the Act as they addresses concerns related to manipulation and protection of investors because the position and exercise limits are extremely conservative and more than appropriate given the Bitcoin Funds are actively traded.

The Exchange represents that it has the necessary systems capacity to support the new Bitcoin Fund options. The Exchange believes that its existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing and trading options, including Bitcoin Fund options. The

Wise Origin Bitcoin Fund under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares (SR-ChoeBZX-2023-044), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-choebzx-2023-044/srchoebzx2023044-358759-884163.pdf>.

⁴⁰ The Exchange understands from customers that investors have historically transacted in options on ETFs in the OTC options market if such options were not available for trading in a listed environment.

⁴¹ 15 U.S.C. 78f(b).

⁴² 15 U.S.C. 78f(b)(5).

⁴³ See Rule 915, Commentary .10. The Exchange has not identified any issues with the continued listing and trading of precious metal commodity-backed ETP options that it currently lists for trading.

⁴⁴ See Rule 915, Commentary .10(a).

⁴⁵ The Exchange will submit a separate rule filing that would permit the Exchange to authorize for trading FLEX options on the Bitcoin Funds (which filing may propose changes to existing FLEX option position limits for such options if appropriate).

Exchange's existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing and trading options on ETFs and ETPs, such as (existing) precious metal-commodity backed ETP options as well as the proposed options on Bitcoin Funds. The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of options on Bitcoin Funds in all trading sessions and to deter and detect violations of Exchange rules.

Specifically, the Exchange's market surveillance staff also conducts surveillances with respect to the Bitcoin Funds and, as appropriate, would review activity in the underlying Funds when conducting surveillances for market abuse or manipulation in the options on each Trust. Additionally, the Exchange is a member of the Intermarket Surveillance Group ("ISG") under the ISG Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. The Exchange will be able to obtain information regarding trading in the shares of the underlying Trusts from Nasdaq, LLC, Cboe Exchange, Inc., and other markets on which the Trusts trade through the ISG. In addition, the Exchange is a party to an RSA with FINRA and pursuant to a multi-party 17d-2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market surveillances. Further, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on the Bitcoin Funds.

The underlying shares of spot bitcoin ETPs, including the Bitcoin Funds, are also subject to safeguards related to addressing market abuse and manipulation. As the Commission stated in its order approving proposals of several exchanges to list and trade shares of spot bitcoin-based ETPs, "[e]ach Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market."⁴⁶ Given the consistently high correlation between the CME bitcoin futures market and the spot bitcoin market, as confirmed by the Commission through robust correlation analysis, and given that the "CME's surveillance can assist in detecting [the

impact of fraud or manipulation] on CME bitcoin future prices," the Commission was able to conclude that such surveillance sharing agreements could reasonably be "expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [Bitcoin ETPs]." ⁴⁷ In light of surveillance measures related to both options and futures as well as the underlying Bitcoin Funds,⁴⁸ the Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Bitcoin Funds. Further, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on Bitcoin ETPs.

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.

Intramarket Competition: The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act as options on the Bitcoin Funds would need to satisfy the initial listing standards set forth in the Exchange Rules in the same manner as any other options on an ETF before the Exchange could list these options. Additionally, Bitcoin Fund options will be equally available to all market participants who wish to trade such options. The Exchange Rules currently applicable to the listing and trading of options on ETFs on the Exchange will apply in the same manner to the listing and trading of all options on the Bitcoin Funds. Also, and as stated above, the Exchange

already lists options on other commodity-based ETPs, including on bitcoin-backed ETPs.⁴⁹

Intermarket Competition: The Exchange does not believe that the proposal to list and trade options on Bitcoin Funds will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the extent that the advent of Bitcoin Fund options trading on the Exchange may make the Exchange a more attractive marketplace to market participants at other exchanges, such market participants are free to elect to become market participants on the Exchange. As noted herein, this is a competitive filing as the Commission recently approved the listing and trading of options on an ETP that, like the Bitcoin Funds, holds bitcoin.⁵⁰ Additionally, other options exchanges are free to amend their listing rules, as applicable, to permit them to list and trade options on Bitcoin Funds. The Exchange notes that listing and trading Bitcoin Fund options on the Exchange will subject such options to transparent exchange-based rules as well as price discovery and liquidity, as opposed to alternatively trading such options in the OTC market.

The Exchange believes that the proposed rule change may relieve any burden on, or otherwise promote, competition as it is designed to increase competition for order flow on the Exchange in a manner that is beneficial to investors by providing them with a lower-cost option to hedge their investment portfolios. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues that offer similar products. Ultimately, the Exchange believes that offering Bitcoin Fund options for trading on the Exchange will promote competition by providing investors with an additional, relatively low-cost means to hedge their portfolios and meet their investment needs in connection with Bitcoin prices and Bitcoin-related products and positions on a listed options 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.

⁴⁹ See Rule 915, Commentary .10 and Commentary .10(a).

⁵⁰ See *id.* See also *supra* notes 4 and 5 (regarding the IBIT Approval Order and the FBTC and ARKB Approval Order).

⁴⁶ See Bitcoin ETP Order, 89 FR at 3009.

⁴⁷ See Bitcoin ETP Order, 89 FR at 3010–11.

⁴⁸ See Amendment No. 1 to Proposed Rule Change to List and Trade Shares of the iShares Bitcoin Trust under Nasdaq Rule 5711(d), Commodity-Based Trust Shares (SR–NASDAQ–2023–016), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-nasdaq-2023-016/srnasdaq2023016-357659-883042.pdf>; Amendment No. 5 to Proposed Rule Change to List and Trade Shares of the ARK 21Shares Bitcoin ETF under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares (SR–CboeBZX–2023–028), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-cboebzx-2023-028/sr-cboebzx2023028-358679-884202.pdf>; and Amendment No. 3 to Proposed Rule Change to List and Trade Shares of the Fidelity Wise Origin Bitcoin Fund under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares (SR–CboeBZX–2023–044), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-cboebzx-2023-044/sr-cboebzx2023044-358759-884163.pdf>.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act⁵¹ and Rule 19b-4(f)(6) thereunder.⁵² 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 Act⁵³ and subparagraph (f)(6) of Rule 19b-4 thereunder.⁵⁴

A proposed rule change filed under Rule 19b-4(f)(6)⁵⁵ under the Act does not normally become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),⁵⁶ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission previously approved the listing of options on the iShares Bitcoin Trust, the Fidelity Wise Origin Bitcoin Fund, and the ARK21Shares Bitcoin ETF.⁵⁷ The Exchange has provided information regarding the underlying Bitcoin Funds, including, among other things, information regarding trading volume, the number of beneficial holders, and the market capitalization of

the Bitcoin Funds. The proposal also establishes position and exercise limits for options on the Bitcoin Funds and provides information regarding the surveillance procedures that will apply to Bitcoin Fund options. The Commission believes that waiver of the operative delay could benefit investors by providing an additional venue for trading Bitcoin Fund options. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.⁵⁸

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-NYSEAMER-2024-73 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-NYSEAMER-2024-73. 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 (<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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSEAMER-2024-73 and should be submitted on or before December 23, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁹

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-28107 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101735; File No. SR-BOX-2024-27]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rules 3120 (Position Limits) and 5020 (Criteria for Underlying Securities) To Permit Trading of iShares Bitcoin ETF Options

November 25, 2024.

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 November 21, 2024, BOX Exchange LLC ("Exchange" or "BOX Options") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have

⁵⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

⁵¹ 15 U.S.C. 78s(b)(3)(A)(iii).

⁵² 17 CFR 240.19b-4(f)(6).

⁵³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁵⁴ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission waives this requirement.

⁵⁵ 17 CFR 240.19b-4(f)(6).

⁵⁶ 17 CFR 240.19b-4(f)(6)(iii).

⁵⁷ See Securities Exchange Act Release No. 101128 (September 20, 2024), 89 FR 78942 (September 26, 2024) (SR-ISE-2024-03) (Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing of Amendment Nos. 4 and 5 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1, 4, and 5, to Permit the Listing and Trading of Options on the iShares Bitcoin Trust). See also Securities Exchange Act Release No. 101387 (October 18, 2024), 89 FR 84948 (October 24, 2024) (SR-Choe-2024-035) (Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds).

⁵⁸ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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 Rules 3120 (Position Limits), 5020 (Criteria for Underlying Securities) to permit trading of iShares Bitcoin ETF options. Additionally, the Exchange proposes to amend Rule 5055 (FLEX Equity Options). The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at <https://rules.boxexchange.com/rulefilings>.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rules 3120 (Position Limits) and 5020 (Criteria for Underlying Securities) to permit trading of iShares Bitcoin ETF options on BOX. Additionally, the Exchange proposes to amend Rule 5055 (FLEX Equity Options). This is a competitive filing that is based on a proposal recently submitted by Nasdaq ISE, LLC ("Nasdaq ISE") and approved by the Commission.³

The Exchange proposes to amend Rule 5020, Criteria for Underlying Securities, to allow the Exchange to list and trade options on iShares Bitcoin

Trust (the "Trust")⁴ as an ETF deemed appropriate for options trading on BOX. Specifically, the Exchange proposes to amend Rule 5020(h) to allow BOX to list and trade options on the Trust. Currently, Rule 5020(h) provides that securities deemed appropriate for options trading shall include shares or other securities ("Exchange-Traded Fund Shares") that are traded on a national securities exchange and are defined as an "NMS stock" under Rule 600 of Regulation NMS and that (i) represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that hold portfolios of securities and/or financial instruments, including, but not limited to, stock index futures contracts, options on futures, options on securities and indices, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse repurchase agreements (the "Financial Instruments") and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the "Money Market Instruments") comprising or otherwise based on or representing investments in broad-based indexes or portfolios of securities and/or Financial Instruments and Money Market Instruments (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities and/or Financial Instruments and Money Market Instruments); or (ii) represent interests in a trust that holds a specified non-U.S. currency deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency or currencies and pays the beneficial owner interest and other distributions on the deposited non-U.S. currency or currencies, if any, declared and paid by the trust ("Currency Trust Shares"); or (iii) represent commodity pool interests

⁴ On January 10, 2024, the Commission approved proposals by NYSE Arca, Inc., The Nasdaq Stock Market LLC, and Cboe BZX Exchange, Inc. to list and trade the shares of 11 bitcoin-based commodity-based trust shares and trust units, including the iShares Bitcoin Trust. See Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (Jan. 17, 2024) (order approving File Nos. SR-NYSEARCA-2021-90; SR-NYSEARCA-2023-44; SR-NYSEARCA-2023-58; SR-NASDAQ-2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SR-CboeBZX-2023-044; SR-CboeBZX-2023-072) ("Bitcoin ETP Order"). The Exchange represents it would not list options on the Trust unless it satisfied all applicable criteria in Rule 5020.

principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency ("Commodity Pool ETFs"); or (iv) represent interests in the SPDR® Gold Trust, the iShares COMEX Gold Trust, the iShares Silver Trust, the ETFS Gold Trust, the ETFS Silver trust, the ETFS Palladium Trust, the ETFS Platinum Trust or the Sprott Physical Gold Trust. In addition to the aforementioned requirements, Rules 5020(h)(1) and (2) must be met to list options on ETFs.⁵

Proposal

The Exchange proposes to expand the list of ETFs that are appropriate for options trading on the Exchange in Rule 5020(h) to include the Trust.⁶

Description of the Trust⁷

The Shares are issued by the Trust, a Delaware statutory trust. The Trust operates pursuant to a trust agreement (the "Trust Agreement") between the Sponsor, BlackRock Fund Advisors (the "Trustee") as the trustee of the Trust and Wilmington Trust, National Association, as Delaware trustee (the "Delaware Trustee"). The Trust issues Shares representing fractional undivided beneficial interests in its net assets. The assets of the Trust consist only of Bitcoin, held by a custodian on behalf of the Trust except under limited circumstances when transferred through the Trust's prime broker temporarily (described below), and cash. Coinbase Custody Trust Company, LLC (the "Bitcoin Custodian") is the custodian for the Trust's Bitcoin holdings, and

⁵ Rule 5020(h)(1) states that the Exchange-Traded Fund Shares either (i) meet the criteria and guidelines set forth in paragraphs (a) and (b) of this Rule 5020 above; or (ii) the Exchange-Traded Fund Shares are available for creation or redemption each business day from or through the issuing trust, investment company, commodity pool or other entity in cash or in kind at a price related to net asset value, and the issuer is obligated to issue Exchange-Traded Fund Shares in a specified aggregate number even if some or all of the investment assets and/or cash required to be deposited have not been received by the issuer, subject to the condition that the person obligated to deposit the investment assets has undertaken to deliver them as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the issuer of the Exchange-Traded Fund Shares, all as described in the Exchange-Traded Fund Shares' prospectus; and meet other criteria.

⁶ Specifically, the Exchange proposes to amend Rule 5020(h) to include the name of the Trust to enable options to be listed on the Trust on BOX.

⁷ See SR-NASDAQ-2023-016 for a complete description of the Trust.

³ See Securities Exchange Act Release No. 101128 (September 20, 2024) (Notice of Filing of Amendment Nos. 4 and 5 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1, 4, and 5, to Permit the Listing and Trading of Options on the iShares Bitcoin Trust), 89 FR 78942 (September 26, 2024) ("ISE Approval Order").

maintains a custody account for the Trust (“Custody Account”); Coinbase, Inc. (the “Prime Execution Agent”), an affiliate of the Bitcoin Custodian, is the prime broker for the Trust and maintains a trading account for the Trust (“Trading Account”); and Bank of New York Mellon is the custodian for the Trust’s cash holdings (the “Cash Custodian” and together with the Bitcoin Custodian, the “Custodians”) and the administrator of the Trust (the “Trust Administrator”). Under the Trust Agreement, the Trustee may delegate all or a portion of its duties to any agent, and has delegated the bulk of the day-to-day responsibilities to the Trust Administrator and certain other administrative and record-keeping functions to its affiliates and other agents. The Trust is not an investment company registered under the Investment Company Act of 1940, as amended, (the “1940 Act”).

The investment objective of the Trust is to reflect generally the performance of the price of Bitcoin. The Trust seeks to reflect such performance before payment of the Trust’s expenses and liabilities. The Shares are intended to constitute a simple means of making an investment similar to an investment in Bitcoin through the public securities market rather than by acquiring, holding and trading Bitcoin directly on a peer-to-peer or other basis or via a digital asset exchange. The Shares have been designed to remove the obstacles represented by the complexities and operational burdens involved in a direct investment in Bitcoin, while at the same time having an intrinsic value that reflects, at any given time, the investment exposure to the Bitcoin owned by the Trust at such time, less the Trust’s expenses and liabilities. Although the Shares are not the exact equivalent of a direct investment in Bitcoin, they provide investors with an alternative method of achieving investment exposure to Bitcoin through the public securities market, which may be more familiar to them.

Custody of the Trust’s Bitcoin

An investment in the Shares is backed by Bitcoin held by the Bitcoin Custodian on behalf of the Trust. All of the Trust’s Bitcoin will be held in the Custody Account, other than the Trust’s Bitcoin which is temporarily maintained in the Trading Account under limited circumstances, *i.e.*, in connection with creation and redemption Basket⁸ activity or sales of

Bitcoin deducted from the Trust’s holdings in payment of Trust expenses or the Sponsor’s fee (or, in extraordinary circumstances, upon liquidation of the Trust). The Custody Account includes all of the Trust’s Bitcoin held at the Bitcoin Custodian, but does not include the Trust’s Bitcoin temporarily maintained at the Prime Execution Agent in the Trading Account from time to time. The Bitcoin Custodian will keep all of the private keys associated with the Trust’s Bitcoin held in the Custody Account in “cold storage.”⁹ The hardware, software, systems, and procedures of the Bitcoin Custodian may not be available or cost-effective for many investors to access directly. As provided in the ISE Approval Order, the Exchange believes that offering options on the Trust will benefit investors by providing them with an additional, relatively lower cost investing tool to gain exposure to spot Bitcoin as well as a hedging vehicle to meet their investment needs in connection with Bitcoin products and positions. Similar to other commodity ETFs in which options may be listed on BOX (*e.g.*, SPDR[®] Gold Trust, the iShares COMEX Gold Trust, the iShares Silver Trust, the ETFs Gold Trust, the ETFs Silver Trust, the ETFs Palladium Trust, the ETFs Platinum Trust or the Sprott Physical Gold Trust),¹⁰ the proposed ETF is a trust that essentially offers the same objectives and benefits to investors. Options on the Trust will trade in the same manner as options on other ETFs on BOX. Exchange Rules that currently apply to the listing and trading of all options on ETFs on BOX, including, for example, rules that govern listing criteria, expirations, exercise prices, minimum increments, position and exercise limits (including as proposed herein), margin requirements, customer accounts, and trading halt procedures will apply to the listing and trading of options on the Trust on BOX. Today, these rules apply to options on the various commodities ETFs deemed appropriate for options trading on BOX pursuant to Rule 5020(h)(iv). The Exchange’s initial listing standards for ETFs on which options may be listed and traded on BOX will apply to the Trust. The initial listing standard as set

block of 40,000 Shares is called a “Basket.” These transactions take place in exchange for Bitcoin.

⁹ The term “cold storage” refers to a safeguarding method by which the private keys corresponding to the Trust’s Bitcoin are generated and stored in an offline manner, subject to layers of procedures designed to enhance security. Private keys are generated by the Bitcoin Custodian in offline computers that are not connected to the internet so that they are more resistant to being hacked.

¹⁰ See Rule 5020(h)(iv).

forth in Rule 5020(a) provides that: Underlying securities with respect to which put or call options contracts are approved for listing and trading on the Exchange must meet the following criteria: (1) the security must be registered and be an “NMS stock” as defined in Rule 600 of Regulation NMS under the Exchange Act; and (2) the security shall be characterized by a substantial number of outstanding shares that are widely held and actively traded. Pursuant to Rule 5020, ETFs on which options may be listed and traded must satisfy the listing standards set forth in Rule 5020(h). Specifically, the Trust must meet either: (1) the criteria and guidelines for underlying securities set forth in Rules 5020(a) and (b), or (2) it must be available for creation or redemption each business day from or through the issuing trust, investment company, commodity pool or other entity in cash or in kind at a price related to net asset value, and the issuer is obligated to issue Exchange-Traded Fund Shares in a specified aggregate number even if some or all of the investment assets and/or cash required to be deposited have not been received by the issuer, subject to the condition that the person obligated to deposit the investment assets has undertaken to deliver them as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the issuer of the Exchange-Traded Fund Shares, all as described in the Exchange-Traded Fund Shares’ prospectus, and meet other criteria. Options on the Trust will also be subject to the Exchange’s continued listing standards for options on ETFs set forth in Rule 5030(h). Specifically, options approved for trading pursuant to Rule 5020(h) will not be deemed to meet the requirements for continued approval, and the Exchange shall not open for trading any additional series of option contracts of the class covering such ETFs if the ETFs are delisted from trading as provided in Rule 5030(b)(6)¹¹ or the ETFs are halted or suspended from trading on their primary market.¹² In addition, the Exchange shall consider the suspension of opening transactions in any series of options of the class covering ETFs in any of the following circumstances: (1) in the case of options covering Exchange-Traded Fund Shares approved pursuant to Rule 5020(h)(1)(i), in accordance with the terms of

¹¹ Rule 5030(b)(6) provides, “The underlying security ceases to be an “NMS stock” as defined in Rule 600 of Regulation NMS under the Exchange Act.”

¹² See Rule 5030(h).

⁸ The Trust issues and redeems Shares only in blocks of 40,000 or integral multiples thereof. A

subparagraphs (b)(1), (2), (3) and (6) of Rule 5030;¹³ (2) in the case of options covering Fund Shares approved pursuant to Rule 5020(h)(1)(ii), following the initial twelve-month period beginning upon the commencement of trading in the Exchange-Traded Fund Shares on a national securities exchange and are defined as an “NMS stock” under Rule 600 of Regulation NMS, there were fewer than 50 record and/or beneficial holders of such Exchange-Traded Fund Shares for 30 or more consecutive trading days; (3) the value of the index or portfolio of securities or non-U.S. currency, portfolio of commodities including commodity futures contracts, options on commodity futures contracts, swaps, forward contracts, options on physical commodities and/or Financial Instruments and Money Market Instruments, on which the Exchange-Traded Fund Shares are based is no longer calculated or available; or (4) such other event occurs or condition exists that in the opinion of the Exchange makes further dealing in such options on BOX inadvisable. Options on the Trust would be physically settled contracts with American-style exercise.¹⁴ Consistent with current Rule 5050, which governs the opening of options series on a specific underlying security (including ETFs), the Exchange will open at least one expiration month for options on the Trust and may also list series of options on the Trust for trading on a weekly,¹⁵ monthly,¹⁶ or quarterly¹⁷ basis. The Exchange may also list long-term equity option series (“LEAPS”)¹⁸ that expire from twelve to one hundred eighty months from the time they are listed.

¹³ Rules 5030(b)(1)–(3) and (6) provide, if: (1) there are fewer than 6,300,000 shares of the underlying security held by persons other than those who are required to report their security holdings under Section 16(a) of the Act, (2) there are fewer than 1,600 holders of the underlying security, (3) the trading volume (in all markets in which the underlying security is traded) has been less than 1,800,000 shares in the preceding twelve (12) months, or (6) the underlying security ceases to be an “NMS stock” as defined in Rule 600 of Regulation NMS under the Exchange Act.

¹⁴ See Rule 5010, Rights and Obligations of Holders and Writers, which provides that the rights and obligations of holders and writers shall be as set forth in the Rules of the Clearing Corporation. See also OCC Rules, Chapter VIII, which governs exercise and assignment, and Chapter IX, which governs the discharge of delivery and payment obligations arising out of the exercise of physically settled stock option contracts. OCC Rules can be located at: https://www.theocc.com/getmedia/9d3854cd-b782-450f-bcf7-33169b0576ce/occ_rules.pdf.

¹⁵ See IM–5050–6.

¹⁶ See IM–5050–13.

¹⁷ See IM–5050–4.

¹⁸ See Rule 5070.

Pursuant to Rule 5050(d)(4), which governs strike prices of series of options on ETFs, the interval between strike prices of series of options on ETFs approved for options trading pursuant to Rule 5020(h) shall be fixed at a price per share which is reasonably close to the price per share at which the underlying security is traded in the primary market at or about the same time such series of options is first open for trading on the Exchange, or at such intervals as may have been established on another options exchange prior to the initiation of trading on BOX. With respect to the Short Term Options Series or Weekly Program, during the month prior to expiration of an option class that is selected for the Short Term Option Series Program, the strike price intervals for the related non-Short Term Option (“Related non-Short Term Option”) shall be the same as the strike price intervals for the Short Term Option.¹⁹ Specifically, the Exchange may open for trading Short Term Option Series at strike price intervals of (i) \$0.50 or greater where the strike price is less than \$100, and \$1 or greater where the strike price is between \$100 and \$150 for all option classes that participate in the Short Term Options Series Program; (ii) \$0.50 for option classes that trade in one dollar increments and are in the Short Term Option Series Program; or (iii) \$2.50 or greater where the strike price is above \$150.²⁰ Additionally, the Exchange may list series of options pursuant to the \$1 Strike Price Interval Program,²¹ the \$0.50 Strike Program,²² and the \$2.50 Strike Price Program.²³ Rule 7050 governs the minimum increment for bids and offers for options traded on BOX. Pursuant to Rule 7050, where the price of a series of options for the Trust is less than \$3.00 the minimum increment will be \$0.05, and where the price is \$3.00 or higher, the minimum increment will be \$0.10²⁴ consistent with the minimum increments for options on other ETFs listed on BOX. Any and all new series of Trust options that BOX lists will be consistent and comply with the expirations, strike prices, and minimum increments set forth in Rules 5050 and 7050, as applicable. Position and exercise limits for options on ETFs, including options on the Trust, are determined pursuant to

¹⁹ See Rule 5050(d)(6).

²⁰ See IM–5050–6.

²¹ See IM–5050–2.

²² See IM–5050–5.

²³ See IM–5050–3.

²⁴ Options that are eligible to participate in the Penny Interval Program have a minimum increment of \$0.01 below \$3.00 and \$0.05 above \$3.00. See Rule 7260.

Rules 3120 and 3140, respectively. Position and exercise limits for ETFs options vary according to the number of outstanding shares and the trading volumes of the underlying ETF over the past six months, where the largest in capitalization and the most frequently traded ETFs have an option position and exercise limit of 250,000 contracts (with adjustments for splits, re-capitalizations, etc.) on the same side of the market; and smaller capitalization ETFs have position and exercise limits of 200,000, 75,000, 50,000 or 25,000 contracts (with adjustments for splits, re-capitalizations, etc.) on the same side of the market. Notwithstanding the position limits in Rule 3120 and exercise limits in Rule 3140, the Exchange proposes the position and exercise limits for the options on the Trust to be 25,000 contracts on the same side pursuant to proposed IM–3120–2. Capping the position and exercise limits at 25,000 contracts, the lowest limits available in options, would address concerns related to manipulation and protection of investors as this number is extremely conservative for the Trust and is more than appropriate given its liquidity.

For purposes of addressing position and exercise limits, the Exchange applies position and exercise limits for options for each underlying security and does not aggregate position and exercise limits. In considering the appropriate position and exercise limits for the Trust, the Exchange reviewed the data presented by ISE in its filing, specifically in Exhibit 3 of the filing,²⁵ where ISE measured the Trust’s market capitalization and ADV against other industry data as explained further below. The Commission should consider the position and exercise limits for options on the Trust exclusive of other options on Bitcoin. In its filing, ISE considered the Trust’s market capitalization and ADV, and prospective position limit in relation to other securities. In measuring the Trust against other securities, ISE aggregated market capitalization and volume data for securities that have defined position limits utilizing data from The Options

²⁵ See Securities Exchange Act Release No. 101128 (September 20, 2024), 89 FR 78942 (September 26, 2024) (SR–ISE–2024–03) (Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1, 4, and 5, to Permit the Listing and Trading of Options on the iShares Bitcoin Trust) (Exhibit 3) (“IBIT Approval Order”) (letter from Angela Dunn, Nasdaq ISE, LLC, to Vanessa Countryman, Secretary, Commission, dated August 21, 2024) (“ISE Letter”).

Clearing Corporations (“OCC”).²⁶ This pool of data took into consideration 3,984 options on single stock securities, excluding broad based ETFs.²⁷ Next, ISE aggregated the data based on market capitalization and ADV and grouped option symbols by position limit utilizing statistical thresholds for ADV and market capitalization that were one standard deviation above the mean for each position limit category (*i.e.*, 25,000, 50,000 to 65,000, 75,000, 100,000 to less than 250,000, 250,000 to 400,000, 450,000 to 1,000,000, and greater than or equal to 1,000,000) (*sic*).²⁸ Rule 3120(d) sets out position limits for various contracts. For example, on the Exchange like on ISE, a 25,000 contract limit applies to those options having an underlying security that does not meet the requirements for a higher options contract limit. ISE performed an exercise to demonstrate the Trust’s position limit relative to other options symbols in terms of market capitalization and ADV. For reference the market capitalization for the Trust was 19,789,068 billion²⁹ with an ADV, for the preceding three months prior to August 7, 2024, of greater than 26 million shares.³⁰ Today, by comparison, other options symbols with similar market capitalization and ADV have a position limit in excess of 400,000.³¹ Therefore, the proposed 25,000 same side position limit for options on the Trust is extremely conservative relative to these options symbols which are a full standard deviation above the mean in comparison. Second, ISE reviewed the Trust’s data relative to the market capitalization of the entire Bitcoin market in terms of exercise risk and availability of deliverables. Utilizing data as of August 3, 2024, there were 19,737,193 Bitcoins in circulation.³² ISE took a price of \$57,000 that equates to a market capitalization of greater than 1.125 trillion US dollars, and applied that to a position limit of 400,000 for

options on the Trust.³³ If a position limit of 400,000 options were considered (the position limit that would be typically assigned based upon data) the exercisable risk would represent only 6.6% of the outstanding shares of the Trust. The 25,000 position limit being sought only represents 0.4% of the outstanding shares of the Trust. Since the Trust has a creation and redemption process managed through the issuer, additionally it can be compared the position limit sought to the total market capitalization of the entire Bitcoin market. In this case, the exercisable risk for options on the Trust would be less than 0.01% of the market capitalization of all outstanding Bitcoin. Assuming a scenario where all options on the Trust’s shares were exercised given the proposed 25,000 per same side position limit, this would have a virtually unnoticed impact on the entire Bitcoin market. This analysis demonstrates that the proposed 25,000 per same side position limit is also extremely conservative and more than appropriate for options on the Trust. Third, ISE reviewed the proposed position limit by comparing it to position limits for derivative products regulated by the Commodity Futures Trading Commission (“CFTC”). While the CFTC, through the relevant Designated Contract Markets, only regulates options positions based upon delta equivalents (creating a less stringent standard), ISE examined equivalent Bitcoin futures position limits. In particular, ISE looked at the CME Bitcoin futures contract³⁴ that has a position limit of 2,000 futures.³⁵ On August 7, 2024, CME Bitcoin futures settled at \$55,000.³⁶ Taking the position limit of 2,000 futures at a \$5 multiplier³⁷ equates to \$550 million of notional value for Bitcoin futures. By way of comparison, on August 7, 2024, the Trust settled at \$31.19 per share, which would equate to 17,633,857 shares of the Trust³⁸ if the CME notional position limit were utilized.

Since substantial portions of any distributed options portfolio are likely to be out of the money on expiration, an options position limit equivalent to the CME position limit for Bitcoin futures (considering that all options deltas are ≤ 1.00) should be a bit higher than the CME implied 176,338 limit. Of note, unlike options contracts, CME position limits are calculated on a net futures equivalent basis by contract and include contracts that aggregate into one or more base contracts according to an aggregation ratio(s).³⁹ Therefore, if a portfolio includes positions in options on futures, CME would aggregate those positions into the underlying futures contracts in accordance with a table published by CME on a delta equivalent value for the relevant spot month, subsequent spot month, single month and all month position limits.⁴⁰ If a position exceeds position limits because of an option assignment, CME permits market participants to liquidate the excess position within one business day without being considered in violation of its rules. Additionally, if at the close of trading, a position that includes options exceeds position limits for futures contracts, when evaluated using the delta factors as of that day’s close of trading, but does not exceed the limits when evaluated using the previous day’s delta factors, then the position shall not constitute a position limit violation. Considering CME’s position limits on futures for bitcoin, the Exchange believes that that the proposed 25,000 per same side position limit is conservative and more than appropriate for options on the Trust.

In analyzing the proposed position limit for options on the Trust, ISE also considered the supply of Bitcoin. Specifically, ISE examined the number of market participants with position limits that would need to exercise in unison to put the underlying asset under stress. In the case of options on the Trust, the proposed 25,000 same side position limit effectively restricts a market participant from holding positions that could be exercised in excess of 2,500,000 shares of the Trust. Utilizing data from August 12, 2024, the Trust had 611,040,000 shares outstanding, therefore 244 market participants would have to simultaneously exercise position limits in order to create a scenario that may put the underlying asset (the Trust)

²⁶ The computations are based on OCC data from August 6, 2024. Data displaying zero values in market capitalization or ADV were removed.

²⁷ The Trust has one asset and therefore is not comparable to a broad based ETF where there are typically multiple components.

²⁸ See ISE Letter at 10.

²⁹ ISE acquired this figure as of August 13, 2024. See <https://www.ishares.com/us/products/333011/ishares-bitcoin-trust>. The global supply of Bitcoin grows each day Bitcoin are minted.

³⁰ See ISE Letter at 10.

³¹ See, e.g., iShares® iBoxx® \$ High Yield Corporate Bond ETF (“HYG”) with a market capitalization of 13,859,235,000 dollars as of November 4, 2024. See <https://www.ishares.com/us/products/239565/ishares-iboxx-high-yield-corporate-bond-etf>. The Exchange notes that HYG has a position limit of 500,000 contracts.

³² See ISE Letter at 10.

³³ *Id.*

³⁴ CME Bitcoin Futures are described in Chapter 350 of CME’s Rulebook.

³⁵ See the Position Accountability and Reportable Level Table in the Interpretations & Special Notices Section of Chapter 5 of CME’s Rulebook.

³⁶ See https://finance.yahoo.com/quote/BTC%3DF/history/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAM7ngaS6ZQS9c2Wzx7JW2IUe-1FnLyr8T-Qw4jkleHyCEN/SMIEpPPT2hCzPDĒryTVyB78NlwxkwFB5Fuw-jA-YiuSmYJHBriWbV6dYn91VQfzQNt3p0I2RkYLD3HhZXPwu4AP5as-WzHNpEbon4sk5sUZxgkpmrZR-CS.

³⁷ Each bitcoin futures contract is valued at 5 bitcoins as defined by the CME CF Bitcoin Reference Rate (“BRR”). See CME Rule 35001.

³⁸ See ISE Letter at 11.

³⁹ See <https://www.cmegroup.com/education/courses/market-regulation/position-limits/positionlimits-aggregation-of-contracts-and-table.htm>.

⁴⁰ *Id.*

under stress.⁴¹ As unlikely an occurrence as all market participants exercising their position limits in unison would be, if it were to occur, it should be noted that even such an occurrence would not likely put the Trust under stress as economic incentives, would induce the creation of more shares through the ETF creation and redemption process. By way of example, given that the current global supply of Bitcoin, the underlying asset of the Trust, is 19,789,068⁴² and that each Bitcoin can currently be redeemed for 1,755 shares of the Trust, another 34,729,814,340 shares of the Trust could be created. To exhaust this supply of the Trust, 13,891 market participants would have to simultaneously exercise their position limit. Comparing the Trust to the SPDR® Gold Shares (“GLD”) ETF or the iShares Silver Trust (“SLV”) ETF, which have position limits of 250,000 or ten times the proposed position limit for the Trust as well as lower shares outstanding in both products,⁴³ it is unjustified to mandate a different level of stringency with respect to a position limit for options on the Trust. The supply of Bitcoin does have a limit, which will take years to fully mint.⁴⁴ The Exchange notes that Bitcoin is a viable economic alternative to traditional assets. The price of goods denominated by Bitcoin has actually declined. This dynamic not only makes a fixed supply desirable, but a necessary condition of the value added by this asset in the broader economy. Further, the Exchange notes that corporations have a limited number of outstanding shares. Corporations may authorize additional shares, repurchase shares or split their shares. Similarly, ETFs, like the Trust, may also create, redeem, or split shares to suit the demand of the marketplace. Importantly, because the supply of Bitcoin is much larger than the available supply of most securities and the proposed 25,000 contract position limit is so conservative, the Exchange believes that evaluating the available supply of Bitcoin in

establishing a position limit for options on the Trust would demonstrate that the proposed limit is safe for investors and the market.⁴⁵ The Trust constitutes less than 2% of the entire Bitcoin supply. When comparing the market capitalization of Bitcoin against the largest securities, Bitcoin would rank 7th among those securities.⁴⁶ Further, the Exchange believes that its proposal to list options on the Trust with a position limit of 25,000 on the same side is a conservative position limit that does not lend itself to manipulation in the market given the ample market capitalization and liquidity in the Trust. If we look to the liquidity statistics of similar instruments and their concomitant position limits, we are able to extrapolate a reasonable standard for arriving at a position limit for a new product. In this case we can look to GLD, SLV, and the ProShares Bitcoin Strategy ETF (“BITO”). These products have volume statistics and “float” statistics, which gauge liquidity, which are in line, yet slightly lower than the Trust. All three of these reference products have position limits of 250,000 contracts. These reference products are remarkably similar in nature to the Trust; they are exchange-traded products (“ETPs”) holding one asset in a trust.

Further, Rule Series 10100, which governs margin requirements applicable to the trading of all options on BOX including options on ETFs, will also apply to the trading of the Trust options.

Lastly, Rule 5055(e)(2)(i) permits the Exchange to authorize for trading a FLEX Equity Option class on any equity security if it may authorize for trading a Non-FLEX Equity Option class on that equity security pursuant to Rule 5020.⁴⁷ At this time, the Exchange is not proposing to permit Trust options to trade as FLEX Equity Options.⁴⁸ The Exchange therefore proposes to modify Rule 5055(e)(2)(i) to specify this exception, which will add clarity and transparency to the Exchange Rules.⁴⁹

The Exchange represents that the same surveillance procedures applicable to all other options on other ETFs currently listed and traded on the Exchange will apply to options on the

Trust. Also, the Exchange represents that it has the necessary systems capacity to support the new option series. The Exchange believes that its existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading options on ETFs, including the proposed Trust options.

Today, the Exchange has an adequate surveillance program in place for options. The Exchange intends to apply those same program procedures to options on the Trust that it applies to the Exchange’s other options products.⁵⁰ The Exchange would review activity in the underlying Trust when conducting surveillances for market abuse or manipulation in the options on the Trust. Additionally, the Exchange is a member of the Intermarket Surveillance Group (“ISG”) under the Intermarket Surveillance Group Agreement. The Exchange would be able to obtain information regarding trading in shares of the Trust from Nasdaq and other markets that trade shares of the Trust through ISG. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. In addition, the Exchange has a Regulatory Services Agreement with the Financial Industry Regulatory Authority (“FINRA”). Pursuant to a multi-party 17d–2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market surveillance that are common to rules of all options exchanges.⁵¹

The underlying shares of spot Bitcoin ETPs, including the Trust, are also subject to safeguards related to addressing market abuse and manipulation. As the Commission

⁵⁰ The surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (e.g., spoofing, marking the close, phishing).

⁵¹ Section 19(g)(1) of the Act, among other things, requires every SRO registered as a national securities exchange or exchange or national securities association to comply with the Act, the rules and regulations thereunder, and the SRO’s own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members. See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d–2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO (“common members”). Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

⁴¹ See <https://www.ishares.com/us/products/333011/ishares-bitcoin-trust>.

⁴² This figure was acquired as of August 13, 2024. See <https://www.ishares.com/us/products/333011/ishares-bitcoin-trust>. The global supply of bitcoin grows each day bitcoin are minted.

⁴³ As of August 13, 2024, GLD had 294,000,000 shares outstanding and SLV had 510,200,000 shares outstanding. See <https://www.ssga.com/us/en/intermediary/etfs/funds/spdr-gold-shares-gld> and <https://www.ishares.com/us/products/239855/ishares-silver-trust-fund>.

⁴⁴ A recent article suggested that the remaining supply will take over 100 years to fully mint. See Sen, Vivek, “94% of Bitcoin’s Supply Has Now Been Issued,” Bitcoin Magazine, <https://bitcoinmagazine.com/business/94-of-bitcoins-supply-has-now-been-issued>. August 19, 2024.

⁴⁵ A supply consideration would likely be valuable for an option symbol that had far less liquidity than the Trust.

⁴⁶ See <https://companiesmarketcap.com/usa/largest-companies-in-the-usa-by-market-cap/>.

⁴⁷ See Rule 5055(e)(2)(i).

⁴⁸ The Exchange would be required to submit a separate rule filing to permit the Exchange to authorize for trading FLEX Equity Options on the Trust (which filing may propose changes to existing FLEX Equity Option position limits for such options if appropriate).

⁴⁹ See proposed Rule 5055(e)(2)(i).

stated in its orders approving proposals of several exchanges to list and trade shares of spot bitcoin-based exchange-traded products (“Bitcoin ETP Order”): Each Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market.⁵² Given the consistently high correlation between the CME Bitcoin futures market and the spot Bitcoin market, as confirmed by the Commission through robust correlation analysis, the Commission was able to conclude that such surveillance sharing agreements could reasonably be “expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [Bitcoin ETPs].”⁵³ In light of surveillance measures related to both options and futures as well as the underlying Trust,⁵⁴ the Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Trust.

The Exchange has also analyzed its capacity and represents that it believes the Exchange and the Options Price Reporting Authority or “OPRA” have the necessary systems capacity to handle the additional traffic associated with the listing of new series that may result from the introduction of options on the Trust up to the number of expirations currently permissible under the Exchange Rules. Because the proposal is limited to one class, the Exchange believes any additional traffic that may be generated from the introduction of the Trust options will be manageable.

Finally, the Exchange proposes a technical amendment to Rule

5020(h)(iv) to amend the names “ETFS Gold Trust” to “abrdn Gold ETF Trust,”⁵⁵ “ETFS Silver Trust” to “abrdn Silver ETF Trust,”⁵⁶ “ETFS Palladium Trust” to “abrdn Palladium ETF Trust,”⁵⁷ and “ETFS Platinum Trust” to “abrdn Platinum ETF Trust.”⁵⁸ In 2018 and again in 2022 these trusts were renamed. As such, the Exchange proposes to amend the names of the ETFs to reflect their current names.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),⁵⁹ in general, and Section 6(b)(5) of the Act,⁶⁰ 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, 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.

In particular, the Exchange believes that the proposal to list and trade options on the Trust will remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors because offering options on the Trust will

provide investors with a greater opportunity to realize the benefits of utilizing options on an ETF based on spot Bitcoin, including cost efficiencies and increased hedging strategies. The Exchange believes that offering options on a competitively priced ETF based on spot Bitcoin will benefit investors by providing them with an additional, relatively lower cost risk management tool allowing them to manage, more easily, their positions, and associated risks, in their portfolios in connection with exposure to spot Bitcoin. Today, BOX lists options on other commodity ETFs structured as a trust, which essentially offer the same objectives and benefits to investors, and for which the Exchange has not identified any issues with the continued listing and trading of options on those ETFs. The Exchange also believes the proposal to permit options on the Trust will remove impediments to and perfect the mechanism of a free and open market and a national market system because options on the Trust will comply with current Exchange Rules. As discussed above, options on the Trust must satisfy the initial listing standards and continued listing standards currently in the Exchange Rules, applicable to options on all ETFs, including options on other commodity ETFs already deemed appropriate for options trading on BOX pursuant to Rule 5020(h). Further, Exchange Rules that currently govern the listing and trading of options on ETFs, including permissible expirations, strike prices, minimum increments, position and exercise limits (including as proposed herein), and margin requirements will govern the listing and trading of options on the Trust. The proposed position and exercise limits for options on the Trust is 25,000 contracts. These position and exercise limits are the lowest position and exercise limits available in the options industry, are extremely conservative and more than appropriate given the Trust’s market capitalization, average daily volume, and high number of outstanding shares. The proposed position limit, and exercise limit, is consistent with the Act as it addresses concerns related to manipulation and protection of investors because the position limit (and exercise limit) is extremely conservative and more than appropriate given the Trust is actively traded. In support of the proposed position and exercise limits for options on the Trust of 25,000 contracts, the Exchange is citing the in depth analysis ISE did in its filing. As noted above, in the IBIT Approval Order, ISE considered the: (i) Trust’s market

⁵² See Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008, 3009 (January 17, 2024) (File Nos. SR-NYSEArca-2021-90; SR-NYSEArca-2023-44; SR-NYSEArca-2023-58; SR-NASDAQ-2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SRCboeBZX-2023-044; and SR-CboeBZX-2023-072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units).

⁵³ See Bitcoin ETP Order, 89 FR at 3010–11.

⁵⁴ See Securities Exchange Act Release No. 99295 (January 8, 2024), 89 FR 2321, 2334–35 (January 12, 2024) (SR-NASDAQ-2023-016) (Notice of Filing of Amendment No. 1 to a Proposed Rule Change To List and Trade Shares of the iShares Bitcoin Trust Under Nasdaq Rule 5711(d)).

⁵⁵ Effective October 1, 2018, ETFS Gold Trust was renamed Aberdeen Standard Gold ETF Trust. See <https://www.sec.gov/Archives/edgar/data/1450923/000138713118005292/ex10-2.htm>. Effective March 31, 2022, Aberdeen Standard Gold ETF Trust was renamed abrdn Gold ETF Trust. See <https://www.sec.gov/Archives/edgar/data/1450923/000138713122003628/ex10-2.htm>.

⁵⁶ Effective October 1, 2018 ETFS Silver Trust was renamed Aberdeen Standard Silver ETF Trust. See <https://www.sec.gov/Archives/edgar/data/1450922/000138713118005294/ex10-2.htm>. Effective March 31, 2022 Aberdeen Standard Silver ETF Trust was renamed abrdn Silver ETF Trust. See <https://www.sec.gov/Archives/edgar/data/1450922/000138713122003632/ex10-2.htm>.

⁵⁷ Effective October 1, 2018 ETFS Palladium Trust was renamed Aberdeen Standard Palladium ETF Trust. See <https://www.sec.gov/Archives/edgar/data/1459862/000138713118005304/ex10-2.htm>. Effective March 31, 2022 Aberdeen Standard Palladium ETF Trust was renamed abrdn Palladium ETF Trust. See <https://www.sec.gov/Archives/edgar/data/1459862/000138713122003629/ex10-2.htm>.

⁵⁸ Effective October 1, 2018 ETFS Platinum Trust was renamed Aberdeen Standard Platinum ETF Trust. See <https://www.sec.gov/Archives/edgar/data/1460235/000138713118005301/ex10-2.htm>. Effective March 31, 2022 Aberdeen Standard Platinum ETF Trust was renamed abrdn Platinum ETF Trust. See <https://www.sec.gov/Archives/edgar/data/1460235/000138713122003633/ex10-2.htm>.

⁵⁹ 15 U.S.C. 78f(b).

⁶⁰ 15 U.S.C. 78f(b)(5).

capitalization and ADV, and prospective position limit in relation to other securities; (ii) market capitalization of the entire Bitcoin market in terms of exercise risk and availability of deliverables; (iii) proposed position limit by comparing it to position limits for derivative products regulated by the CFTC; and (iv) supply of Bitcoin. Based on the Exchange's review of IBIT Approval Order, the Exchange believes that setting position and exercise limits for options on the Trust of 25,000 contracts is more than appropriate for the Trust. The proposed position and exercise limits reasonably and appropriately balance the liquidity provisioning in the market against the prevention of manipulation. The Exchange believes these proposed limits are effectively designed to prevent an individual customer or entity from establishing options positions that could be used to manipulate the market of the underlying as well as the Bitcoin market.⁶¹

The Exchange believes the proposed rule change to exclude options on the Trust from being eligible for trading as FLEX Equity Options is consistent with the Act because, without this prohibition, trading a FLEX Equity Option in the Trust would otherwise establish different position and exercise limits than those proposed herein.⁶²

The Exchange represents that BOX has the necessary systems capacity to support options on the Trust. The Exchange believes that its existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing and trading options on ETFs, including the Trust options.

Today, the Exchange has an adequate surveillance program in place for options. The Exchange intends to apply those same program procedures to options on the Trust that it applies to the Exchange's other options products.⁶³ The Exchange will review activity in the underlying Trust when conducting surveillances for market abuse or manipulation in the options on the Trust. Additionally, the Exchange is a member of the ISG under the Intermarket Surveillance Group

Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. The Exchange will be able to obtain information from Nasdaq, LLC and other markets through ISG. In addition, the Exchange has a Regulatory Services Agreement with FINRA. Pursuant to a multi-party 17d-2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market surveillance that are common to rules of all options exchanges.⁶⁴

The underlying shares of spot bitcoin ETPs, including the Trust, are also subject to safeguards related to addressing market abuse and manipulation. As the Commission stated in Bitcoin ETP Order:

Each Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market.⁶⁵

Given the consistently high correlation between the CME Bitcoin futures market and the spot Bitcoin market, as confirmed by the Commission through robust correlation analysis, the Commission was able to conclude that such surveillance sharing agreements could reasonably be "expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [Bitcoin ETPs]." ⁶⁶

In light of surveillance measures related to both options and futures as well as the underlying Trust,⁶⁷ the

Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Trust. Further, the Exchange represents that it will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on the Trust.

Finally, the Commission has previously approved the listing and trading of options on other commodity ETFs structured as a trust, such as SPDR® Gold Trust,⁶⁸ the iShares COMEX Gold Trust⁶⁹ the iShares Silver Trust,⁷⁰ the ETFS Gold Trust,⁷¹ and the ETFS Silver Trust.⁷²

Further, the Exchange's proposal to amend the names "ETFS Gold Trust" to "abrdn Gold ETF Trust," "ETFS Silver trust" to "abrdn Silver ETF Trust," "ETFS Palladium Trust" to "abrdn Palladium ETF Trust," and "ETFS Platinum Trust" to "abrdn Platinum ETF Trust" in Rule 5020(h)(iv) is consistent with the Act and the protection of investors as this amendment reflects the current names of these products.

The Exchange notes that the proposed rule change is substantively the same as a rule change proposed by Nasdaq ISE which the Commission recently approved.⁷³

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

⁶⁸ See Securities Exchange Act Release No. 57897 (May 30, 2008), 73 FR 32061 (June 5, 2008) (SR-Amex-2008-15; SR-CBOE-2005-11; SR-ISE-2008-12; SR-NYSEArca-2008-52; and SR-Phlx-2008-17) (Order Granting Approval of a Proposed Rule Change, as Modified, and Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Changes, as Modified, Relating to Listing and Trading Options on the SPDR Gold Trust).

⁶⁹ See Securities Exchange Act Release No. 59055 (December 4, 2008), 73 FR 75148 (December 10, 2008) (SR-Amex-2008-68; SR-BSE-2008-51; SR-CBOE-2008-72; SR-ISE-2008-58; SR-NYSEArca-2008-66; and SR-Phlx-2008-58) (Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Changes Relating to the Listing and Trading Options on Shares of the iShares COMEX Gold Trust and the iShares Silver Trust).

⁷⁰ *Id.*

⁷¹ See Securities Exchange Act Release No. 61483 (February 3, 2010), 75 FR 6753 (February 10, 2010) (SR-CBOE-2010-007; SR-ISE-2009-106; SR-NYSEAmex-2009-86; and SR-NYSEArca-2009-110) (Order Granting Approval of Proposed Rule Changes and Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Relating to Listing and Trading Options on the ETFS Gold Trust and the ETFS Silver Trust).

⁷² *Id.*

⁷³ See *supra* note 3.

⁶¹ See Securities Exchange Act Release No. 39489 (December 24, 1997), 63 FR 276 (January 5, 1998) (SR-CBOE-1997-11).

⁶² The Exchange would need to submit a separate rule filing to permit the Exchange to authorize for trading FLEX Equity Options on the Trust (which filing may propose changes to existing FLEX Equity Option position limits for such options if appropriate).

⁶³ The surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (e.g., spoofing, marking the close, phishing).

⁶⁴ Section 19(g)(1) of the Act, among other things, requires every SRO registered as a national securities exchange or national securities association to comply with the Act, the rules and regulations thereunder, and the SRO's own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members. See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO ("common members"). Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

⁶⁵ See *supra* note 4.

⁶⁶ See Bitcoin ETP Order, 89 FR at 3010-11.

⁶⁷ See Securities Exchange Act Release No. 99295 (January 8, 2024), 89 FR 2321, 2334-35 (January 12, 2024) (SR-NASDAQ-2023-016) (Notice of Filing of Amendment No. 1 to a Proposed Rule Change To List and Trade Shares of the iShares Bitcoin Trust Under Nasdaq Rule 5711(d)).

of the purposes of the Act. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to a filing submitted by Nasdaq ISE that was recently approved by the Commission.⁷⁴

The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act as options on the Trust will be subject to initial listing standards and continued listing standards the same as other options on ETFs listed on BOX. Further, options on the Trust will be subject to Exchange Rules that currently govern the listing and trading of options on ETFs, including permissible expirations, strike prices, minimum increments, position and exercise limits (including as proposed to modify herein), and margin requirements. Options on the Trust will be equally available to all market participants who wish to trade such options. Also, and as stated above, the Exchange already lists options on other commodity ETFs structured as a trust. The Exchange does not believe that the proposal to list and trade options on the Trust will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the extent that permitting options on the Trust to trade on BOX may make BOX a more attractive marketplace to market participants, such market participants are free to elect to become market participants on BOX.

Additionally, other options exchanges are free to amend their listing rules, as applicable, to permit them to list and trade options on the Trust. The Exchange believes that the proposed rule change may relieve any burden on, or otherwise promote, competition as it is designed to increase competition for order flow on BOX in a manner that is beneficial to investors by providing them with a lower-cost option to hedge their investment portfolios. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues that offer similar products. Ultimately, the Exchange believes that offering options on the Trust for trading on BOX will promote competition by providing investors with an additional, relatively low-cost means to hedge their portfolios and meet their investment needs in connection with spot Bitcoin prices and Bitcoin related products and positions.

Additionally, the Exchange's proposal to amend the names "ETFS Gold Trust"

to "abrdn Gold ETF Trust," "ETFS Silver Trust" to "abrdn Silver ETF Trust," "ETFS Palladium Trust" to "abrdn Palladium ETF Trust," and "ETFS Platinum Trust" to "abrdn Platinum ETF Trust" in Rule 5020(h)(iv) does not impose an undue burden on competition as this amendment reflects the current names of these products.

Finally, the proposed rule change to exclude options on the Trust from being eligible for trading as FLEX Equity Options does not impose an undue burden on competition as no BOX Participant will be able to transact a FLEX Equity Option on the Trust.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act⁷⁵ and Rule 19b-4(f)(6) thereunder.⁷⁶

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)⁷⁷ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission previously approved the listing of options on the shares of the Trust.⁷⁸ The Exchange has provided information regarding the underlying Trust, including, among other things, information regarding trading volume, the number of

beneficial holders, and the market capitalization of the Trust. The proposal also establishes position and exercise limits for options on the Trust and provides information regarding the surveillance procedures that will apply to options on the Trust. In addition, the proposal updates the names of certain commodity-based trusts, as described above, which will ensure that the Exchange's rules identify these trusts by their current names. The Commission believes that waiver of the operative delay could benefit investors by providing an additional venue for trading Bitcoin Fund options and helping to ensure that the accuracy of the Exchange's rules. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.⁷⁹

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.

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-BOX-2024-27 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-BOX-2024-27. 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

⁷⁵ 15 U.S.C. 78s(b)(3)(A).

⁷⁶ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission waives this requirement.

⁷⁷ 17 CFR 240.19b-4(f)(6)(iii).

⁷⁸ See *supra* note 3.

⁷⁹ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁷⁴ *Id.*

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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-BOX-2024-27 and should be submitted on or before December 23, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸⁰

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-28105 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101740; File No. SR-CboeBZX-2024-121]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To List Options on Certain Bitcoin ETFs

November 25, 2024.

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 November 21, 2024, Cboe BZX Exchange, Inc. ("Exchange" or "BZX Options") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in

Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the "Exchange" or "BZX Options") proposes to amend Rule 19.3. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 19.3 regarding the criteria for underlying securities. Specifically, the Exchange proposes to amend Rule 19.3(i)(4) to allow the Exchange to list and trade options on shares or other securities ("Fund Shares") that are principally traded on a national securities exchange and are defined as an "NMS stock" under Rule 600 of Regulation NMS and that represent interests the iShares Bitcoin Trust (the "iShares Fund"), the Grayscale Bitcoin Trust (the "Grayscale Fund"), the Grayscale Bitcoin Mini Trust (the "Grayscale Mini Fund"), or the Bitwise Bitcoin ETF (the "Bitwise Fund" and, together with the iShares Fund, the Grayscale Fund, and the Grayscale Mini Fund, the "Bitcoin Funds").³ This is a

competitive filing based on similar proposals submitted by Nasdaq ISE, LLC ("ISE") (with respect to the iShares Fund) and NYSE American, LLC ("NYSE American") (with respect to the Grayscale Fund, the Grayscale Mini Fund, and the Bitwise Fund), which were recently approved by the Securities and Exchange Commission (the "Commission").⁴ Current Rule 19.3(i) provides that, subject to certain other criteria set forth in that Rule, securities deemed appropriate for options trading include Fund Shares that represent certain types of interests,⁵ including interests in certain specific trusts that hold financial instruments, money market instruments, precious metals (which are deemed

2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SR-CboeBZX-2023-044; and SR-CboeBZX-2023-072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) ("Bitcoin ETP Approval Order").

⁴ See Securities Exchange Act Release Nos. 101128 (September 20, 2024), 89 FR 78942 (September 26, 2024) (SR-ISE-2024-03) ("ISE Approval"); and 101386 (October 18, 2024), 89 FR 84960 (October 24, 2024) (SR-NYSEAMER-2024-49) ("NYSE American Approval").

⁵ See Rule 19.3(i) which permits options trading on Fund Shares that (1) represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities, and that hold portfolios of securities comprising or otherwise based on or representing investments in indexes or portfolios of securities (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities) ("Funds") and/or financial instruments including, but not limited to, stock index futures contracts, options on futures, options on securities and indexes, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse repurchase agreements (the "Financial Instruments"), and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the "Money Market Instruments") constituting or otherwise based on or representing an investment in an index or portfolio of securities and/or Financial Instruments and Money Market Instruments, or (2) represent commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward 477 contracts and/or options on physical commodities and/or non-U.S. currency ("Commodity Pool ETFs") or (3) represent interests in a trust or similar entity that holds a specified non-U.S. currency or currencies deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency or currencies and pays the beneficial owner interest and other distributions on the deposited non-U.S. currency or currencies, if any, declared and paid by the trust ("Currency Trust Shares"), or (4) represent interests in the SPDR Gold Trust or are issued by the iShares COMEX Gold Trust, iShares Silver Trust, the Fidelity Wise Origin Bitcoin Fund (the "Fidelity Fund"), or the ARK 21Shares Bitcoin ETF (the "Ark 21 Fund").

⁸⁰ 17 CFR 200.30-3(a)(12), (59).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008, 3009 (January 17, 2024) (SR-NYSEArca-2021-90; SR-NYSEArca-2023-44; SR-NYSEArca-2023-58; SR-NASDAQ-

commodities), or Bitcoin (which is deemed a commodity. In addition, Rule 19.3(i)(1) requires that Fund Shares meet the criteria and standards set forth in Rule 19.3(a) and (b)⁶ or (2) be available for creation or redemption each business day from or through the issuer in cash or in kind at a price related to net asset value, and the issuer must be obligated to issue Fund Shares in a specified aggregate number even if some or all of the investment assets required to be deposited have not been received by the issuer, subject to the condition that the person obligated to deposit the investments has undertaken to deliver the investment assets as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the issuer, as provided in the respective prospectus.

The Bitcoin Funds are Bitcoin-backed commodity exchange-traded funds ("ETFs") structured as trusts. Similar to any Fund Share currently deemed appropriate for options trading under Rule 19.3(i), the investment objective of each Bitcoin Fund is for its shares to reflect the performance of Bitcoin (less the expenses of the trust's operations), offering investors an opportunity to gain exposure to Bitcoin without the complexities of Bitcoin delivery. As is the case for Fund Shares currently deemed appropriate for options trading, a Bitcoin Fund's shares represent units of fractional undivided beneficial interest in the trust, the assets of which consist principally of Bitcoin and are designed to track Bitcoin or the performance of the price of Bitcoin and offer access to the Bitcoin market.⁷ The Bitcoin Funds provide investors with cost-efficient alternatives that allow a level of participation in the Bitcoin market through the securities market. The primary substantive difference between Bitcoin Funds and Fund Shares currently deemed appropriate for options trading is that Fund Shares may hold securities, certain financial instruments, and specified precious metals (which are deemed commodities), while Bitcoin Funds hold Bitcoin (which is also deemed a commodity). The Bitcoin Funds are similar to the Fidelity Fund and the Ark 21 Fund, which are already eligible for options trading on the Exchange.⁸

The Exchange's initial listing standards for Fund Shares on which options may be listed and traded on the Exchange will apply to the Bitcoin Funds. Pursuant to Rule 19.3(a), a security (which includes a Fund Share) on which options may be listed and traded on the Exchange must be registered with the Securities and Exchange Commission (the "Commission") and be an "NMS stock" as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934, as amended (the "Act"); and the security shall be characterized by a substantial number of outstanding shares that are widely held and actively traded. Rule 19.3(i)(1) requires that Fund Shares either (1) meet the criteria and standards set forth in Rule 19.3(a) and (b),⁹ or (2) are available for creation or redemption each business day in cash or in kind from the investment company, commodity pool or other entity at a price related to net asset value, and the investment company, commodity pool or other entity is obligated to provide that Fund Shares may be created even if some or all of the securities and/or cash required to be deposited have not been received by the Fund, the unit investment trust or the management investment company, provided the authorized creation participant has undertaken to deliver the securities and/or cash as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the Fund, all as described in the Fund's or unit trust's prospectus. Each Bitcoin Fund satisfies Rule 19.3(i)(1)(B) as each is subject to this creation and redemption process.

Options on the Bitcoin Funds will be subject to the Exchange's continued listing standards set forth in Rule 19.4(g) for Fund Shares deemed appropriate for options trading pursuant to Rule 19.3(i). Specifically, 19.4(g) provides that Fund Shares that were initially approved for options trading pursuant to Rule 19.3 will not be deemed to meet the requirements for continued approval, and the Exchange shall not open for trading any additional series of option contracts of the class covering such Fund Shares if the security ceases to be an NMS stock (see Rule 19.4(b)(4)). Additionally, the Exchange will not open for trading any additional series of option contracts of the class covering Fund Shares in any of the following circumstances: (1) in the case of options

covering Fund Shares approved for trading under Rule 19.3(i)(4)(A), in accordance with the terms of Rule 19.4(b)(1), (2) and (3); (2) in the case of options covering Fund Shares approved pursuant to Rule 19.3(i)(4)(B), following the initial 12-month period beginning upon the commencement of trading in the Fund Shares on a national securities exchange and are defined as NMS stock under Rule 600 of Regulation NMS, there were fewer than 50 record and/or beneficial holders of such Fund Shares for 30 consecutive days; (3) the value of the index, non-U.S. currency, portfolio of commodities including commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or Financial Instruments or Money Market Instruments, or portfolio of securities on which the Fund Shares are based is no longer calculated or available; or (4) such other event occurs or condition exists that in the opinion of the Exchange makes further dealing in such options on the Exchange inadvisable.

Options on each Bitcoin Fund will be physically settled contracts with American-style exercise.¹⁰ Consistent with current Rule 19.6, which governs the opening of options series on a specific underlying security (including Fund Shares), the Exchange will open at least one expiration month for options on each Bitcoin Fund¹¹ at the

¹⁰ See Rule 19.2, which provides that the rights and obligations of holders and writers are set forth in the Rules of the Options Clearing Corporation ("OCC"); and Equity Options Product Specifications January 3, 2024), available at Equity Options Specifications (cboe.com); see also OCC Rules, Chapters VIII (which governs exercise and assignment) and Chapter IX (which governs the discharge of delivery and payment obligations arising out of the exercise of physically settled stock option contracts).

¹¹ See Rule 19.6(b). The monthly expirations are subject to certain listing criteria for underlying securities described within Rule 19.3. Monthly listings expire the third Friday of the month. The term "expiration date" (unless separately defined elsewhere in the OCC By-Laws), when used in respect of an option contract (subject to certain exceptions), means the third Friday of the expiration month of such option contract, or if such Friday is a day on which the exchange on which such option is listed is not open for business, the preceding day on which such exchange is open for business. See OCC By-Laws Article I, Section 1. Pursuant to Rule 19.6(c), additional series of options of the same class may be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the market price of the underlying stock moves more than five strike prices from the initial exercise price or prices. New series of options on an individual stock may be added until the beginning of the month in which the options contract will expire. Due to unusual market conditions, the Exchange, in its discretion, may add a new series of options on an individual stock until the close of trading on the business day prior to expiration.

⁶ Rule 19.3(a) and (b) sets forth the criteria that underlying securities must satisfy for option contracts on those underlying securities to be eligible for listing and trading on the Exchange.

⁷ The trust may include minimal cash.

⁸ See Rule 19.3(i); and SR-CboeBZX-2024-118 (filed November 21, 2024).

⁹ Rule 19.3(a) and (b) sets forth the criteria an underlying security must meet for the Exchange to be able to list options on the underlying.

commencement of trading on the Exchange and may also list series of options on a Bitcoin Fund for trading on a weekly,¹² monthly,¹³ or quarterly¹⁴ basis. The Exchange may also list long-term equity option series (“LEAPS”) that expire from 12 to 39 months from the time they are listed.¹⁵

Pursuant to Rule 19.6, Interpretation and Policy .01, which governs strike prices of series of options on Fund Shares, the interval of strikes prices for series of options on Bitcoin Funds will be \$1 or greater when the strike price is \$200 or less and \$5 or greater where the strike price is over \$200.¹⁶ Additionally, the Exchange may list series of options pursuant to the \$1 Strike Price Interval Program,¹⁷ the \$0.50 Strike Program,¹⁸ the \$2.50 Strike Price Program,¹⁹ and the \$5 Strike Program.²⁰ Pursuant to Rule 21.5, where the price of a series of a Bitcoin Fund option is less than \$3.00, the minimum increment will be \$0.05, and where the price is \$3.00 or higher, the minimum increment will be \$0.10.²¹ Any and all new series of Bitcoin Fund options that the Exchange lists will be consistent and comply with the expirations, strike prices, and minimum increments set forth in Rules 19.6 and 21.5, as applicable.

Bitcoin Fund options will trade in the same manner as any other Fund Share options on the Exchange. The Exchange Rules that currently apply to the listing and trading of all Fund Share options on the Exchange, including, for example, Rules that govern listing criteria, expirations, exercise prices, minimum increments, margin requirements, customer accounts, and trading halt procedures will apply to the listing and trading of Bitcoin Funds options on the Exchange in the same manner as they apply to other options on all other Fund Shares that are listed and traded on the Exchange, including the precious-metal

backed commodity Fund Shares and the Fidelity and Ark 21 Funds already deemed appropriate for options trading on the Exchange pursuant to current already deemed appropriate for options trading on the Exchange pursuant to current Rule 19.3(i).

Pursuant to Rules 18.7 and 18.9, the position and exercise limits, respectively, for each Bitcoin Fund option will be 25,000 same side option contracts.²² In considering the appropriate position and exercise limits for the Bitcoin Funds, the Exchange reviewed the data presented by ISE in its filing (specifically in Exhibit 3 of the filing) with respect to the iShares Fund²³ and by NYSE American in its filing with respect to the Grayscale Fund, the Grayscale Mini Fund, and the Bitwise Fund.²⁴

With respect to the iShares Fund, in its filing, ISE considered the iShares Fund market capitalization and average daily volume (“ADV”) against those of other underlying securities, as well as the proposed position limit in relation to other options. In measuring the iShares Fund against other securities, ISE aggregated market capitalization and volume data for securities that have defined position limits utilizing data from The Options Clearing Corporations (“OCC”).²⁵ This pool of data took into consideration 3,984 options on single stock securities, excluding broad based ETFs.²⁶ Next, ISE aggregated the data based on market capitalization and ADV and grouped option symbols by position limit utilizing statistical thresholds for ADV and market capitalization that were one standard deviation above the mean for each position limit category (*i.e.*, 25,000, 50,000 to 65,000, 75,000, 100,000 to less than 250,000, 250,000 to 400,000, 450,000 to 1,000,000, and greater than or equal to 1,000,000)

(sic).²⁷ Rule 8.30 sets out position limits for various contracts. For example, on the Exchange, like ISE, a 25,000 contract position limit applies to options with an underlying security that does not meet the requirements for a higher options contract position limit. ISE performed an exercise to demonstrate the iShares Fund position limit relative to other options symbols in terms of market capitalization and ADV. For reference the market capitalization for the iShares Fund was 19,789,068 billion²⁸ with an ADV, for the preceding three months prior to August 7, 2024, of greater than 26 million shares.²⁹ By comparison, other options symbols with similar market capitalization and ADV have a position limit in excess of 400,000.³⁰ Therefore, the proposed 25,000 same side position limit for options on the iShares Fund is extremely conservative relative to these options symbols which are a full standard deviation above the mean in comparison.

Second, ISE reviewed the iShares Fund’s data relative to the market capitalization of the entire Bitcoin market in terms of exercise risk and availability of deliverables. Utilizing data as of August 3, 2024, there were 19,737,193 Bitcoins in circulation.³¹ ISE took a price of \$57,000 that equates to a market capitalization of greater than 1.125 trillion U.S. dollars, and applied that to a position limit of 400,000 for options on the iShares Fund.³² If a position limit of 400,000 options were considered (the position limit that would be typically assigned based upon data) the exercisable risk would represent only 6.6% of the outstanding shares of the iShares Fund. The 25,000 position limit being sought only represents 0.4% of the outstanding shares of the iShares Fund. Since the iShares Fund has a creation and redemption process managed through the issuer, additionally it can be compared the position limit sought to the total market capitalization of the entire Bitcoin market. In this case, the exercisable risk for options on the iShares Fund would be less than 0.01% of the market capitalization of all

¹² See Rule 19.6, Interpretation and Policy .05.

¹³ See Rule 19.6, Interpretation and Policy .08.

¹⁴ See Rule 19.6, Interpretation and Policy .04.

¹⁵ See Rule 19.8.

¹⁶ The Exchange notes that for options listed pursuant to the Short Term Option Series Program, the Monthly Options Series Program, and the Quarterly Options Series Program, Rule 19.6, Interpretations and Policies .05, .08, and .04 specifically sets forth intervals between strike prices on Quarterly Options Series, Short Term Option Series, and Monthly Options Series, respectively.

¹⁷ See Rule 19.6, Interpretation and Policy .02.

¹⁸ See Rule 19.6, Interpretation and Policy .06.

¹⁹ See Rule 19.6, Interpretation and Policy .03.

²⁰ See Rule 19.6(d)(5).

²¹ If options on a Bitcoin Fund are eligible to participate in the Penny Interval Program, the minimum increment will be \$0.01 for series with a price below \$3.00 and \$0.05 for series with a price at or above \$3.00. See 21.5(d) (which describes the requirements for the Penny Interval Program).

²² Rule 18.7(a)(1) provides that no Options Member shall make, for any account in which it has any interest or for the account of any Customer, an opening transaction on any exchange if the Options Member has reason to believe that as a result of such transaction the Options Member or its Customer would, acting alone or in concert with others, directly or indirectly, exceed the applicable position limit fixed by Cboe Exchange, Inc. (“Cboe Options”). Cboe Options Rule 8.30, Interpretation and Policy .10 establishes a position limit for the Bitcoin Fund options of 25,000. See SR-CBOE-2024-051.

²³ See ISE Approval; and Letter from Angela Dunn, Nasdaq ISE, LLC, to Vanessa Countryman, Secretary, Commission, dated August 21, 2024) (“ISE Letter”).

²⁴ See NYSE American Approval.

²⁵ The computations are based on OCC data from August 6, 2024. Data displaying zero values in market capitalization or ADV were removed.

²⁶ The iShares Fund has one asset and therefore is not comparable to a broad based ETF where there are typically multiple components.

²⁷ See ISE Letter at 10.

²⁸ ISE acquired this figure as of August 13, 2024. See <https://www.ishares.com/us/products/333011/ishares-bitcoin-trust>. The global supply of Bitcoin grows each day Bitcoin are minted.

²⁹ See ISE Letter at 10.

³⁰ See, e.g., iShares® iBoxx® \$ High Yield Corporate Bond ETF (“HYG”) with a market capitalization of 13,859,235,000 billion as of November 4, 2024. See <https://www.ishares.com/us/products/239565/ishares-iboxx-high-yield-corporate-bond-etf>. The Exchange notes that HYG has a position limit of 500,000 contracts.

³¹ See ISE Letter at 10.

³² *Id.*

outstanding Bitcoin. Assuming a scenario where all options on the iShares Fund's shares were exercised given the proposed 25,000 per same side position limit, this would have a virtually unnoticed impact on the entire Bitcoin market. This analysis demonstrates that the proposed 25,000 per same side position limit is also extremely conservative and more than appropriate for options on the iShares Fund.

Third, ISE reviewed the proposed position limit by comparing it to position limits for derivative products regulated by the Commodity Futures Trading Commission ("CFTC"). While the CFTC, through the relevant Designated Contract Markets, only regulates options positions based upon delta equivalents (creating a less stringent standard), ISE examined equivalent bitcoin futures position limits. In particular, ISE looked at the CME Bitcoin futures contract that has a position limit of 2,000 futures.³³ On August 7, 2024, CME Bitcoin futures settled at \$55,000.³⁴ Taking the position limit of 2,000 futures at a \$5 multiplier equates to \$550 million of notional value for Bitcoin futures. By way of comparison, on August 7, 2024, the iShares Fund settled at \$31.19 per share, which would equate to 17,633,857 shares of the iShares Fund³⁵ if the CME notional position limit were utilized. Since substantial portions of any distributed options portfolio are likely to be out of the money on expiration, an options position limit equivalent to the CME position limit for Bitcoin futures (considering that all options deltas are ≤ 1.00) should be a bit higher than the CME implied 176,338 limit.

The Exchange notes, unlike options contracts, CME position limits are calculated on a net futures-equivalent basis by contract and include contracts that aggregate into one or more base contracts according to an aggregation ratio(s).³⁶ Therefore, if a portfolio

includes positions in options on futures, CME would aggregate those positions into the underlying futures contracts in accordance with a table published by CME on a delta equivalent value for the relevant spot month, subsequent spot month, single month and all month position limits.³⁷ If a position exceeds position limits because of an option assignment, CME permits market participants to liquidate the excess position within one business day without being considered in violation of its rules. Additionally, if at the close of trading, a position that includes options exceeds position limits for futures contracts, when evaluated using the delta factors as of that day's close of trading but does not exceed the limits when evaluated using the previous day's delta factors, then the position shall not constitute a position limit violation. Considering CME's position limits on futures for Bitcoin, the Exchange believes that that the proposed same side position limits are more than appropriate for the iShares Fund options.

In analyzing the proposed position limit for options on the iShares Fund, ISE also considered the supply of Bitcoin. Specifically, ISE examined the number of market participants with position limits that would need to exercise in unison to put the underlying asset under stress. In the case of options on the iShares Fund, the proposed 25,000 same side position limit effectively restricts a market participant from holding positions that could be exercised in excess of 2,500,000 shares of the iShares Fund. Utilizing data from August 12, 2024, the iShares Fund had 611,040,000 shares outstanding, therefore 244 market participants would have to simultaneously exercise position limits in order to create a scenario that may put the underlying asset (iShares Fund) under stress.³⁸ The Exchange notes that historically, from observation only, it appears that no more than five market participants holding position limits in any security have exercised in unison in any option. As unlikely an occurrence as all market participants exercising their position limits in unison would be, if it were to occur, it should be noted that even such an occurrence would not likely put the iShares Fund under stress as economic incentives, would induce the creation of more shares through the ETF creation and redemption process.

By way of example, given that the current global supply of Bitcoin, the

underlying asset of the iShares Fund, is 19,789,068³⁹ and that each Bitcoin can currently be redeemed for 1,755 shares of the iShares Fund, another 34,729,814,340 shares of the iShares Fund could be created. To exhaust this supply of the iShares Fund, 13,891 market participants would have to simultaneously exercise their position limit. Comparing the iShares Fund to the SPDR Gold Shares ("GLD") ETF or the iShares Silver Trust ("SLV") ETF, which have position limits of 250,000 or ten times the proposed position limit for the iShares Fund as well as lower shares outstanding in both products,⁴⁰ it is unjustified to mandate a different level of stringency with respect to a position limit for options on the iShares Fund.

With respect to the Grayscale Fund, the Grayscale Mini Fund, and the Bitwise Fund, the Exchange reviewed the data presented by NYSE American in its filing. NYSE American aggregated market capitalization, volume, and shares outstanding data of the Bitcoin Funds and compared that data to those of other ETFs, and compared the proposed position limit of the Bitcoin Funds to the position limits of the options overlying those other ETFs. The Exchange reviewed NYSE American's data that demonstrated that each of these three Bitcoin Funds would easily qualify for the 250,000-contract position limit available to other ETFs and ETPs pursuant to the criterion in Rule 8.30, Interpretation and Policy .02, which requires the most recent six-month trading volume of the underlying security to be at least 100,000,000 shares.⁴¹

Bitcoin Fund	Total volume (shares) (as of September 30, 2024)
Grayscale Fund	723,758,100
Grayscale Mini Fund	335,492,930
Bitwise Fund	263,965,870

³³ See CME Rulebook Chapter 350 (description of CME Bitcoin Futures) and Chapter 5, Position Limit, Position Accountability and Reportable Level Table in the Interpretations & Special Notices. Each CME Bitcoin futures contract is valued at five Bitcoins as defined by the CME CF Bitcoin Reference Rate ("BRR"). See CME Rule 35001.

³⁴ See https://finance.yahoo.com/quote/BTC%3DF/history?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvbS8&guce_referrer_sig=AQAAAMngaS6ZQS9c2Wzx7JW2IUe- - 1FnLyr8T-Qw4jkleHyCENfSMIEpPPt2hCzPDeryTVyB78NIwxkFB5Fuw-jA-YiuSmYJHBriWbV6dYn91VQfzQNT3p0I2RkYLD3HhZXPwu4AP5as-WzHNpEBon4sk5sUZxgkapMrZR--CS.

³⁵ See ISE Letter at 11.

³⁶ See CME Rulebook Chapter 5, Position Limit, Position Accountability and Reportable Level Table in the Interpretations & Special Notices.

³⁷ *Id.*

³⁸ See <https://www.ishares.com/us/products/333011/ishares-bitcoin-trust>.

³⁹ This figure was acquired as of August 13, 2024. See <https://www.ishares.com/us/products/333011/ishares-bitcoin-trust>. The global supply of Bitcoin grows each day Bitcoin are minted.

⁴⁰ As of August 13, 2024, GLD had 294,000,000 shares outstanding and SLV had 510,200,000 shares outstanding. See <https://www.ssga.com/us/en/intermediary/etfs/funds/spdr-gold-shares-gld> and <https://www.ishares.com/us/products/239855/ishares-silver-trust-fund>.

⁴¹ Rule 8.30, Interpretation and Policy .02(e) states that to be eligible for the 250,000 option contract limit, either the most recent six-month trading volume of the underlying security must have totaled at least 100,000,000 shares; or the most recent six-month trading volume of the underlying security must have totaled at least 75,000,000 shares and the underlying security must have at least 300,000,000 currently outstanding.

Based on this trading volume,⁴² each Bitcoin Fund exceeded the requisite 100,000,000 shares necessary to qualify for the 250,000-contract position and exercise limits. By comparison, the underlying of other options with six-month trading volume less than the volumes in the table above are eligible

for position and exercise limits of at least 250,000.⁴³

Second, with respect to the outstanding shares of these three Bitcoin Funds, the Exchange reviewed NYSE American's data regarding the outstanding shares of each of these Bitcoin Funds. NYSE American performed an exercise to demonstrate that if a market participant held the

maximum number of contracts possible pursuant to the proposed position and exercise limits (25,000 contracts), the equivalent shares represented by the proposed position and exercise limits (2,500,000 shares) would represent the following approximate percentage of outstanding shares as of August 30, 2024:

Bitcoin Fund	Proposed position/ exercise limits in equivalent shares	Outstanding shares	Percentage of outstanding shares
Grayscale Fund	2,500,000	284,570,100	0.9
Grayscale Mini Fund	2,500,000	366,950,100	0.7
Bitwise Fund	2,500,000	68,690,000	3.6

As this table demonstrates, if a market participant held the maximum permissible options positions in one of the Bitcoin Fund options and exercised all of them at the same time, that market participant would control a small percentage of the outstanding shares of the underlying Bitcoin Fund. For

example, as noted above, a position limit of 25,000 same side contracts effectively restricts a market participant from holding positions that could result in the receipt of no more than 2,500,000 shares of the applicable Bitcoin Fund (if that market participant exercised all its options). NYSE American used the

number of shares outstanding for each Bitcoin Fund as of August 30, 2024, and calculated the approximate number of market participants that could hold the maximum of 25,000 same side positions in each Bitcoin Fund that would equate to the number of shares outstanding of that Bitcoin Fund:

Bitcoin Fund	Outstanding shares	Number of market participants with 25,000 same side positions
Grayscale Fund	284,570,100	114
Grayscale Mini Fund	366,950,100	147
Bitwise Fund	68,690,000	27

This means if 114 market participants had 25,000 same side positions in options on the Grayscale Fund, each of them would have to simultaneously exercise all of those options to create a scenario that may put the underlying security under stress. Similarly, this means if 147 market participants had 25,000 same side positions in options on the Grayscale Mini Fund, each of them would have to simultaneously exercise all of those options to create a scenario that may put the underlying security under stress. Finally, this means if 27 market participants had 25,000 same side positions in options on the Bitwise Fund, each of them would have to simultaneously exercise all of those options to create a scenario that may put the underlying security

under stress. The Exchange believes it is highly unlikely for this to occur; however, even if such event did occur, the Exchange would not expect any of the Bitcoin Fund to be under stress because such an event would merely induce the creation of more shares through the trust's creation and redemption process.

NYSE American also performed an exercise to compare the size of the proposed position limit to the market capitalization of the Bitcoin market given that the issuer of each of these three Bitcoin Funds may create and redeem shares that represent an interest in Bitcoin. NYSE American took the global supply of Bitcoin, which was 19,747,066, and the price of one Bitcoin, which was approximately \$59,108.23, as of August 30, 2024, which equates to a

market capitalization of approximately \$1.167 trillion.⁴⁴ Consider the proposed position and exercise limit of 25,000 option contracts for each Bitcoin Fund option. A position and exercise limit of 25,000 same side contracts effectively restricts a market participant from holding positions that could result in the receipt of no more than 2,500,000 shares of the Grayscale Fund, the Grayscale Mini Fund, or the Bitwise Fund, as applicable (if that market participant exercised all its options). NYSE American considered the share price of each Bitcoin Fund on August 30, 2024 and calculated the value of 2,500,000 shares of the Bitcoin Fund at that price, and the approximate percentage of that value of the size of the Bitcoin market:

⁴² See FactSet, 9/30/2024, <https://www.factset.com/data-attribution>. Bitwise Fund shares began trading on July 31, 2024, and therefore the data in the above table has only two months of trading data available.

⁴³ See <https://www.theocc.com/Market-Data/Market-Data-Reports/Series-and-Trading-Data/Series-Search> (including the following symbols that have a position limit of 250,000: GLD, IAU, SLV, SIVR, SGOL).

⁴⁴ See <https://www.blockchain.com/explorer/charts/total-bitcoins>.

Bitcoin Fund	Share price (\$)	Value of 2,500,000 shares	Percentage of Bitcoin market
Grayscale Fund	46.75	116,875,000	0.010
Grayscale Mini Fund	5.20	13,000,000	0.001
Bitwise Fund	31.95	79,875,000	0.007

Therefore, if a market participant with the maximum 25,000 same side contracts in options on the Grayscale Fund, the Grayscale Mini Fund, or the

Bitwise Fund exercised all positions at one time, such an event would have no practical impact on the Bitcoin market. The Exchange also reviewed NYSE American's data regarding the market

capitalization of each of these three Bitcoin Funds relative to the market capitalization of the entire Bitcoin market, as of August 30, 2024:⁴⁵

	Bitcoin/shares outstanding	Market value (\$)	Percentage of total Bitcoin market
Total Bitcoin Market	19,747,066	1,167,214,096,788	100
Grayscale Fund	284,570,100	13,443,091,524	1.15
Grayscale Mini Fund	366,950,100	1,930,157,526	0.17
Bitwise Fund	68,690,000	2,221,640,670	0.19

As this data gathered by NYSE American demonstrates, none of these three Bitcoin Funds represent more than 1.2% of the global supply of Bitcoin (19,747,066). Based on the \$46.75 price of a Grayscale Fund share on August 30, 2024, a market participant could have redeemed one Bitcoin for approximately 1,264 Grayscale Fund shares. Another 24,967,146,455 Grayscale Fund shares could be created before the supply of Bitcoin was exhausted. As a result, 9,987 market participants would have to simultaneously exercise 25,000 same side positions in Grayscale Fund options to receive shares of the Grayscale Fund holding the entire global supply of Bitcoin. Similarly, based on the \$5.20 price of a Grayscale Mini Fund share on August 30, 2024, a market participant

could have redeemed one Bitcoin for approximately 11,367 Grayscale Mini Fund shares. Another 224,464,249,382 Grayscale Mini Fund shares could be created before the supply of Bitcoin was exhausted. As a result, 89,786 market participants would have to simultaneously exercise 25,000 same side positions in Grayscale Mini Fund options to receive shares of Grayscale Mini Fund holding the entire global supply of Bitcoin. Similarly, based on the \$31.95 price of a Bitwise Fund share on August 30, 2024, a market participant could have redeemed one Bitcoin for approximately 1,850 Bitwise Fund shares. Another 36,532,522,591 Bitwise Fund shares could be created before the supply of Bitcoin was exhausted. As a result, 14,613 market

participants would have to simultaneously exercise 25,000 same side positions in Bitwise Fund options to receive shares of Bitwise Fund holding the entire global supply of Bitcoin.

As ISE did with respect to the iShares Fund, NYSE American compared the proposed position limits to the position limit of CME Bitcoin futures, which as noted above is 2,000 futures. On August 28, 2024, CME Aug 24 Bitcoin Futures settled at \$58,950. A position of 2,000 CME Bitcoin futures, therefore, would have a notional value of \$589,500,000. The following table shows the share price of each Bitcoin Fund on August 28, 2024, and the approximate number of option contracts that equates to that notional value:

Bitcoin Fund	Share price (\$)	Number of option contracts
Grayscale Fund	46.94	125,585
Grayscale Mini Fund	5.23	1,127,151
Bitwise Fund	32.08	183,759

The approximate number of option contracts for each Bitcoin Fund that equate to the notional value of CME Bitcoin futures is significantly higher than the proposed limit of 25,000 options contract for each Bitcoin Fund option. As noted above, the fact that many options ultimately expire out-of-the-money and thus are not exercised for shares of the underlying, while the delta of a Bitcoin Future is 1, further

demonstrates how conservative the proposed limits of 25,000 options contracts are for the Bitcoin Fund options.

The Exchange notes, again, unlike options contracts, CME position limits are calculated on a net futures-equivalent basis by contract and include contracts that aggregate into one or more base contracts according to an aggregation ratio(s).⁴⁶ Therefore, if a

portfolio includes positions in options on futures, CME would aggregate those positions into the underlying futures contracts in accordance with a table published by CME on a delta equivalent value for the relevant spot month, subsequent spot month, single month and all month position limits.⁴⁷ If a position exceeds position limits because of an option assignment, CME permits market participants to liquidate the

⁴⁵ See *id.*

⁴⁶ See CME Rulebook Chapter 5, Position Limit, Position Accountability and Reportable Level Table in the Interpretations & Special Notices.

⁴⁷ *Id.*

excess position within one business day without being considered in violation of its rules. Additionally, if at the close of trading, a position that includes options exceeds position limits for futures contracts, when evaluated using the delta factors as of that day's close of trading but does not exceed the limits when evaluated using the previous day's delta factors, then the position shall not constitute a position limit violation. Considering CME's position limits on futures for Bitcoin, the Exchange believes that that the proposed same side position limits are more than appropriate for the Grayscale Fund, Grayscale Mini Fund, and Bitwise Fund options.

While the supply of Bitcoin is limited to 21,000,000, it is believed that it will take more than 100 years to fully mine the remaining Bitcoin.⁴⁸ The Exchange notes that Bitcoin is a viable economic alternative to traditional assets. The price of goods denominated by Bitcoin has actually declined. This dynamic not only makes a fixed supply desirable, but a necessary condition of the value added by this asset in the broader economy. Unlike the Bitcoin Funds, the number of shares that corporations may issue is limited. However, like corporations, which authorize additional shares, repurchase shares, or split their shares, the Bitcoin Funds may create, redeem, or split shares in response to demand. Given the significant unlikelihood of any of events described above ever occurring, the Exchange does not believe options on the Bitcoin Funds should be subject to position and exercise limits even lower than those proposed (which are already equal to the lowest available limit for equity options in the industry) to protect the supply of Bitcoin.

Importantly, because the supply of Bitcoin is much larger than the available supply of most securities and the proposed 25,000 contract position limit is so conservative, the Exchange believes that evaluating the available supply of Bitcoin in establishing a position limit for options on each of the Bitcoin Funds would demonstrate that the proposed limit is safe for investors and the market.⁴⁹ Each Bitcoin Fund represents less than 2% of the entire Bitcoin supply. When comparing the market capitalization of bitcoin against the largest securities, Bitcoin would

rank 7th among those securities.⁵⁰ Further, the Exchange believes that its proposal to list options on the Bitcoin Funds each with a position limit of 25,000 on the same side is a conservative position limit that does not lend itself to manipulation in the market given the ample market capitalization and liquidity in each Bitcoin Fund. If we look to the liquidity statistics of similar instruments and their concomitant position limits, we are able to extrapolate a reasonable standard for arriving at a position limit for a new product. In this case we can look to GLD, SLV, and the ProShares Bitcoin Strategy ETF. These products have volume statistics and "float" statistics, which gauge liquidity, which are in line, yet slightly lower than the Bitcoin Funds. All three of these reference products have position limits of 250,000 contracts. These reference products are remarkably similar in nature to the Bitcoin Funds; they are exchange-traded products ("ETPs") holding one asset in a trust.

The Exchange believes the available supply of Bitcoin is not relevant to the determination of position and exercise limits for options overlying the Bitcoin Funds.⁵¹ Position and exercise limits are not a tool that should be used to address a potential limited supply of the underlying of an underlying. Position and exercise limits do not limit the total number of options that may be held, but rather they limit the number of positions a single customer may hold or exercise at one time.⁵² "Since the

⁵⁰ See <https://companiesmarketcap.com/usa/largest-companies-in-the-usa-by-market-cap/>.

⁵¹ The Exchange is unaware of any proposed rule change related to position and exercise limits for any equity option (including commodity ETF options) for which the Commission required consideration of whether the available supply of an underlying (whether it be a corporate stock or an ETF) or the contents of an ETF (commodity or otherwise) should be considered when an exchange proposed to establish those limits. See, e.g., Securities Exchange Act Release No. 57894 (May 30, 2008), 73 FR 32061 (June 5, 2008) (SR-CBOE-2005-11) (approval order in which the Commission stated that the "listing and trading of Gold Trust Options will be subject to the exchanges' rules pertaining to position and exercise limits and margin"). The Exchange notes when the Commission approved this filing, the position limits in Rule 8.30 were the same as they are today. For reference, the current position and exercise limits for options on SPDR Gold Shares ETF ("GLD") and options on iShares Silver Trust ("SLV") are 250,000 contracts, or 10 times that proposed position and exercise limit for the Bitcoin Fund options.

⁵² For example, suppose an option has a position limit of 25,000 option contracts and there are a total of 10 investors trading that option. If all 10 investors max out their positions, that would result in 250,000 option contracts outstanding at that time. However, suppose 10 more investors decide to begin trading that option and also max out their positions. This would result in 500,000 option

inception of standardized options trading, the options exchanges have had rules imposing limits on the aggregate number of options contracts that a member or customer could hold or exercise."⁵³ Position and exercise limit rules are intended "to prevent the establishment of options positions that can be used or might create incentives to manipulate or disrupt the underlying market so as to benefit the options position. In particular, position and exercise limits are designed to minimize the potential for mini-manipulations and for corners or squeezes of the underlying market. In addition, such limits serve to reduce the possibility for disruption of the options market itself, especially in illiquid options classes."⁵⁴

The Exchange notes that a Registration Statement on Form S-1 was filed with the Commission for each Bitcoin Fund, each of which described the supply of Bitcoin as being limited to 21,000,000 (of which approximately 90% had already been mined), and that the limit would be reached around the year 2140.⁵⁵ Each Registration Statement permits an unlimited number of shares of the applicable Bitcoin Fund to be created. Further, the Commission approved proposed rule changes that permitted the listing and trading of shares of each Bitcoin Fund, which approval did not comment on the sufficient supply of Bitcoin or address whether there was a risk that permitting an unlimited number of shares for a Bitcoin Fund would impact the supply of Bitcoin.⁵⁶ Therefore, the Exchange believes the Commission had ample time and opportunity to consider whether the supply of Bitcoin was sufficient to permit the creation of unlimited Bitcoin Fund shares, and does not believe considering this supply with respect to the establishment of position and exercise limits is appropriate given its lack of relevance to the purpose of position and exercise limits. However, given the significant

contracts outstanding at that time. An increase in the number of investors could cause an increase in outstanding options even if position limits remain unchanged.

⁵³ See Securities Exchange Act Release No. 39489 (December 24, 1997), 63 FR 276 (January 5, 1998) (SR-CBOE-1997-11).

⁵⁴ See *id.*

⁵⁵ See iShares Fund Form S-1 Registration Statement, at p. 25, [bit20230608_s1.htm](https://www.sec.gov/Archives/edgar/data/1588489/000119312517013693/d157414ds1.htm); Grayscale Fund Form S-1 Registration Statement, at p. 17, <https://www.sec.gov/Archives/edgar/data/1763415/000119312524065444/d785023ds1.htm>; and Bitwise Amendment No. 2 to S-1, at p. 47, https://www.sec.gov/Archives/edgar/data/1763415/000199937123000735/bitwise-s1a_120423.htm.

⁵⁶ See Bitcoin ETP Approval Order.

⁴⁸ See <https://www.blockchain.com/explorer/assets/btc> (citing 21 million as the "total supply" of bitcoin).

⁴⁹ A supply consideration would likely be valuable for an option symbol that had far less liquidity than the Trust.

size of the Bitcoin supply, the proposed positions limits are more than sufficient to protect investors and the market. All of the above information demonstrates that the proposed position and exercise limits for the Bitcoin Fund options are more than reasonable and appropriate. The trading volume, ADV, and outstanding shares of each Bitcoin Fund demonstrate that these funds are actively traded and widely held, and proposed position and exercise limits are well below those of other ETFs with similar market characteristics. The proposed position and exercise limits are the lowest position and exercise limits available for equity options in the industry, are extremely conservative, and are more than appropriate given each Bitcoin Fund's market capitalization and ADV.

Today, the Exchange has an adequate surveillance program in place for options. The Exchange intends to apply those same program procedures to options on the Bitcoin Funds that it applies to the Exchange's other options products.⁵⁷ The Exchange's market surveillance staff would have access to the surveillances conducted by Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc., in addition to the Exchange's equity market,⁵⁸ with respect to the Bitcoin Funds and would review activity in the underlying Bitcoin Funds when conducting surveillances for market abuse or manipulation in the options on the Bitcoin Funds. Additionally, the Exchange is a member of the Intermarket Surveillance Group ("ISG") under the Intermarket Surveillance Group Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. In addition to obtaining information from its affiliated markets, the Exchange would be able to obtain information regarding trading in shares of the Bitcoin Funds from their primary listing markets and from other markets that trades shares of the Bitcoin Funds through ISG. In addition, the Exchange has a Regulatory Services Agreement with the Financial Industry Regulatory Authority ("FINRA") for certain market surveillance, investigation and examinations functions. Pursuant to a multi-party 17d-2 joint plan, all options exchanges allocate amongst themselves

and FINRA responsibilities to conduct certain options-related market surveillance that are common to rules of all options exchanges.⁵⁹

The underlying shares of spot bitcoin exchange-traded products ("ETPs"), including the Bitcoin Funds, are also subject to safeguards related to addressing market abuse and manipulation. As the Commission stated in its order approving proposals of several exchanges to list and trade shares of spot bitcoin-based ETPs, "[e]ach Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market.⁶⁰ The Exchange states that, given the consistently high correlation between the CME Bitcoin futures market and the spot bitcoin market, as confirmed by the Commission through robust correlation analysis, the Commission was able to conclude that such surveillance sharing agreements could reasonably be "expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [Bitcoin ETPs]." ⁶¹ In light of surveillance measures related to both options and futures as well as the underlying Bitcoin Funds,⁶² the

⁵⁹ Section 19(g)(1) of the Act, among other things, requires every self-regulatory organization ("SRO") registered as a national securities exchange or national securities association to comply with the Act, the rules and regulations thereunder, and the SRO's own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members. See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO ("common members"). Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

⁶⁰ See Bitcoin ETP Approval Order.

⁶¹ See Bitcoin ETP Approval Order, 89 FR at 3010-11.

⁶² See Securities Exchange Act Release Nos. 99290 (January 8, 2024), 89 FR 2338, 2343, 2347-2348 (January 12, 2024) (SR-CboeBZX-2023-044) Notice of Filing of Amendment No. 3 to a Proposed Rule Change To List and Trade Shares of the Fidelity Wise Origin Bitcoin Fund Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares); and 99288 (January 8, 2024), 89 FR 2387, 2392, 2399-2400 (January 12, 2024) (SR-CboeBZX-2023-028) (Notice of Filing of Amendment No. 5 to a Proposed Rule Change To List and Trade Shares of the ARK 21Shares Bitcoin ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares). See also Securities Exchange Act Release No. 99306 (January 10, 2024),

Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Bitcoin Funds. Further, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on Bitcoin ETPs.

The Exchange has also analyzed its capacity and represents that it believes the Exchange and OPRA have the necessary systems capacity to handle the additional traffic associated with the listing of new series that may result from the introduction of options on Bitcoin Funds up to the number of expirations currently permissible under the Rules. Because the proposal is limited to two classes, the Exchange believes any additional traffic that may be generated from the introduction of Bitcoin Fund options will be manageable.

The Exchange believes that offering options on Bitcoin Funds will benefit investors by providing them with an additional, relatively lower cost investing tool to gain exposure to the price of Bitcoin and hedging vehicle to meet their investment needs in connection with Bitcoin-related products and positions. The Exchange expects investors will transact in options on Bitcoin Funds in the unregulated over-the-counter ("OTC") options market,⁶³ but may prefer to trade such options in a listed environment to receive the benefits of trading listing options, including (1) enhanced efficiency in initiating and closing out positions; (2) increased market transparency; and (3) heightened contra-party creditworthiness due to the role of OCC as issuer and guarantor of all listed options. The Exchange believes that listing Bitcoin Fund options may cause investors to bring this liquidity to the Exchange, would increase market transparency and enhance the process of price discovery conducted on the Exchange through increased order flow. The Fund Shares

89 FR 3008, 3009 (January 17, 2024) (SR-NYSEArca-2021-90; SR-NYSEArca-2023-44; SR-NYSEArca-2023-58; SR-NASDAQ-2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SR-CboeBZX-2023-044; and SR-CboeBZX-2023-072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) ("Bitcoin ETP Approval Order").

⁶³ The Exchange understands from customers that investors have historically transacted in options on Fund Shares in the OTC options market if such options were not available for trading in a listed environment.

⁵⁷ The surveillance program includes surveillance patterns for price and volume movements as well as patterns for potential manipulation (e.g., spoofing and marking the close).

⁵⁸ Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc. are affiliated markets of the Exchange.

that hold financial instruments, money market instruments, or precious metal commodities on which the Exchange may already list and trade options are trusts structured in substantially the same manner as Bitcoin Funds and essentially offer the same objectives and benefits to investors, just with respect to different assets. The Exchange notes that it has not identified any issues with the continued listing and trading of any Fund Share options, including Fund Shares that hold commodities (*i.e.*, precious metals) that it currently lists and trades on the Exchange.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.⁶⁴ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁶⁵ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁶⁶ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that the proposal to list and trade options on the Bitcoin Funds will remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors because offering options on the Bitcoin Funds will provide investors with an opportunity to realize the benefits of utilizing options on a Bitcoin Fund, including cost efficiencies and increased hedging strategies. The Exchange believes that offering options on a competitively priced ETF based on spot Bitcoin will benefit investors by providing them with an additional, relatively lower-cost risk management tool, allowing them to manage, more easily, their positions and associated

risks in their portfolios in connection with exposure to spot Bitcoin. Today, the Exchange lists options on other commodity (including Bitcoin) ETFs structured as a trust, which essentially offer the same objectives and benefits to investors, and for which the Exchange has not identified any issues with the continued listing and trading of options on those ETFs.

The Exchange also believes the proposal to permit options on the Bitcoin Funds will remove impediments to and perfect the mechanism of a free and open market and a national market system, because options on the Bitcoin Funds will comply with current Exchange Rules. Options on the Bitcoin Funds must satisfy the initial listing standards and continued listing standards currently in the Rules, applicable to options on all ETFs, including options on other commodity ETFs already deemed appropriate for options trading on the Exchange pursuant to Rule 19.3(i). Additionally, as demonstrated above, the Bitcoin Funds are characterized by a substantial number of shares that are widely held and actively traded. Further, Rules that currently govern the listing and trading of options on ETFs, including permissible expirations, strike prices, minimum increments, position and exercise limits (as proposed herein), and margin requirements, will govern the listing and trading of options on the Bitcoin Funds.

The proposed position and exercise limits for options on each of the Bitcoin Funds is 25,000 contracts. These position and exercise limits are the lowest position and exercise limits available in the options industry, are extremely conservative and more than appropriate given Bitcoin Fund's market capitalization, ADV, and high number of outstanding shares. The proposed position limit, and exercise limit, is consistent with the Act as it addresses concerns related to manipulation and protection of investors because, as demonstrated above, the position limit (and exercise limit) is extremely conservative and more than appropriate given the Bitcoin Funds are actively traded. In support of the proposed position and exercise limits for options on the Bitcoin Funds are 25,000 contracts, the Exchange is citing the in depth analysis each of ISE and NYSE American did in their respective filings. As noted above, in the ISE and NYSE American Approvals, each of ISE and NYSE American considered the: (1) applicable Bitcoin Fund's market capitalization and ADV, and proposed position limit in relation to other securities; (2) market capitalization of

the entire Bitcoin market in terms of exercise risk and availability of deliverables; (3) proposed position limit by comparing it to position limits for derivative products regulated by the CFTC; and (4) supply of Bitcoin. Based on the Exchange's review of these analyses, the Exchange believes that the setting position and exercise limits for options on each of the Bitcoin Funds is 25,000 contracts is more than appropriate. The proposed position and exercise limits reasonably and appropriately balance the liquidity provisioning in the market against the prevention of manipulation. The Exchange believes these proposed limits are effectively designed to prevent an individual customer or entity from establishing options positions that could be used to manipulate the market of the underlying as well as the Bitcoin market.⁶⁷

The Exchange represents that it has the necessary systems capacity to support the new Bitcoin Fund options. As discussed above, the Exchange believes that its existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing and trading Fund Share options, including Bitcoin Fund options.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act as the Bitcoin Fund options will be equally available to all market participants who wish to trade such options and will trade generally in the same manner as other options. The Rules that currently apply to the listing and trading of all Fund Share options on the Exchange, including, for example, Rules that govern listing criteria, expirations, exercise prices, minimum increments, margin requirements, customer accounts, and trading halt procedures will apply to the listing and trading of Bitcoin Funds options on the Exchange in the same manner as they apply to other options on all other Fund Shares that are listed and traded on the Exchange. Also, and as stated above, the Exchange already lists options on other

⁶⁴ 15 U.S.C. 78f(b).

⁶⁵ 15 U.S.C. 78f(b)(5).

⁶⁶ *Id.*

⁶⁷ See Securities Exchange Act Release No. 39489 (December 24, 1997), 63 FR 276 (January 5, 1998) (SR-CBOE-1997-11).

commodity-based Fund Shares (including Bitcoin-based).⁶⁸ Further, the Bitcoin Funds would need to satisfy the maintenance listing standards set forth in the Exchange Rules in the same manner as any other Fund Share for the Exchange to continue listing options on them.

The Exchange does not believe that the proposal to list and trade options on Bitcoin Funds will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the extent that the advent of Bitcoin Fund options trading on the Exchange may make the Exchange a more attractive marketplace to market participants at other exchanges, such market participants are free to elect to become market participants on the Exchange. The Commission recently approved rule filings of other exchanges to permit the listing and trading of options on the Bitcoin Funds.⁶⁹ The Exchange notes that listing and trading Bitcoin Fund options on the Exchange will subject such options to transparent exchange-based rules as well as price discovery and liquidity, as opposed to alternatively trading such options in the OTC market.

The Exchange believes that the proposed rule change may relieve any burden on, or otherwise promote, competition, as it is designed to increase competition for order flow on the Exchange in a manner that is beneficial to investors by providing them with a lower-cost option to hedge their investment portfolios. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues that offer similar products. Ultimately, the Exchange believes that offering Bitcoin Fund options for trading on the Exchange will promote competition by providing investors with an additional, relatively low-cost means to hedge their portfolios and meet their investment needs in connection with Bitcoin prices and Bitcoin-related products and positions on a listed options exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act⁷⁰ and Rule 19b-4(f)(6) thereunder.⁷¹

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)⁷² permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission previously approved the listing of options on the Bitcoin Funds.⁷³ The Exchange has provided information regarding the underlying Bitcoin Funds, including, among other things, information regarding trading volume, the number of beneficial holders, and the market capitalization of the Bitcoin Funds. The proposal also establishes position and exercise limits for options on the Bitcoin Funds and provides information regarding the surveillance procedures that will apply to options on the Bitcoin Funds. The Commission believes that waiver of the operative delay could benefit investors by providing an additional venue for trading Bitcoin Fund options. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.⁷⁴

⁷⁰ 15 U.S.C. 78s(b)(3)(A).

⁷¹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission waives this requirement.

⁷² 17 CFR 240.19b-4(f)(6)(iii).

⁷³ See *supra* note 4.

⁷⁴ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

At any time within 60 days of the filing of 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.

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-CboeBZX-2024-121 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-CboeBZX-2024-121. 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All

⁶⁸ See Rule 19.3(i)(4).

⁶⁹ See ISE Approval and NYSE American Approval.

submissions should refer to file number SR–CboeBZX–2024–121 and should be submitted on or before December 23, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷⁵

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024–28110 Filed 11–29–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101738; File No. SR–NYSE–2024–44]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Adopt a Provision That the Exchange Will Not Review a Compliance Plan Submitted by a Listed Company That Is Below Compliance With a Continued Listing Standard if the Company Owes Any Unpaid Fees to the Exchange and Will Instead Immediately Commence Suspension and Delisting Procedures if Such Fees Are Not Paid in Full

November 25, 2024.

On September 27, 2024, New York Stock Exchange LLC (“Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) ¹ and Rule 19b–4 thereunder, ² a proposed rule change to amend Sections 802.02 and 802.03 of the NYSE Listed Company Manual (“Manual”) to provide that the Exchange will not review a compliance plan submitted by a domestic or non-U.S. listed company that is determined to be below compliance with a continued listing standard unless the company has paid in full all outstanding listing or annual fees due to the Exchange and will immediately commence suspension and delisting procedures in accordance with Section 804.00 of the Manual if such fees are not paid in full by the plan submission deadline or, with respect to any unpaid fees that have become due and payable since the commencement of its plan period, if such fees are not paid in full at the time of any required periodic review of such plan. The proposed rule change was published for comment in the **Federal Register** on October 16,

2024.³ The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act ⁴ provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission will either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is November 30, 2024. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change, so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act, ⁵ designates January 14, 2025, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NYSE–2024–44).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024–28108 Filed 11–29–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35401; 812–15649]

TCW Private Asset Income Fund and TCW Asset Backed Finance Management Company LLC

November 26, 2024.

AGENCY: Securities and Exchange Commission (“Commission” or “SEC”).

ACTION: Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (the “Act”) for an exemption from sections 18(a)(2), 18(c) and 18(i) of the Act, under sections 6(c) and 23(c) of the

Act for an exemption from rule 23c–3 under the Act, and for an order pursuant to section 17(d) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain registered closed-end investment companies to issue multiple classes of shares and to impose asset-based distribution and/or service fees and early withdrawal charges.

APPLICANTS: TCW Private Asset Income Fund and TCW Asset Backed Finance Management Company LLC.

FILING DATES: The application was filed on October 24, 2024.

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 on any application by emailing the SEC’s Secretary at *Secretaries-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on December 20, 2024, and should be accompanied by proof of service on the Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer’s interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission’s Secretary.

ADDRESSES: The Commission: *Secretaries-Office@sec.gov*. Applicants: Pamela Poland Chen, Esq., Kirkland & Ellis LLP, *pamela.chen@kirkland.com*, with a copy to Peter Davidson, Esq., TCW Asset Backed Finance Management Company LLC, *peter.davidson@tcw.com*.

FOR FURTHER INFORMATION CONTACT: Trace W. Rakestraw, Senior Special Counsel, at (202) 551–6825 (Division of Investment Management, Chief Counsel’s Office).

SUPPLEMENTARY INFORMATION: For Applicants’ representations, legal analysis, and conditions, please refer to Applicants’ application, dated October 24, 2024, which may be obtained via the Commission’s website by searching for the file number at the top of this document, or for an Applicant using the Company name search field on the SEC’s EDGAR system. The SEC’s EDGAR system may be searched at

⁷⁵ 17 CFR 200.30–3(a)(12), (59).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 101295 (Oct. 9, 2024), 89 FR 83527.

⁴ 15 U.S.C. 78s(b)(2).

⁵ *Id.*

⁶ 17 CFR 200.30–3(a)(31).

<https://www.sec.gov/edgar/searchedgar/legacy/companysearch.html>. You may also call the SEC's Public Reference Room at (202) 551-8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-28195 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101741; File No. SR-CboeEDGX-2024-078]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 19.3

November 25, 2024.

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 November 21, 2024, Cboe EDGX Exchange, Inc. ("Exchange" or "EDGX Options") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the "Exchange" or "EDGX Options") proposes to amend Rule 19.3. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/options/regulation/rule_filings/edgx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these

statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 19.3 regarding the criteria for underlying securities. Specifically, the Exchange proposes to amend Rule 19.3(i)(4) to allow the Exchange to list and trade options on shares or other securities ("Fund Shares") that are principally traded on a national securities exchange and are defined as an "NMS stock" under Rule 600 of Regulation NMS and that represent interests the iShares Bitcoin Trust (the "iShares Fund"), the Grayscale Bitcoin Trust (the "Grayscale Fund"), the Grayscale Bitcoin Mini Trust (the "Grayscale Mini Fund"), or the Bitwise Bitcoin ETF (the "Bitwise Fund" and, together with the iShares Fund, the Grayscale Fund, and the Grayscale Mini Fund, the "Bitcoin Funds").³ This is a competitive filing based on similar proposals submitted by Nasdaq ISE, LLC ("ISE") (with respect to the iShares Fund) and NYSE American, LLC ("NYSE American") (with respect to the Grayscale Fund, the Grayscale Mini Fund, and the Bitwise Fund), which were recently approved by the Securities and Exchange Commission (the "Commission").⁴ Current Rule 19.3(i) provides that, subject to certain other criteria set forth in that Rule, securities deemed appropriate for options trading include Fund Shares that represent certain types of interests,⁵

including interests in certain specific trusts that hold financial instruments, money market instruments, precious metals (which are deemed commodities), or Bitcoin (which is deemed a commodity. In addition, Rule 19.3(i)(1) requires that Fund Shares meet the criteria and standards set forth in Rule 19.3(a) and (b)⁶ or (2) be available for creation or redemption each business day from or through the issuer in cash or in kind at a price related to net asset value, and the issuer must be obligated to issue Fund Shares in a specified aggregate number even if some or all of the investment assets required to be deposited have not been received by the issuer, subject to the condition that the person obligated to deposit the investments has undertaken to deliver the investment assets as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the issuer, as provided in the respective prospectus.

The Bitcoin Funds are Bitcoin-backed commodity exchange-traded funds ("ETFs") structured as trusts. Similar to any Fund Share currently deemed appropriate for options trading under

comprising or otherwise based on or representing investments in indexes or portfolios of securities (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities) ("Funds") and/or financial instruments including, but not limited to, stock index futures contracts, options on futures, options on securities and indexes, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse repurchase agreements (the "Financial Instruments"), and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the "Money Market Instruments") constituting or otherwise based on or representing an investment in an index or portfolio of securities and/or Financial Instruments and Money Market Instruments, or (2) represent commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward 477 contracts and/or options on physical commodities and/or non-U.S. currency ("Commodity Pool ETFs") or (3) represent interests in a trust or similar entity that holds a specified non-U.S. currency or currencies deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency or currencies and pays the beneficial owner interest and other distributions on the deposited non-U.S. currency or currencies, if any, declared and paid by the trust ("Currency Trust Shares"), or (4) represent interests in the SPDR Gold Trust or are issued by the iShares COMEX Gold Trust, iShares Silver Trust, the Fidelity Wise Origin Bitcoin Fund (the "Fidelity Fund"), or the ARK 21Shares Bitcoin ETF (the "Ark 21 Fund").

⁶ Rule 19.3(a) and (b) sets forth the criteria that underlying securities must satisfy for option contracts on those underlying securities to be eligible for listing and trading on the Exchange.

³ See Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008, 3009 (January 17, 2024) (SR-NYSEArca-2021-90; SR-NYSEArca-2023-44; SR-NYSEArca-2023-58; SR-NASDAQ-2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SR-CboeBZX-2023-044; and SR-CboeBZX-2023-072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) ("Bitcoin ETP Approval Order").

⁴ See Securities Exchange Act Release Nos. 101128 (September 20, 2024), 89 FR 78942 (September 26, 2024) (SR-ISE-2024-03) ("ISE Approval"); and 101386 (October 18, 2024), 89 FR 84960 (October 24, 2024) (SR-NYSEAMER-2024-49) ("NYSE American Approval").

⁵ See Rule 19.3(i) which permits options trading on Fund Shares that (1) represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities, and that hold portfolios of securities

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Rule 19.3(i), the investment objective of each Bitcoin Fund is for its shares to reflect the performance of Bitcoin (less the expenses of the trust's operations), offering investors an opportunity to gain exposure to Bitcoin without the complexities of Bitcoin delivery. As is the case for Fund Shares currently deemed appropriate for options trading, a Bitcoin Fund's shares represent units of fractional undivided beneficial interest in the trust, the assets of which consist principally of Bitcoin and are designed to track Bitcoin or the performance of the price of Bitcoin and offer access to the Bitcoin market.⁷ The Bitcoin Funds provide investors with cost-efficient alternatives that allow a level of participation in the Bitcoin market through the securities market. The primary substantive difference between Bitcoin Funds and Fund Shares currently deemed appropriate for options trading are that Fund Shares may hold securities, certain financial instruments, and specified precious metals (which are deemed commodities), while Bitcoin Funds hold Bitcoin (which is also deemed a commodity). The Bitcoin Funds are similar to the Fidelity Fund and the Ark 21 Fund, which are already eligible for options trading on the Exchange.⁸

The Exchange's initial listing standards for Fund Shares on which options may be listed and traded on the Exchange will apply to the Bitcoin Funds. Pursuant to Rule 19.3(a), a security (which includes a Fund Share) on which options may be listed and traded on the Exchange must be registered with the Securities and Exchange Commission (the "Commission") and be an "NMS stock" as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934, as amended (the "Act"); and the security shall be characterized by a substantial number of outstanding shares that are widely held and actively traded. Rule 19.3(i)(1) requires that Fund Shares either (1) meet the criteria and standards set forth in Rule 19.3(a) and (b),⁹ or (2) are available for creation or redemption each business day in cash or in kind from the investment company, commodity pool or other entity at a price related to net asset value, and the investment company, commodity pool or other entity is obligated to provide that Fund Shares may be created even if some or all of the securities and/or cash required to be

deposited have not been received by the Fund, the unit investment trust or the management investment company, provided the authorized creation participant has undertaken to deliver the securities and/or cash as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the Fund, all as described in the Fund's or unit trust's prospectus. Each Bitcoin Fund satisfies Rule 19.3(i)(1)(B) as each is subject to this creation and redemption process.

Options on the Bitcoin Funds will be subject to the Exchange's continued listing standards set forth in Rule 19.4(g) for Fund Shares deemed appropriate for options trading pursuant to Rule 19.3(i). Specifically, 19.4(g) provides that Fund Shares that were initially approved for options trading pursuant to Rule 19.3 will not be deemed to meet the requirements for continued approval, and the Exchange shall not open for trading any additional series of option contracts of the class covering such Fund Shares if the security ceases to be an NMS stock (see Rule 19.4(b)(4)). Additionally, the Exchange will not open for trading any additional series of option contracts of the class covering Fund Shares in any of the following circumstances: (1) in the case of options covering Fund Shares approved for trading under Rule 19.3(i)(4)(A), in accordance with the terms of Rule 19.4(b)(1), (2) and (3); (2) in the case of options covering Fund Shares approved pursuant to Rule 19.3(i)(4)(B), following the initial 12-month period beginning upon the commencement of trading in the Fund Shares on a national securities exchange and are defined as NMS stock under Rule 600 of Regulation NMS, there were fewer than 50 record and/or beneficial holders of such Fund Shares for 30 consecutive days; (3) the value of the index, non-U.S. currency, portfolio of commodities including commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or Financial Instruments or Money Market Instruments, or portfolio of securities on which the Fund Shares are based is no longer calculated or available; or (4) such other event occurs or condition exists that in the opinion of the Exchange makes further dealing in such options on the Exchange inadvisable.

Options on each Bitcoin Fund will be physically settled contracts with American-style exercise.¹⁰ Consistent

with current Rule 19.6, which governs the opening of options series on a specific underlying security (including Fund Shares), the Exchange will open at least one expiration month for options on each Bitcoin Fund¹¹ at the commencement of trading on the Exchange and may also list series of options on a Bitcoin Fund for trading on a weekly,¹² monthly,¹³ or quarterly¹⁴ basis. The Exchange may also list long-term equity option series ("LEAPS") that expire from 12 to 39 months from the time they are listed.¹⁵

Pursuant to Rule 19.6, Interpretation and Policy .01, which governs strike prices of series of options on Fund Shares, the interval of strikes prices for series of options on Bitcoin Funds will be \$1 or greater when the strike price is \$200 or less and \$5 or greater where the strike price is over \$200.¹⁶ Additionally, the Exchange may list series of options pursuant to the \$1 Strike Price Interval Program,¹⁷ the \$0.50 Strike Program,¹⁸

in the Rules of the Options Clearing Corporation ("OCC"); and Equity Options Product Specifications January 3, 2024), available at Equity Options Specifications (cboe.com); see also OCC Rules, Chapters VIII (which governs exercise and assignment) and Chapter IX (which governs the discharge of delivery and payment obligations arising out of the exercise of physically settled stock option contracts).

¹¹ See Rule 19.6(b). The monthly expirations are subject to certain listing criteria for underlying securities described within Rule 19.3. Monthly listings expire the third Friday of the month. The term "expiration date" (unless separately defined elsewhere in the OCC By-Laws), when used in respect of an option contract (subject to certain exceptions), means the third Friday of the expiration month of such option contract, or if such Friday is a day on which the exchange on which such option is listed is not open for business, the preceding day on which such exchange is open for business. See OCC By-Laws Article I, Section 1. Pursuant to Rule 19.6(c), additional series of options of the same class may be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the market price of the underlying stock moves more than five strike prices from the initial exercise price or prices. New series of options on an individual stock may be added until the beginning of the month in which the options contract will expire. Due to unusual market conditions, the Exchange, in its discretion, may add a new series of options on an individual stock until the close of trading on the business day prior to expiration.

¹² See Rule 19.6, Interpretation and Policy .05.

¹³ See Rule 19.6, Interpretation and Policy .08.

¹⁴ See Rule 19.6, Interpretation and Policy .04.

¹⁵ See Rule 19.8.

¹⁶ The Exchange notes that for options listed pursuant to the Short Term Option Series Program, the Monthly Options Series Program, and the Quarterly Options Series Program, Rule 19.6, Interpretations and Policies .05, .08, and .04 specifically sets forth intervals between strike prices on Quarterly Options Series, Short Term Option Series, and Monthly Options Series, respectively.

¹⁷ See Rule 19.6, Interpretation and Policy .02.

¹⁸ See Rule 19.6, Interpretation and Policy .06.

⁷ The trust may include minimal cash.

⁸ See Rule 19.3(i); and SR-ChoeEDGX-2024-077.

⁹ Rule 19.3(a) and (b) sets forth the criteria an underlying security must meet for the Exchange to be able to list options on the underlying.

¹⁰ See Rule 19.2, which provides that the rights and obligations of holders and writers are set forth

the \$2.50 Strike Price Program,¹⁹ and the \$5 Strike Program.²⁰ Pursuant to Rule 21.5, where the price of a series of a Bitcoin Fund option is less than \$3.00, the minimum increment will be \$0.05, and where the price is \$3.00 or higher, the minimum increment will be \$0.10.²¹ Any and all new series of Bitcoin Fund options that the Exchange lists will be consistent and comply with the expirations, strike prices, and minimum increments set forth in Rules 19.6 and 21.5, as applicable.

Bitcoin Fund options will trade in the same manner as any other Fund Share options on the Exchange. The Exchange Rules that currently apply to the listing and trading of all Fund Share options on the Exchange, including, for example, Rules that govern listing criteria, expirations, exercise prices, minimum increments, margin requirements, customer accounts, and trading halt procedures will apply to the listing and trading of Bitcoin Funds options on the Exchange in the same manner as they apply to other options on all other Fund Shares that are listed and traded on the Exchange, including the precious-metal backed commodity Fund Shares and the Fidelity and Ark 21 Funds already deemed appropriate for options trading on the Exchange pursuant to current Rule 19.3(i).

Pursuant to Rules 18.7 and 18.9, the position and exercise limits, respectively, for each Bitcoin Fund option will be 25,000 same side option contracts.²² In considering the appropriate position and exercise limits for the Bitcoin Funds, the Exchange reviewed the data presented by ISE in its filing (specifically in Exhibit 3 of the filing) with respect to the iShares Fund²³ and by NYSE American in its

filing with respect to the Grayscale Fund, the Grayscale Mini Fund, and the Bitwise Fund.²⁴

With respect to the iShares Fund, in its filing, ISE considered the iShares Fund market capitalization and average daily volume (“ADV”) against those of other underlying securities, as well as the proposed position limit in relation to other options. In measuring the iShares Fund against other securities, ISE aggregated market capitalization and volume data for securities that have defined position limits utilizing data from The Options Clearing Corporations (“OCC”).²⁵ This pool of data took into consideration 3,984 options on single stock securities, excluding broad based ETFs.²⁶ Next, ISE aggregated the data based on market capitalization and ADV and grouped option symbols by position limit utilizing statistical thresholds for ADV and market capitalization that were one standard deviation above the mean for each position limit category (*i.e.*, 25,000, 50,000 to 65,000, 75,000, 100,000 to less than 250,000, 250,000 to 400,000, 450,000 to 1,000,000, and greater than or equal to 1,000,000) (*sic*).²⁷ Rule 8.30 sets out position limits for various contracts. For example, on the Exchange, like ISE, a 25,000 contract position limit applies to options with an underlying security that does not meet the requirements for a higher options contract position limit. ISE performed an exercise to demonstrate the iShares Fund position limit relative to other options symbols in terms of market capitalization and ADV. For reference the market capitalization for the iShares Fund was 19,789,068 billion²⁸ with an ADV, for the preceding three months prior to August 7, 2024, of greater than 26 million shares.²⁹ By comparison, other options symbols with similar market capitalization and ADV have a position limit in excess of 400,000.³⁰ Therefore, the proposed 25,000 same side position limit for options on the iShares Fund is extremely conservative

relative to these options symbols which are a full standard deviation above the mean in comparison.

Second, ISE reviewed the iShares Fund’s data relative to the market capitalization of the entire Bitcoin market in terms of exercise risk and availability of deliverables. Utilizing data as of August 3, 2024, there were 19,737,193 Bitcoins in circulation.³¹ ISE took a price of \$57,000 that equates to a market capitalization of greater than 1.125 trillion U.S. dollars, and applied that to a position limit of 400,000 for options on the iShares Fund.³² If a position limit of 400,000 options were considered (the position limit that would be typically assigned based upon data) the exercisable risk would represent only 6.6% of the outstanding shares of the iShares Fund. The 25,000 position limit being sought only represents 0.4% of the outstanding shares of the iShares Fund. Since the iShares Fund has a creation and redemption process managed through the issuer, additionally it can be compared the position limit sought to the total market capitalization of the entire Bitcoin market. In this case, the exercisable risk for options on the iShares Fund would be less than 0.01% of the market capitalization of all outstanding Bitcoin. Assuming a scenario where all options on the iShares Fund’s shares were exercised given the proposed 25,000 per same side position limit, this would have a virtually unnoticed impact on the entire Bitcoin market. This analysis demonstrates that the proposed 25,000 per same side position limit is also extremely conservative and more than appropriate for options on the iShares Fund.

Third, ISE reviewed the proposed position limit by comparing it to position limits for derivative products regulated by the Commodity Futures Trading Commission (“CFTC”). While the CFTC, through the relevant Designated Contract Markets, only regulates options positions based upon delta equivalents (creating a less stringent standard), ISE examined equivalent bitcoin futures position limits. In particular, ISE looked at the CME Bitcoin futures contract that has a position limit of 2,000 futures.³³ On August 7, 2024, CME Bitcoin futures

¹⁹ See Rule 19.6, Interpretation and Policy .03.

²⁰ See Rule 19.6(d)(5).

²¹ If options on a Bitcoin Fund are eligible to participate in the Penny Interval Program, the minimum increment will be \$0.01 for series with a price below \$3.00 and \$0.05 for series with a price at or above \$3.00. See 21.5(d) (which describes the requirements for the Penny Interval Program).

²² Rule 18.7(a)(1) provides that no Options Member shall make, for any account in which it has any interest or for the account of any Customer, an opening transaction on any exchange if the Options Member has reason to believe that as a result of such transaction the Options Member or its Customer would, acting alone or in concert with others, directly or indirectly, exceed the applicable position limit fixed by Cboe Exchange, Inc. (“Cboe Options”). Cboe Options Rule 8.30, Interpretation and Policy .10 establishes a position limit for the Bitcoin Fund options of 25,000. See SR-CBOE-2024-051.

²³ See ISE Approval; and Letter from Angela Dunn, Nasdaq ISE, LLC, to Vanessa Countryman, Secretary, Commission, dated August 21, 2024) (“ISE Letter”).

²⁴ See NYSE American Approval.

²⁵ The computations are based on OCC data from August 6, 2024. Data displaying zero values in market capitalization or ADV were removed.

²⁶ The iShares Fund has one asset and therefore is not comparable to a broad based ETF where there are typically multiple components.

²⁷ See ISE Letter at 10.

²⁸ ISE acquired this figure as of August 13, 2024. See <https://www.ishares.com/us/products/333011/ishares-bitcoin-trust>. The global supply of Bitcoin grows each day Bitcoin are minted.

²⁹ See ISE Letter at 10.

³⁰ See, *e.g.*, iShares® iBoxx® \$ High Yield Corporate Bond ETF (“HYG”) with a market capitalization of 13,859,235,000 billion as of November 4, 2024. See <https://www.ishares.com/us/products/239565/ishares-iboxx-high-yield-corporate-bond-etf>. The Exchange notes that HYG has a position limit of 500,000 contracts.

³¹ See ISE Letter at 10.

³² *Id.*

³³ See CME Rulebook Chapter 350 (description of CME Bitcoin Futures) and Chapter 5, Position Limit, Position Accountability and Reportable Level Table in the Interpretations & Special Notices. Each CME Bitcoin futures contract is valued at five Bitcoins as defined by the CME CF Bitcoin Reference Rate (“BRR”). See CME Rule 35001.

settled at \$55,000.³⁴ Taking the position limit of 2,000 futures at a \$5 multiplier equates to \$550 million of notional value for Bitcoin futures. By way of comparison, on August 7, 2024, the iShares Fund settled at \$31.19 per share, which would equate to 17,633,857 shares of the iShares Fund³⁵ if the CME notional position limit were utilized. Since substantial portions of any distributed options portfolio are likely to be out of the money on expiration, an options position limit equivalent to the CME position limit for Bitcoin futures (considering that all options deltas are ≤ 1.00) should be a bit higher than the CME implied 176,338 limit.

The Exchange notes, unlike options contracts, CME position limits are calculated on a net futures-equivalent basis by contract and include contracts that aggregate into one or more base contracts according to an aggregation ratio(s).³⁶ Therefore, if a portfolio includes positions in options on futures, CME would aggregate those positions into the underlying futures contracts in accordance with a table published by CME on a delta equivalent value for the relevant spot month, subsequent spot month, single month and all month position limits.³⁷ If a position exceeds position limits because of an option assignment, CME permits market participants to liquidate the excess position within one business day without being considered in violation of its rules. Additionally, if at the close of trading, a position that includes options exceeds position limits for futures contracts, when evaluated using the delta factors as of that day's close of trading but does not exceed the limits when evaluated using the previous day's delta factors, then the position shall not constitute a position limit violation. Considering CME's position limits on futures for Bitcoin, the Exchange believes that that the proposed same side position limits are

more than appropriate for the iShares Fund options.

In analyzing the proposed position limit for options on the iShares Fund, ISE also considered the supply of Bitcoin. Specifically, ISE examined the number of market participants with position limits that would need to exercise in unison to put the underlying asset under stress. In the case of options on the iShares Fund, the proposed 25,000 same side position limit effectively restricts a market participant from holding positions that could be exercised in excess of 2,500,000 shares of the iShares Fund. Utilizing data from August 12, 2024, the iShares Fund had 611,040,000 shares outstanding, therefore 244 market participants would have to simultaneously exercise position limits in order to create a scenario that may put the underlying asset (iShares Fund) under stress.³⁸ The Exchange notes that historically, from observation only, it appears that no more than five market participants holding position limits in any security have exercised in unison in any option. As unlikely an occurrence as all market participants exercising their position limits in unison would be, if it were to occur, it should be noted that even such an occurrence would not likely put the iShares Fund under stress as economic incentives, would induce the creation of more shares through the ETF creation and redemption process.

By way of example, given that the current global supply of Bitcoin, the underlying asset of the iShares Fund, is 19,789,068³⁹ and that each Bitcoin can currently be redeemed for 1,755 shares of the iShares Fund, another 34,729,814,340 shares of the iShares Fund could be created. To exhaust this supply of the iShares Fund, 13,891 market participants would have to simultaneously exercise their position limit. Comparing the iShares Fund to the SPDR Gold Shares ("GLD") ETF or the iShares Silver Trust ("SLV") ETF, which have position limits of 250,000 or ten times the proposed position limit for the iShares Fund as well as lower shares outstanding in both products,⁴⁰ it is

unjustified to mandate a different level of stringency with respect to a position limit for options on the iShares Fund.

With respect to the Grayscale Fund, the Grayscale Mini Fund, and the Bitwise Fund, the Exchange reviewed the data presented by NYSE American in its filing. NYSE American aggregated market capitalization, volume, and shares outstanding data of the Bitcoin Funds and compared that data to those of other ETFs, and compared the proposed position limit of the Bitcoin Funds to the position limits of the options overlying those other ETFs. The Exchange reviewed NYSE American's data that demonstrated that each of these three Bitcoin Funds would easily qualify for the 250,000-contract position limit available to other ETFs and ETPs pursuant to the criterion in Rule 8.30, Interpretation and Policy .02, which requires the most recent six-month trading volume of the underlying security to be at least 100,000,000 shares.⁴¹

Bitcoin Fund	Total volume (shares) (as of September 30, 2024)
Grayscale Fund	723,758,100
Grayscale Mini Fund	335,492,930
Bitwise Fund	263,965,870

Based on this trading volume,⁴² each Bitcoin Fund exceeded the requisite 100,000,000 shares necessary to qualify for the 250,000-contract position and exercise limits. By comparison, the underlying of other options with six-month trading volume less than the volumes in the table above are eligible for position and exercise limits of at least 250,000.⁴³

<https://www.ishares.com/us/products/239855/ishares-silver-trust-fund>.

⁴¹ Rule 8.30, Interpretation and Policy .02(e) states that to be eligible for the 250,000 option contract limit, either the most recent six-month trading volume of the underlying security must have totaled at least 100,000,000 shares; or the most recent six-month trading volume of the underlying security must have totaled at least 75,000,000 shares and the underlying security must have at least 300,000,000 currently outstanding.

⁴² See FactSet, 9/30/2024, <https://www.factset.com/data-attribution>. Bitwise Fund shares began trading on July 31, 2024, and therefore the data in the above table has only two months of trading data available.

⁴³ See <https://www.theocc.com/Market-Data/Market-Data-Reports/Series-and-Trading-Data/Series-Search> (including the following symbols that have a position limit of 250,000: GLD, IAU, SLV, SIVR, SGOL).

³⁴ See https://finance.yahoo.com/quote/BTC%3Df/history/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LnNvbS8&guce_referrer_sig=AQAAAM7ngaS6ZQS9c2Wzx7JW2IUe-_-1FnLyr8T-Qw4jjkleHyCENfSMIEpPPt2hCzPDeryTVyB78NIwxkwFB5Fuw-jA-YiuSmYJHBriWbV6dYn91VQfzQNT3p0l2RkYLD3HhzXPwu4AP5as-WzHNpEBon4sk5sUZXgkapMrZR--CS.

³⁵ See ISE Letter at 11.

³⁶ See CME Rulebook Chapter 5, Position Limit, Position Accountability and Reportable Level Table in the Interpretations & Special Notices.

³⁷ Id.

³⁸ See <https://www.ishares.com/us/products/333011/ishares-bitcoin-trust>.

³⁹ This figure was acquired as of August 13, 2024. See <https://www.ishares.com/us/products/333011/ishares-bitcoin-trust>. The global supply of Bitcoin grows each day Bitcoin are minted.

⁴⁰ As of August 13, 2024, GLD had 294,000,000 shares outstanding and SLV had 510,200,000 shares outstanding. See <https://www.ssga.com/us/en/intermediary/etfs/funds/spdr-gold-shares-gld> and

Second, with respect to the outstanding shares of these three Bitcoin Funds, the Exchange reviewed NYSE American's data regarding the outstanding shares of each of these Bitcoin Funds. NYSE American

performed an exercise to demonstrate that if a market participant held the maximum number of contracts possible pursuant to the proposed position and exercise limits (25,000 contracts), the equivalent shares represented by the

proposed position and exercise limits (2,500,000 shares) would represent the following approximate percentage of outstanding shares as of August 30, 2024:

Bitcoin Fund	Proposed position/ exercise limits in equivalent shares	Outstanding shares	Percentage of outstanding shares
Grayscale Fund	2,500,000	284,570,100	0.9
Grayscale Mini Fund	2,500,000	366,950,100	0.7
Bitwise Fund	2,500,000	68,690,000	3.6

As this table demonstrates, if a market participant held the maximum permissible options positions in one of the Bitcoin Fund options and exercised all of them at the same time, that market participant would control a small percentage of the outstanding shares of the underlying Bitcoin Fund. For

example, as noted above, a position limit of 25,000 same side contracts effectively restricts a market participant from holding positions that could result in the receipt of no more than 2,500,000 shares of the applicable Bitcoin Fund (if that market participant exercised all its options). NYSE American used the

number of shares outstanding for each Bitcoin Fund as of August 30, 2024, and calculated the approximate number of market participants that could hold the maximum of 25,000 same side positions in each Bitcoin Fund that would equate to the number of shares outstanding of that Bitcoin Fund:

Bitcoin Fund	Outstanding shares	Number of market participants with 25,000 same side positions
Grayscale Fund	284,570,100	114
Grayscale Mini Fund	366,950,100	147
Bitwise Fund	68,690,000	27

This means if 114 market participants had 25,000 same side positions in options on the Grayscale Fund, each of them would have to simultaneously exercise all of those options to create a scenario that may put the underlying security under stress. Similarly, this means if 147 market participants had 25,000 same side positions in options on the Grayscale Mini Fund, each of them would have to simultaneously exercise all of those options to create a scenario that may put the underlying security under stress. Finally, this means if 27 market participants had

25,000 same side positions in options on the Bitwise Fund, each of them would have to simultaneously exercise all of those options to create a scenario that may put the underlying security under stress. The Exchange believes it is highly unlikely for this to occur; however, even if such event did occur, the Exchange would not expect any of the Bitcoin Fund to be under stress because such an event would merely induce the creation of more shares through the trust's creation and redemption process.

NYSE American also performed an exercise to compare the size of the

proposed position limit to the market capitalization of the Bitcoin market given that the issuer of each of these three Bitcoin Funds may create and redeem shares that represent an interest in Bitcoin. NYSE American took the global supply of Bitcoin, which was 19,747,066, and the price of one Bitcoin, which was approximately \$59,108.23, as of August 30, 2024, which equates to a market capitalization of approximately \$1.167 trillion.⁴⁴ Consider the proposed position and exercise limit of 25,000 option contracts for each Bitcoin Fund option. A position and exercise limit of

⁴⁴ See <https://www.blockchain.com/explorer/charts/total-bitcoins>.

25,000 same side contracts effectively restricts a market participant from holding positions that could result in the receipt of no more than 2,500,000 shares of the Grayscale Fund, the

Grayscale Mini Fund, or the Bitwise Fund, as applicable (if that market participant exercised all its options). NYSE American considered the share price of each Bitcoin Fund on August

30, 2024 and calculated the value of 2,500,000 shares of the Bitcoin Fund at that price, and the approximate percentage of that value of the size of the Bitcoin market:

Bitcoin Fund	Share price (\$)	Value of 2,500,000 shares	Percentage of Bitcoin market
Grayscale Fund	46.75	116,875,000	0.010
Grayscale Mini Fund	5.20	13,000,000	0.001
Bitwise Fund	31.95	79,875,000	0.007

Therefore, if a market participant with the maximum 25,000 same side contracts in options on the Grayscale Fund, the Grayscale Mini Fund, or the

Bitwise Fund exercised all positions at one time, such an event would have no practical impact on the Bitcoin market. The Exchange also reviewed NYSE American's data regarding the market

capitalization of each of these three Bitcoin Funds relative to the market capitalization of the entire Bitcoin market, as of August 30, 2024:⁴⁵

	Bitcoin/shares outstanding	Market value (\$)	% of total Bitcoin market
Total Bitcoin Market	19,747,066	1,167,214,096,788	100
Grayscale Fund	284,570,100	13,443,091,524	1.15
Grayscale Mini Fund	366,950,100	1,930,157,526	0.17
Bitwise Fund	68,690,000	2,221,640,670	0.19

As this data gathered by NYSE American demonstrates, none of these three Bitcoin Funds represent more than 1.2% of the global supply of Bitcoin (19,747,066). Based on the \$46.75 price of a Grayscale Fund share on August 30, 2024, a market participant could have redeemed one Bitcoin for approximately 1,264 Grayscale Fund shares. Another 24,967,146,455 Grayscale Fund shares could be created before the supply of Bitcoin was exhausted. As a result, 9,987 market participants would have to simultaneously exercise 25,000 same side positions in Grayscale Fund options to receive shares of the Grayscale Fund holding the entire global supply of Bitcoin. Similarly, based on the \$5.20 price of a Grayscale Mini Fund share on August 30, 2024, a market participant

could have redeemed one Bitcoin for approximately 11,367 Grayscale Mini Fund shares. Another 224,464,249,382 Grayscale Mini Fund shares could be created before the supply of Bitcoin was exhausted. As a result, 89,786 market participants would have to simultaneously exercise 25,000 same side positions in Grayscale Mini Fund options to receive shares of Grayscale Mini Fund holding the entire global supply of Bitcoin. Similarly, based on the \$31.95 price of a Bitwise Fund share on August 30, 2024, a market participant could have redeemed one Bitcoin for approximately 1,850 Bitwise Fund shares. Another 36,532,522,591 Bitwise Fund shares could be created before the supply of Bitcoin was exhausted. As a result, 14,613 market

participants would have to simultaneously exercise 25,000 same side positions in Bitwise Fund options to receive shares of Bitwise Fund holding the entire global supply of Bitcoin.

As ISE did with respect to the iShares Fund, NYSE American compared the proposed position limits to the position limit of CME Bitcoin futures, which as noted above is 2,000 futures. On August 28, 2024, CME Aug 24 Bitcoin Futures settled at \$58,950. A position of 2,000 CME Bitcoin futures, therefore, would have a notional value of \$589,500,000. The following table shows the share price of each Bitcoin Fund on August 28, 2024, and the approximate number of option contracts that equates to that notional value:

Bitcoin Fund	Share price (\$)	Number of option contracts
Grayscale Fund	46.94	125,585
Grayscale Mini Fund	5.23	1,127,151
Bitwise Fund	32.08	183,759

The approximate number of option contracts for each Bitcoin Fund that equate to the notional value of CME Bitcoin futures is significantly higher than the proposed limit of 25,000 options contract for each Bitcoin Fund option. As noted above, the fact that many options ultimately expire out-of-the-money and thus are not exercised

for shares of the underlying, while the delta of a Bitcoin Future is 1, further demonstrates how conservative the proposed limits of 25,000 options contracts are for the Bitcoin Fund options.

The Exchange notes, again, unlike options contracts, CME position limits are calculated on a net futures-

equivalent basis by contract and include contracts that aggregate into one or more base contracts according to an

⁴⁵ See *id.*

aggregation ratio(s).⁴⁶ Therefore, if a portfolio includes positions in options on futures, CME would aggregate those positions into the underlying futures contracts in accordance with a table published by CME on a delta equivalent value for the relevant spot month, subsequent spot month, single month and all month position limits.⁴⁷ If a position exceeds position limits because of an option assignment, CME permits market participants to liquidate the excess position within one business day without being considered in violation of its rules. Additionally, if at the close of trading, a position that includes options exceeds position limits for futures contracts, when evaluated using the delta factors as of that day's close of trading but does not exceed the limits when evaluated using the previous day's delta factors, then the position shall not constitute a position limit violation. Considering CME's position limits on futures for Bitcoin, the Exchange believes that that the proposed same side position limits are more than appropriate for the Grayscale Fund, Grayscale Mini Fund, and Bitwise Fund options.

While the supply of Bitcoin is limited to 21,000,000, it is believed that it will take more than 100 years to fully mine the remaining Bitcoin.⁴⁸ The Exchange notes that Bitcoin is a viable economic alternative to traditional assets. The price of goods denominated by Bitcoin has actually declined. This dynamic not only makes a fixed supply desirable, but a necessary condition of the value added by this asset in the broader economy. Unlike the Bitcoin Funds, the number of shares that corporations may issue is limited. However, like corporations, which authorize additional shares, repurchase shares, or split their shares, the Bitcoin Funds may create, redeem, or split shares in response to demand. Given the significant unlikelihood of any of events described above ever occurring, the Exchange does not believe options on the Bitcoin Funds should be subject to position and exercise limits even lower than those proposed (which are already equal to the lowest available limit for equity options in the industry) to protect the supply of Bitcoin.

Importantly, because the supply of Bitcoin is much larger than the available supply of most securities and the proposed 25,000 contract position limit

is so conservative, the Exchange believes that evaluating the available supply of Bitcoin in establishing a position limit for options on each of the Bitcoin Funds would demonstrate that the proposed limit is safe for investors and the market.⁴⁹ Each Bitcoin Fund represents less than 2% of the entire Bitcoin supply. When comparing the market capitalization of bitcoin against the largest securities, Bitcoin would rank 7th among those securities.⁵⁰ Further, the Exchange believes that its proposal to list options on the Bitcoin Funds each with a position limit of 25,000 on the same side is a conservative position limit that does not lend itself to manipulation in the market given the ample market capitalization and liquidity in each Bitcoin Fund. If we look to the liquidity statistics of similar instruments and their concomitant position limits, we are able to extrapolate a reasonable standard for arriving at a position limit for a new product. In this case we can look to GLD, SLV, and the ProShares Bitcoin Strategy ETF. These products have volume statistics and "float" statistics, which gauge liquidity, which are in line, yet slightly lower than the Bitcoin Funds. All three of these reference products have position limits of 250,000 contracts. These reference products are remarkably similar in nature to the Bitcoin Funds; they are exchange-traded products ("ETPs") holding one asset in a trust.

The Exchange believes the available supply of Bitcoin is not relevant to the determination of position and exercise limits for options overlying the Bitcoin Funds.⁵¹ Position and exercise limits are not a tool that should be used to address

a potential limited supply of the underlying of an underlying. Position and exercise limits do not limit the total number of options that may be held, but rather they limit the number of positions a single customer may hold or exercise at one time.⁵² "Since the inception of standardized options trading, the options exchanges have had rules imposing limits on the aggregate number of options contracts that a member or customer could hold or exercise."⁵³ Position and exercise limit rules are intended "to prevent the establishment of options positions that can be used or might create incentives to manipulate or disrupt the underlying market so as to benefit the options position. In particular, position and exercise limits are designed to minimize the potential for mini-manipulations and for corners or squeezes of the underlying market. In addition, such limits serve to reduce the possibility for disruption of the options market itself, especially in illiquid options classes."⁵⁴

The Exchange notes that a Registration Statement on Form S-1 was filed with the Commission for each Bitcoin Fund, each of which described the supply of Bitcoin as being limited to 21,000,000 (of which approximately 90% had already been mined), and that the limit would be reached around the year 2140.⁵⁵ Each Registration Statement permits an unlimited number of shares of the applicable Bitcoin Fund to be created. Further, the Commission approved proposed rule changes that permitted the listing and trading of shares of each Bitcoin Fund, which approval did not comment on the sufficient supply of Bitcoin or address whether there was a risk that permitting an unlimited number of shares for a Bitcoin Fund would impact the supply

⁴⁹ A supply consideration would likely be valuable for an option symbol that had far less liquidity than the Trust.

⁵⁰ See <https://companiesmarketcap.com/usa/largest-companies-in-the-usa-by-market-cap/>.

⁵¹ The Exchange is unaware of any proposed rule change related to position and exercise limits for any equity option (including commodity ETF options) for which the Commission required consideration of whether the available supply of an underlying (whether it be a corporate stock or an ETF) or the contents of an ETF (commodity or otherwise) should be considered when an exchange proposed to establish those limits. See, e.g., Securities Exchange Act Release No. 57894 (May 30, 2008), 73 FR 32061 (June 5, 2008) (SR-CBOE-2005-11) (approval order in which the Commission stated that the "listing and trading of Gold Trust Options will be subject to the exchanges' rules pertaining to position and exercise limits and margin"). The Exchange notes when the Commission approved this filing, the position limits in Rule 8.30 were the same as they are today. For reference, the current position and exercise limits for options on SPDR Gold Shares ETF ("GLD") and options on iShares Silver Trust ("SLV") are 250,000 contracts, or 10 times that proposed position and exercise limit for the Bitcoin Fund options.

⁵² For example, suppose an option has a position limit of 25,000 option contracts and there are a total of 10 investors trading that option. If all 10 investors max out their positions, that would result in 250,000 option contracts outstanding at that time. However, suppose 10 more investors decide to begin trading that option and also max out their positions. This would result in 500,000 option contracts outstanding at that time. An increase in the number of investors could cause an increase in outstanding options even if position limits remain unchanged.

⁵³ See Securities Exchange Act Release No. 39489 (December 24, 1997), 63 FR 276 (January 5, 1998) (SR-CBOE-1997-11).

⁵⁴ See *id.*

⁵⁵ See iShares Fund Form S-1 Registration Statement, at p. 25, [bit20230608_s1.htm](https://www.sec.gov/Archives/edgar/data/1588489/000119312517013693/d157414ds1.htm); Grayscale Fund Form S-1 Registration Statement, at p. 17, <https://www.sec.gov/Archives/edgar/data/1588489/000119312517013693/d157414ds1.htm>; Grayscale Mini Fund, Form S-1 Registration Statement, at p. 21, <https://www.sec.gov/Archives/edgar/data/2015034/000119312524065444/d785023ds1.htm>; and Bitwise Amendment No. 2, to S-1, at p. 47, https://www.sec.gov/Archives/edgar/data/1763415/000199937123000735/bitwise-s1a_120423.htm.

⁴⁶ See CME Rulebook Chapter 5, Position Limit, Position Accountability and Reportable Level Table in the Interpretations & Special Notices.

⁴⁷ *Id.*

⁴⁸ See <https://www.blockchain.com/explorer/assets/btc> (citing 21 million as the "total supply" of bitcoin).

of Bitcoin.⁵⁶ Therefore, the Exchange believes the Commission had ample time and opportunity to consider whether the supply of Bitcoin was sufficient to permit the creation of unlimited Bitcoin Fund shares, and does not believe considering this supply with respect to the establishment of position and exercise limits is appropriate given its lack of relevance to the purpose of position and exercise limits. However, given the significant size of the Bitcoin supply, the proposed positions limits are more than sufficient to protect investors and the market.

All of the above information demonstrates that the proposed position and exercise limits for the Bitcoin Fund options are more than reasonable and appropriate. The trading volume, ADV, and outstanding shares of each Bitcoin Fund demonstrate that these funds are actively traded and widely held, and proposed position and exercise limits are well below those of other ETFs with similar market characteristics. The proposed position and exercise limits are the lowest position and exercise limits available for equity options in the industry, are extremely conservative, and are more than appropriate given each Bitcoin Fund's market capitalization and ADV.

Today, the Exchange has an adequate surveillance program in place for options. The Exchange intends to apply those same program procedures to options on the Bitcoin Funds that it applies to the Exchange's other options products.⁵⁷ The Exchange's market surveillance staff would have access to the surveillances conducted by Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., and Cboe EDGA Exchange, Inc., in addition to the Exchange's equity market,⁵⁸ with respect to the Bitcoin Funds and would review activity in the underlying Bitcoin Funds when conducting surveillances for market abuse or manipulation in the options on the Bitcoin Funds. Additionally, the Exchange is a member of the Intermarket Surveillance Group ("ISG") under the Intermarket Surveillance Group Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. In addition to obtaining information from its affiliated markets, the Exchange

would be able to obtain information regarding trading in shares of the Bitcoin Funds from their primary listing markets and from other markets that trades shares of the Bitcoin Funds through ISG. In addition, the Exchange has a Regulatory Services Agreement with the Financial Industry Regulatory Authority ("FINRA") for certain market surveillance, investigation and examinations functions. Pursuant to a multi-party 17d-2 joint plan, all options exchanges allocate amongst themselves and FINRA responsibilities to conduct certain options-related market surveillance that are common to rules of all options exchanges.⁵⁹

The underlying shares of spot bitcoin exchange-traded products ("ETPs"), including the Bitcoin Funds, are also subject to safeguards related to addressing market abuse and manipulation. As the Commission stated in its order approving proposals of several exchanges to list and trade shares of spot bitcoin-based ETPs, "[e]ach Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market.⁶⁰ The Exchange states that, given the consistently high correlation between the CME Bitcoin futures market and the spot bitcoin market, as confirmed by the Commission through robust correlation analysis, the Commission was able to conclude that such surveillance sharing agreements could reasonably be "expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [Bitcoin ETPs]." ⁶¹ In light of surveillance measures related to both

options and futures as well as the underlying Bitcoin Funds,⁶² the Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Bitcoin Funds. Further, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on Bitcoin ETPs.

The Exchange has also analyzed its capacity and represents that it believes the Exchange and OPRA have the necessary systems capacity to handle the additional traffic associated with the listing of new series that may result from the introduction of options on Bitcoin Funds up to the number of expirations currently permissible under the Rules. Because the proposal is limited to two classes, the Exchange believes any additional traffic that may be generated from the introduction of Bitcoin Fund options will be manageable.

The Exchange believes that offering options on Bitcoin Funds will benefit investors by providing them with an additional, relatively lower cost investing tool to gain exposure to the price of Bitcoin and hedging vehicle to meet their investment needs in connection with Bitcoin-related products and positions. The Exchange expects investors will transact in options on Bitcoin Funds in the unregulated over-the-counter ("OTC") options market,⁶³ but may prefer to trade such options in a listed environment to receive the benefits of trading listing options, including (1)

⁶² See Securities Exchange Act Release Nos. 99290 (January 8, 2024), 89 FR 2338, 2343, 2347–2348 (January 12, 2024) (SR–CboeBZX–2023–044) Notice of Filing of Amendment No. 3 to a Proposed Rule Change to List and Trade Shares of the Fidelity Wise Origin Bitcoin Fund Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares); and 99288 (January 8, 2024), 89 FR 2387, 2392, 2399–2400 (January 12, 2024) (SR–CboeBZX–2023–028) (Notice of Filing of Amendment No. 5 to a Proposed Rule Change To List and Trade Shares of the ARK 21Shares Bitcoin ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares). See also Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008, 3009 (January 17, 2024) (SR–NYSEArca–2021–90; SR–NYSEArca–2023–44; SR–NYSEArca–2023–58; SR–NASDAQ–2023–016; SR–NASDAQ–2023–019; SR–CboeBZX–2023–028; SR–CboeBZX–2023–038; SR–CboeBZX–2023–040; SR–CboeBZX–2023–042; SR–CboeBZX–2023–044; and SR–CboeBZX–2023–072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) ("Bitcoin ETP Approval Order").

⁶³ The Exchange understands from customers that investors have historically transacted in options on Fund Shares in the OTC options market if such options were not available for trading in a listed environment.

⁵⁶ See Bitcoin ETP Approval Order.

⁵⁷ The surveillance program includes surveillance patterns for price and volume movements as well as patterns for potential manipulation (e.g., spoofing and marking the close).

⁵⁸ Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., and Cboe EDGA Exchange, Inc. are affiliated markets of the Exchange.

⁵⁹ Section 19(g)(1) of the Act, among other things, requires every self-regulatory organization ("SRO") registered as a national securities exchange or national securities association to comply with the Act, the rules and regulations thereunder, and the SRO's own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members. See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO ("common members"). Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

⁶⁰ See Bitcoin ETP Approval Order.

⁶¹ See Bitcoin ETP Approval Order, 89 FR at 3010–11.

enhanced efficiency in initiating and closing out positions; (2) increased market transparency; and (3) heightened contra-party creditworthiness due to the role of OCC as issuer and guarantor of all listed options. The Exchange believes that listing Bitcoin Fund options may cause investors to bring this liquidity to the Exchange, would increase market transparency and enhance the process of price discovery conducted on the Exchange through increased order flow. The Fund Shares that hold financial instruments, money market instruments, or precious metal commodities on which the Exchange may already list and trade options are trusts structured in substantially the same manner as Bitcoin Funds and essentially offer the same objectives and benefits to investors, just with respect to different assets. The Exchange notes that it has not identified any issues with the continued listing and trading of any Fund Share options, including Fund Shares that hold commodities (*i.e.*, precious metals) that it currently lists and trades on the Exchange.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.⁶⁴ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁶⁵ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁶⁶ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that the proposal to list and trade options on the Bitcoin Funds will remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors because

offering options on the Bitcoin Funds will provide investors with an opportunity to realize the benefits of utilizing options on a Bitcoin Fund, including cost efficiencies and increased hedging strategies. The Exchange believes that offering options on a competitively priced ETF based on spot Bitcoin will benefit investors by providing them with an additional, relatively lower-cost risk management tool, allowing them to manage, more easily, their positions and associated risks in their portfolios in connection with exposure to spot Bitcoin. Today, the Exchange lists options on other commodity (including Bitcoin) ETFs structured as a trust, which essentially offer the same objectives and benefits to investors, and for which the Exchange has not identified any issues with the continued listing and trading of options on those ETFs.

The Exchange also believes the proposal to permit options on the Bitcoin Funds will remove impediments to and perfect the mechanism of a free and open market and a national market system, because options on the Bitcoin Funds will comply with current Exchange Rules. Options on the Bitcoin Funds must satisfy the initial listing standards and continued listing standards currently in the Rules, applicable to options on all ETFs, including options on other commodity ETFs already deemed appropriate for options trading on the Exchange pursuant to Rule 19.3(i). Additionally, as demonstrated above, the Bitcoin Funds are characterized by a substantial number of shares that are widely held and actively traded. Further, Rules that currently govern the listing and trading of options on ETFs, including permissible expirations, strike prices, minimum increments, position and exercise limits (as proposed herein), and margin requirements, will govern the listing and trading of options on the Bitcoin Funds.

The proposed position and exercise limits for options on each of the Bitcoin Funds is 25,000 contracts. These position and exercise limits are the lowest position and exercise limits available in the options industry, are extremely conservative and more than appropriate given Bitcoin Fund's market capitalization, ADV, and high number of outstanding shares. The proposed position limit, and exercise limit, is consistent with the Act as it addresses concerns related to manipulation and protection of investors because, as demonstrated above, the position limit (and exercise limit) is extremely conservative and more than appropriate given the Bitcoin Funds are actively

traded. In support of the proposed position and exercise limits for options on the Bitcoin Funds are 25,000 contracts, the Exchange is citing the in depth analysis each of ISE and NYSE American did in their respective filings. As noted above, in the ISE and NYSE American Approvals, each of ISE and NYSE American considered the: (1) applicable Bitcoin Fund's market capitalization and ADV, and proposed position limit in relation to other securities; (2) market capitalization of the entire Bitcoin market in terms of exercise risk and availability of deliverables; (3) proposed position limit by comparing it to position limits for derivative products regulated by the CFTC; and (4) supply of Bitcoin. Based on the Exchange's review of these analyses, the Exchange believes that the setting position and exercise limits for options on each of the Bitcoin Funds is 25,000 contracts is more than appropriate. The proposed position and exercise limits reasonably and appropriately balance the liquidity provisioning in the market against the prevention of manipulation. The Exchange believes these proposed limits are effectively designed to prevent an individual customer or entity from establishing options positions that could be used to manipulate the market of the underlying as well as the Bitcoin market.⁶⁷

The Exchange represents that it has the necessary systems capacity to support the new Bitcoin Fund options. As discussed above, the Exchange believes that its existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing and trading Fund Share options, including Bitcoin Fund options.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act as the Bitcoin Fund options will be equally available to all market participants who wish to trade such options and will trade generally in the same manner as other options. The Rules that currently apply to the listing

⁶⁴ 15 U.S.C. 78f(b).

⁶⁵ 15 U.S.C. 78f(b)(5).

⁶⁶ *Id.*

⁶⁷ See Securities Exchange Act Release No. 39489 (December 24, 1997), 63 FR 276 (January 5, 1998) (SR-CBOE-1997-11).

and trading of all Fund Share options on the Exchange, including, for example, Rules that govern listing criteria, expirations, exercise prices, minimum increments, margin requirements, customer accounts, and trading halt procedures will apply to the listing and trading of Bitcoin Funds options on the Exchange in the same manner as they apply to other options on all other Fund Shares that are listed and traded on the Exchange. Also, and as stated above, the Exchange already lists options on other commodity-based Fund Shares (including Bitcoin-based).⁶⁸ Further, the Bitcoin Funds would need to satisfy the maintenance listing standards set forth in the Exchange Rules in the same manner as any other Fund Share for the Exchange to continue listing options on them.

The Exchange does not believe that the proposal to list and trade options on Bitcoin Funds will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the extent that the advent of Bitcoin Fund options trading on the Exchange may make the Exchange a more attractive marketplace to market participants at other exchanges, such market participants are free to elect to become market participants on the Exchange. The Commission recently approved rule filings of other exchanges to permit the listing and trading of options on the Bitcoin Funds.⁶⁹ The Exchange notes that listing and trading Bitcoin Fund options on the Exchange will subject such options to transparent exchange-based rules as well as price discovery and liquidity, as opposed to alternatively trading such options in the OTC market.

The Exchange believes that the proposed rule change may relieve any burden on, or otherwise promote, competition, as it is designed to increase competition for order flow on the Exchange in a manner that is beneficial to investors by providing them with a lower-cost option to hedge their investment portfolios. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues that offer similar products. Ultimately, the Exchange believes that offering Bitcoin Fund options for trading on the Exchange will promote competition by providing investors with an additional, relatively low-cost means to hedge their portfolios and meet their investment

needs in connection with Bitcoin prices and Bitcoin-related products and positions on a listed options exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act⁷⁰ and Rule 19b-4(f)(6) thereunder.⁷¹

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)⁷² permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission previously approved the listing of options on the Bitcoin Funds.⁷³ The Exchange has provided information regarding the underlying Bitcoin Funds, including, among other things, information regarding trading volume, the number of beneficial holders, and the market capitalization of the Bitcoin Funds. The proposal also establishes position and exercise limits for options on the Bitcoin Funds and provides information regarding the surveillance procedures that will apply to options on the Bitcoin Funds. The Commission believes that waiver of the operative delay could benefit investors by providing an additional venue for trading Bitcoin Fund options. Therefore, the Commission believes that waiver of the

30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.⁷⁴

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.

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-CboeEDGX-2024-078 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-CboeEDGX-2024-078. 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,

⁷⁰ 15 U.S.C. 78s(b)(3)(A).

⁷¹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission waives this requirement.

⁷² 17 CFR 240.19b-4(f)(6)(iii).

⁷³ See *supra* note 4.

⁷⁴ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁶⁸ See Rule 19.3(i)(4).

⁶⁹ See ISE Approval and NYSE American Approval.

Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeEDGX-2024-078 and should be submitted on or before December 23, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷⁵

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-28111 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101742; File No. SR-CboeBZX-2024-113]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt Fees for New Logical Ports in Connection With a New Connectivity Offering on Its Equity Options Platform

November 25, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 12, 2024, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) proposes to adopt fees for new logical ports in connection with a new connectivity offering on its equity options platform. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (http://markets.cboe.com/us/equities/regulation/rule_filings/BZX/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule to adopt fees for Unitized Logical Ports, a new connectivity offering for its equity options platform (“BZX Options”) and adopt new Average Daily Quote and Average Daily Order fees.³

Unitized Port Fees

By way of background, Exchange Members may interface with the Exchange’s Trading System by utilizing either the Financial Information Exchange (“FIX”) protocol or the Binary Order Entry (“BOE”) protocol. The Exchange further offers a variety of logical ports,⁴ which provide users of these ports with the ability within the Exchange’s System to accomplish a specific function through a connection, such as order entry, data receipt or access to information. For example, such ports include Logical Ports,⁵ Purge

Ports,⁶ and Ports with Bulk Quoting Capabilities⁷ (“Bulk Ports”). By way of further background, each of these ports corresponds to a single running order handler. Each order handler processes the messages it receives from these ports from the connected Members. This processing includes determining whether the message contains the required information to enter the System, whether the message parameters satisfy port-level (*i.e.*, pre-trade) risk controls, and where to send that message within the System (*i.e.*, to which matching engine⁸). Once an order handler completes the processing of a message, it sends that message to the appropriate matching engine.

Historically, all order handlers connect to all matching engines. That is, under the BOEv2 and FIX protocols, Members were able to access all symbols from a single logical port since each port corresponds to a single order handler that conveniently connects to all matching engines (“convenience layer”). Although the Exchange configures the software and hardware for its order handlers in the same manner, there can be a natural variance in the amount of time it takes individual order handlers to process messages of the same type under this architecture. Factors that contribute to this differentiation in processing times include the availability of shared resources (such as memory), which is impacted by (among other things) then-current message rates, the number of active symbols (*i.e.*, classes), and recent messages for a symbol. This natural differentiation in processing times inherently may cause some messages to

Port, Multicast PITCH Spin Server Port or GRP Port).

⁶ Purge Ports provide users the ability to cancel a subset (or all) of open orders across Executing Firm ID(s) (“EFID(s)”), Underlying symbol(s), or CustomGroupID(s), across multiple logical ports/sessions. See Securities Exchange Act Release 79956 (February 3, 2017), 82 FR 10102 (February 9, 2017) (SR-BatsBZX-2017-05). See also https://cdn.cboe.com/resources/membership/US_Options_BOE_Specification.pdf and https://cdn.cboe.com/resources/membership/US_Options_FIX_Specification.pdf.

⁷ See Exchange Rule 21.1 (l)(3), definition of “bulk port.” Bulk Ports provide users with the ability to submit and update multiple quote bids and offers in one message through logical ports enabled for bulk-quoting.

⁸ A matching engine is a part of the Exchange’s System that processes options quotes and trades on a symbol-by-symbol basis. Some matching engines will process option classes with multiple root symbols, and other matching engines will be dedicated to one single option root symbol (for example, options on SPY will be processed by one single matching engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated matching engine. A particular root symbol may not be assigned to multiple matching engines.

⁷⁵ 17 CFR 200.30-3(a)(12), (59).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange initially submitted the proposed rule change on August 30, 2024 and was effective September 3, 2024 (SR-CboeBZX-2024-082). On September 13, 2024, the Exchange withdrew that filing and submitted SR-CboeBZX-2024-088. On November 12, 2024, the Exchange withdrew that filing and submitted this filing.

⁴ See Exchange Rule 21.1 (l)(2), definition of “logical port.” Logical ports include FIX and BOE ports (used for order entry), drop logical port (which grants users the ability to receive and/or send drop copies) and ports that are used for receipt of certain market data feeds.

⁵ The term “Logical Ports” used herein shall refer to FIX and BOE ports (used for order entry). See Cboe BZX Options Fee Schedule, Options Logical Port Fees, “Logical Ports” (which exclude Purge

be sent from an order handler to a matching engine ahead of other messages that the Exchange's System may have received earlier on a different order handler.

The Exchange recently implemented a new architecture and protocol which includes, among other things, a single gateway per matching engine ("unitized layer"), which renders the above-described natural variance of order handler processing irrelevant for Members that connect to the unitized order handler.⁹ More specifically, effective August 19, 2024, the Exchange implemented this new unitized access architecture and a new version of its Binary Order Entry (BOE) protocol¹⁰ ("BOEv3"), which also resulted in the adoption of new logical port types

("Unitized Logical Ports"), for which the Exchange is now seeking to establish fees.¹¹ Under the new unitized BOEv3 architecture, a single BOEv3 order handler corresponds to a single matching engine and all message traffic (including FIX and current BOEv2¹² port traffic) pass through this unitized BOEv3 order handler before reaching that order handler's corresponding matching engine. If a Member desires to access this optional unitized layer of the BOEv3 architecture (which it is not required to do), the Member would need to obtain a Unitized Logical Port for each unitized BOEv3 order handler and corresponding matching engine(s) that process the symbol(s) that Member desires to trade.¹³ The three new port types that have been adopted are: (1)

BOE Unitized Logical Ports,¹⁴ (2) Bulk Unitized Logical Ports,¹⁵ and (3) Purge Unitized Logical Ports.¹⁶ As noted above, use of Unitized Logical Ports is completely voluntary, and no Member is required, or under any regulatory obligation, to utilize them.

The Exchange proposes to establish fees for the new Unitized Logical Ports, which can be purchased on an individual basis (*i.e.*, capable of accessing a specified matching engine ("Matching Unit")) and/or as a set ("Unitized Logical Port Set") (*i.e.*, will include the total number of ports needed to connect to each available Matching Unit). The proposed fees for Unitized Logical Ports purchased individually and as sets are as follows:

BOE unitized logical port	\$350/port/month.
Bulk Unitized Logical Port	\$550/port/month.
Purge Unitized Logical Port	\$400/port/month.
BOE Unitized Logical Port (Set)	\$2,500/month for 1st and 2nd port set. \$3,000/month for 3rd–14th port set. \$3,500/month for 15th–20th port set.
Bulk Unitized Logical Port (Set)	\$5,500/month for 1st and 2nd port set. \$6,000/month for 3rd–14th port set. \$6,500/month for 15th–20th port set.
Purge Unitized Logical Port (Set)	\$2,500/month for 1st and 2nd port set. \$3,000/month for 3rd–14th port set. \$3,500/month for 15th–20th port set.

The proposed fees for Unitized Logical Port Sets are progressive. For example, if a User were to purchase 11 BOE Unitized Logical Port Sets, it will be charged a total of \$32,000 per month ($\$2,500 \times 2 + \$3,000 \times 9$). As is the case today for existing logical ports, the monthly fees are assessed and applied in their entirety and are not prorated. The Exchange notes the current standard fees assessed for existing logical ports will remain applicable and unchanged.¹⁷ The proposed fees for Unitized Logical Port Sets will be assessed per set, per Port Type. As an example, if a Member requests three BOE Unitized Logical Port Sets, one Bulk Unitized Logical Port Set, and one Purge Unitized Logical Port Set, the firm would be charged \$8,000 ($\$2,500 +$

$\$2,500 + \$3,000$) for the three BOE Unitized Logical Port Sets, \$5,500 for the one Bulk Unitized Logical Port Set, and \$2,500 for the one Purge Unitized Logical Port Set.¹⁸

Since the Exchange has a finite amount of capacity, it also proposes to prescribe a maximum limit on the number of Unitized Logical Ports that may be purchased and used on a per firm, per Matching Unit basis. The purpose of establishing these limits is to manage the allotment of Unitized Logical Ports in a fair and reasonable manner while preventing the Exchange from being required to expend large amounts of resources in order to provide an unlimited capacity to its matching engines. Particularly, the Exchange proposes to provide that the two

structures (*i.e.*, individual unitized ports or unitized port sets) can be combined for up to a maximum of 20 Unitized Logical Ports per Member, per Matching Unit, per port type. As an example, a Member may request 2 BOE Unitized Logical Port Sets and 18 individual BOE Unitized Logical Ports for Matching Unit 1, providing a total max of 20 BOE Unitized Logical Ports on Matching Unit 1 specifically. This would result in having 20 BOE Unitized Logical Ports on Matching Unit 1 and 2 BOE Unitized Ports on all additional Matching Units as part of the 2 BOE Unitized Logical Port Sets requested. Additionally, a firm may request 20 Bulk Unitized Logical Port Sets and 20 Purge Unitized Logical Port Sets as those would constitute

⁹ See Securities Exchange Act Release 100582 (July 23, 2024), 89 FR 60958 (July 29, 2024) (SR–CboeBZX–2024–071).

¹⁰ The BOE protocol is a proprietary order entry protocol used by Members to connect to the Exchange. The current version is BOEv2.

¹¹ See Securities Exchange Act Release No. 100582 (July 23, 2024) 89 FR 60958 (July 29, 2024) (SR–CboeBZX–2024–071).

¹² The Exchange anticipates decommissioning BOEv2 in February 2025.

¹³ Members will be able to purchase Unitized Logical Ports individually or may purchase a "set," which will provide the total number of ports

needed to connect to each available matching engine.

¹⁴ Similar to the Exchange's preexisting Logical Ports, the new Unitized Logical Ports allow Members to submit orders and quotes.

¹⁵ Similar to the Exchange's preexisting Bulk Ports, the new Bulk Unitized Logical Ports allow Members to submit and update multiple quote bids and offers in one message and are particularly useful for Members that provide quotations in many different options.

¹⁶ Similar to the Exchange's preexisting Purge Ports, the new Purge Unitized Logical Ports are dedicated logical ports that provide the ability to cancel/purge all open orders, or a subset thereof, across multiple logical ports through a single

cancel/purge message. They also solely process purge messages and are designed to assist Members, including Market Makers, in the management of, and risk control over, their orders and quotes, particularly if the Member is dealing with a large number of options.

¹⁷ For example, the Exchange currently assesses a monthly per port fee of \$750 for Logical Ports and Purge Ports. It also assesses \$1,500 per port month for the 1st and 2nd Bulk Ports and \$2,500 for the 3rd or more Bulk Ports. See Cboe BZX Options Fee Schedule, Options Logical Port Fees.

¹⁸ The Exchange proposes to include this example in the Fee Schedule to provide further clarity as to the application of the proposed fees.

different port types.¹⁹ The Exchange believes the proposed cap will be sufficient for the vast majority of Members.²⁰ The Exchange notes that it will monitor interest in Unitized Logical Ports and system capacity availability with the goal of increasing these limits to meet Members needs if and when the demand is there, and the Exchange is able to accommodate it. Additionally, Members will still be able to utilize the existing logical port connectivity offerings with no maximum limit in addition to their Unitized Logical Port allocation.

Average Daily Quotes and Average Daily Order Fees

The Exchange also proposes to adopt Average Daily Order (“ADO”) and

Average Daily Quote (“ADQ”) fees. “ADO” represents the total number of orders for the month, divided by the number of trading days. “ADQ” represents the total number of quotes for the month, divided by the number of trading days. When measuring a Member’s ADO and ADQ, orders, quotes, cancel/replace modify orders, and quote updates which submit a bid or offer and do not include cancels, are included. Further ADO and ADQ will include orders and quotes submitted by a Member from all logical port types (*i.e.*, non-unitized logical ports and Unitized Logical Ports). Each Member may submit up to 2,000,000 average daily orders or up to 250,000,000 average daily quotes per calendar month

without incurring any ADO or ADQ fees. In the event that the average number of quotes per trading day during a calendar month submitted exceeds 250,000,000, each incremental usage of up to 20,000 average daily quotes will incur an additional fee as set forth in the table below. Similarly, in the event that the average number of orders per trading day during a calendar month submitted exceeds 2,000,000, each incremental usage of up to 1,000 average daily orders will incur an additional ADO fee as set forth in the table below.²¹ A Member’s ADO and ADQ will be aggregated together with any affiliated Member sharing at least 75% common ownership.

	Fee				
	Tier 1	Tier 2	Tier 3	Tier 4	Tier 5
ADQ Fee Rate per 20,000 ADQ	<= 250,000,000 \$0.00	>250,000,000 \$0.05	>500,000,000 \$0.075	>1,000,000,000 \$0.10	>3,500,000,000 \$0.20
ADO Fee Rate per 1,000 ADO	<= 2,000,000 \$0.00	>2,000,000 \$1.00	>2,500,000 \$1.50	>3,000,000 \$2.00	>3,500,000 \$2.50

As an example, a Member that has 510,000,000 ADQ would subsequently have 25,500 “ADQ increments” (510,000,000 ADQ/20,000 ADQ increments). While 12,500 of the 25,500 ADQ increments are free within Tier 1, 12,500 of the ADQ increments would be fee liable at \$0.050 within Tier 2, while the remaining 500 ADQ increments would be fee liable at \$0.075 within Tier 3, resulting in a total ADQ fee of \$662.50 for that month.²²

The Exchange notes that market participants with incrementally higher ADO or ADQ have the potential residual effect of exhausting system resources, bandwidth, and capacity. Higher ADO or ADQ may therefore, in turn, create latency and impact other Members’ ability to receive timely executions. The proposed fee structure has multiple thresholds, and the proposed fees are incrementally greater at higher ADO and ADQ rates because the potential impact on exchange systems, bandwidth and

capacity becomes greater with increased ADO and ADQ rates. As noted above, the proposal contemplates that a Member would have to exceed the high ADO rate of 2,000,000 and a Market Maker would have to exceed the high ADQ rate of 250,000,000 before that market participant would be charged a fee under the proposed respective tiers. The Exchange believes that it is in the interests of all Members and market participants who access the Exchange to not allow other market participants to exhaust System resources, but to encourage efficient usage of network capacity. The Exchange also believes this proposal (and in particular the proposed fee amounts associated with higher ADO and ADQ) will reduce the incentive for market participants to engage in excessive order/quote and trade activity that may require the Exchange to otherwise increase its storage capacity and will encourage

such activity to be submitted in good faith for legitimate purposes.

The Exchange also represents that the proposed fees are not intended to raise revenue; rather, as noted above, it is intended to encourage efficient behavior so that market participants do not exhaust System resources. Moreover, the Exchange intends to provide Members with daily reports, free of charge, which will detail their order and trade activity in order for those firms to be fully aware of all order and trade activity they (and their affiliates) are sending to the Exchange. This will allow Members to monitor their behavior and determine whether it is approaching any of the ADO or ADQ thresholds that trigger the proposed fees.

The Exchange lastly notes that other exchanges have adopted various fee programs that assess incrementally higher fees to Members that have incrementally higher order and/or

¹⁹ The Exchange proposes to include this example in its Fee Schedule to provide clarity as to how Unitized Logical Port fees will be assessed.

²⁰ The Exchange notes that one Member has indicated that it *may* desire more than the current maximum in the future.

²¹ The term “quote” refers to bids and offers submitted in bulk messages. A bulk message means a single electronic message a user submits with an M (Market-Maker) capacity to the Exchange in which the User may enter, modify, or cancel up to an Exchange-specified number of bids and offers. A

User may submit a bulk message through a bulk port as set forth in Exchange Rule 21.1(j)(3). See Rule 16.1 (definition of bulk message).

²² The Exchange proposes to include this example in the Fees Schedule to provide further clarity as to the application of the proposed fees.

²³ See, e.g., Securities Exchange Act Release No. 60102 (June 11, 2009), 74 FR 29251 (June 19, 2009) (SR-NYSEArca-2009-50) (adopting fees applicable to Members based on the number of orders entered compared to the number of executions received in a calendar month). It appears that Nasdaq similarly

assesses a penalty charge to its members that exceed certain “weighted order-to-trade ratios”. See *Price List—Trading Connectivity*, NASDAQ, available at <https://www.nasdaqtrader.com/trader.aspx?id=pricelisttrading2>. See also Securities Exchange Act Release No. 91406 (March 25, 2021), 86 FR 16795 (March 31, 2023) (SR-EMERALD-2021-10) (adopting an “Excessive Quoting Fee” to ensure that Market Makers do not over utilize the exchange’s System by sending messages to the MIAx Emerald, to the detriment of all other Members of the exchange).

quoting trading activity for similar reasons.²³

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.²⁴ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)²⁵ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)²⁶ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4)²⁷ of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fees are reasonable because Unitized Logical Ports provide an optional, valuable service in that the ports are intended to create a more consistent, deterministic experience for messages once received within the Exchange’s System under the recently adopted unitized BOEv3 architecture. As discussed above, the new architecture (and thereby the new Unitized Logical Ports) was designed to create a more consistent, deterministic experience for messages once received within the Exchange’s System, which the Exchange believes improves the overall access experience on the Exchange and will enable future system enhancements. As noted, the BOEv3 protocol and architecture, along with the three new corresponding Unitized Logical Ports, are intended to reduce the natural variance of order handler processing

times for messages, and as a result reduce the potential resulting “reordering” of messages when they are sent from order handlers to matching engines. The adoption of the unitized BOEv3 structure (including the corresponding new Unitized Ports) was a technical solution that is intended to reduce the potential of this reordering and increase determinism.²⁸ The Exchange believes the proposed fees are also reasonable to offset costs incurred in order to build out an entirely new unitized architecture.

The Exchange also emphasizes that the use of the Unitized Logical Ports is not necessary for trading on the Exchange and, as noted above, is entirely optional. Users can also continue to access the Exchange through existing logical port offerings at existing rates. It is a Member’s specific business needs that will drive its decision whether to use Unitized Logical Ports in lieu of, or in addition to, existing logical ports (or, as emphasized, not use them at all). If a User finds little benefit in having these ports based on its business model and trading strategies, or determines the Unitized Logical ports are not cost-efficient for its needs, or does not provide sufficient value to the firm, such User may continue connecting to the Exchange in the manner it does today, unchanged. Indeed, the Exchange notes that since the adoption of Unitized Logical Ports on August 19, only approximately 27% of logical ports, bulk ports and purge ports being used are Unitized Logical Ports and approximately 73% are the preexisting Logical Ports, Bulk Ports and Purge Ports. Moreover, the Exchange believes that providing Members the option of purchasing Unitized Logical Ports individually or in sets provides Members further flexibility and an opportunity for cost savings for those Members that wish to only trade a subset of classes.

The Exchange also believes that the proposed Unitized Logical Port fees are equitable and not unfairly discriminatory because they continue to be assessed uniformly to similarly situated users in that all Users who choose to purchase Unitized Logical Ports will be subject to the same proposed tiered fee schedule. Moreover, Members purchasing Unitized Logical Ports will only do so if they find a benefit and sufficient value in such ports as, all Members can otherwise continue to use the preexisting logical connectivity options. As such, Members

can choose whether or not to purchase Unitized Logical Ports based on their respective business needs.

The proposed ascending tier structure for Unitized Logical Port Sets is reasonable, equitable and not unfairly discriminatory as it’s designed to encourage market participants to be efficient with their respective Unitized Logical Port usage. It also is designed so that Members that use a higher allotment of the Exchange’s system resources pay higher rates, rather than placing that burden on market participants that have more modest needs. The Exchange believes the proposed ascending fee structure is therefore another appropriate means, in conjunction with an established Unitized Logical Port limit, to manage this finite resource (system capacity) and ensure its apportioned fairly. Furthermore, the Exchange already assesses higher fees to those that consume more Exchange resources for the existing non-Unitized Bulk Ports.²⁹ The proposed limit on Unitized Logical Ports is also reasonable, equitable and not unfairly discriminatory as the Exchange believes that it is in the interests of all Members and market participants who access the Exchange to not allow Members to exhaust System resources, but to encourage efficient usage of network capacity. The Exchange also notes that the new BOEv3 unitized architecture is subject to software limitations on the number of sessions that can be created on any one unitized process. Consideration was given to this limitation as well as to the amount of ports firms had indicated they would need prior to the implementation of Unitized Logical Ports.

The Exchange believes the proposed ADO and ADQ fees are reasonable as Members that do not exceed the high thresholds of 2,000,000 ADO and 250,000,000 ADQ will not be charged any fee under the proposed tiers. The Exchange notes that in establishing the proposed thresholds, it evaluated average ADO and ADQ rates over several months and the thresholds were designed to protect the Exchange’s Matching Engines from being adversely impacted from sustained and excessive orders/quotes throughout the course of a given month. The ADQ thresholds are also designed to ensure Market Makers quoting activity, which acts as important source of liquidity, is not

²⁴ 15 U.S.C. 78f(b).

²⁵ 15 U.S.C. 78f(b)(5).

²⁶ *Id.*

²⁷ 15 U.S.C. 78f(b)(4).

²⁸ See Securities Exchange Act Release 100582 (July 23, 2024), 89 FR 60958 (July 29, 2024) (SR–CboeBZX–2024–071).

²⁹ See Cboe U.S. Options Fees Schedule, BZX Options, Options Logical Port Fees, Ports with Bulk Quoting Capabilities.

impeded by the proposal.³⁰ The Exchange believes it's reasonable, equitable and not unfairly discriminatory to assess higher fees when a Member has higher ADO and ADQ rates because the potential impact on exchange systems, bandwidth and capacity becomes greater with increased ADO and ADQ rates. The Exchange believes the proposed fee amounts are reasonable as the Exchange believes them to be commensurate with the proposed thresholds. Particularly, the proposed fee amounts that correspond to higher ADO and ADQ rates are designed to incentivize Members to reduce excessive order and quoting trade activity that the Exchange believes can be detrimental to all market participants at those levels and encourage such activity to be made in good faith and for legitimate purposes. As noted above, the Exchange believes that it is in the interests of all Members and market participants who access the Exchange to not allow Members to exhaust System resources, but to encourage efficient usage of network capacity. The Exchange therefore also believes that the proposed fees appropriately reflect the benefits to different firms of being able to send orders and quotes into the Exchange's System and also believes the proposed fees are one method of facilitating the Commission's goal of ensuring that critical market infrastructure has "levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets."³¹

The Exchange believes adopting the proposed ADO and ADQ fees are reasonable as unfettered usage of System capacity and network resource consumption can have a detrimental effect on all market participants who access and use the Exchange. As discussed above, high ADO and ADQ rates may adversely impact system resources, bandwidth, and capacity which may, in turn, create latency and impact other Members' ability to receive timely executions. The Exchange believes the proposed fees are therefore reasonable as they are designed to focus on activity that is truly disproportionate while fairly allocating costs.

Further, the Exchange believes that the proposed ADO and ADQ fees are equitable and not unfairly discriminatory because they will be assessed uniformly to similarly situated users in that all Members that exceed the thresholds in connection with ADO and ADQ will be assessed the proposed ADO and ADQ rates. Regarding ADO and ADQ, no market participant is assessed any fees unless it exceeds the proposed thresholds. As noted above, the Exchange believes the proposed ADO and ADQ thresholds (*i.e.*, 2,000,000 ADO and 250,000,000 ADQ) are appropriately high rates respectively, such that the Exchange expects the vast majority of Members to not exceed them. While the Exchange has no way of predicting with certainty how the proposed changes will impact Member activity, based on trading activity from the prior months the Exchange would expect that, absent any changes to Member behavior, all Members would fall within proposed ADO Tier 1 (and thus not be subject to any new fees) and approximately 74% of Members would fall within proposed ADQ Tier 1 (and thus also not be subject to any new fees). With respect to the remaining Members (approximately 26%) that would exceed the ADQ Tier 1 threshold based on current activity, the Exchange would anticipate, absent any change in behavior, approximately 3 Members to fall within Tier 2, approximately 6 Members to fall within Tier 3, approximately 3 Members to fall within Tier 4 and no Members to fall within Tier 5. Notwithstanding this impact, the Exchange believes that Market Makers are able to continue providing important liquidity to the Exchange and meet their quoting obligations[*sic*].

The Exchange believes it's equitable and not unfairly discriminatory to assess incrementally higher fees to Members that have higher ADO and ADQ rates because the potential impact on exchange systems, bandwidth and capacity becomes greater with increased ADO and ADQ. The Exchange also believes it's equitable and not unfairly discriminatory to aggregate Members trading activity with any affiliated Member sharing at least 75% common ownership in order to prevent members from shifting their order flow or quoting activity to other affiliates in order to circumvent the proposed fees.

The Exchange lastly believes that its proposal is reasonable, equitably allocated and not unfairly discriminatory because it is not intended to raise revenue for the Exchange; rather, it is intended to encourage efficient behavior so that Members do not exhaust System

resources. Moreover, as noted above, competing options exchanges similarly assess fees to deter Members from over utilizing the exchange's System by having excessive order and/or quoting trading activity.³²

The Exchange finally notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange is only one of 18 options exchanges which market participants may direct their order flow and/or participate on, and it represents a small percentage of the overall market.³³

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change to adopt fees for Unitized Logical Ports will impose any burden on intramarket competition that is not necessary in furtherance of the purposes of the Act because the proposed fees for will apply equally to all similarly situated Members. As discussed above, Unitized Logical Ports are optional and Members may choose to utilize Unitized Logical Ports, or not, based on their views of the additional benefits and added value provided by these ports. The Exchange believes the proposed fees will be assessed proportionately to the potential value or benefit received by Members with a greater number of Unitized Logical Ports and notes that Members may determine to cease using Unitized Logical Ports. As discussed, Members can also continue to access the Exchange through existing Logical Ports, which fees are not changing.

Similarly, the Exchange does not believe that the proposed rule change to adopt ADO and ADQ fees will impose any burden on intramarket competition that is not necessary in furtherance of the purposes of the Act because such fees will apply equally to all similarly situated Members. Particularly, the proposed fees apply uniformly to all Members, in that any Member who exceeds the ADO and/or ADQ Tier 1 thresholds will be subject to a fee under the proposed corresponding tiers. The Exchange believes that the proposed change neither favors nor penalizes one or more categories of market participants in a manner that would

³⁰ Since the implementation of the proposal on September 3, 2024, the Exchange notes that it has not received any feedback from Market Maker participants that the proposal has impeded their ability to meet their quoting obligations.

³¹ See Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72251 (December 5, 2014) (File No. S7-01-13) (Regulation SCI Adopting Release).

³² See *supra* note 20.

³³ See Cboe Global Markets, U.S. Options Market Volume Summary, Month-to-Date (August 27, 2024), available at https://www.cboe.com/us/options/market_statistics/ which reflects the Exchange representing only 3.3% of total market share.

impose an undue burden on competition. Rather, the proposal seeks to benefit all market participants by encouraging the efficient utilization of the Exchange's network while taking into account the important liquidity provided by its Members. As discussed above potential impact on exchange systems, bandwidth and capacity becomes greater with increased ADO and ADQ rates. The Exchange also anticipates that the vast majority of Members on the Exchange will not be subject to any fees under the proposed tiers. Accordingly, the Exchange believes that the proposed ADO and ADQ fees do not favor certain categories of market participants in a manner that would impose a burden on competition.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market, including competition for exchange memberships. Market Participants have numerous alternative venues that they may participate on, including 17 other options exchanges (including 3 other non-Cboe options exchanges), as well as off-exchange venues, where competitive products are available for trading. Indeed, participants can readily choose to submit their order flow to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."³⁴ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its

market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . ."³⁵ Accordingly, the Exchange does not believe its proposed change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act³⁶ and paragraph (f) of Rule 19b-4³⁷ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2024-113 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.

³⁵ *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

³⁶ 15 U.S.C. 78s(b)(3)(A).

³⁷ 17 CFR 240.19b-4(f).

All submissions should refer to file number SR-CboeBZX-2024-113. 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2024-113 and should be submitted on or before December 23, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁸

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-28112 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-792; OMB Control No. 3235-0739]

Proposed Collection; Comment Request; Extension: Order Granting a Conditional Exemption Under the Securities Exchange Act of 1934 From the Confirmation Requirements of Exchange Act Rule 10b-10(a) for Certain Transactions in Money Market Funds

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of FOIA Services,

³⁸ 17 CFR 200.30-3(a)(12).

³⁴ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

100 F Street NE, Washington, DC 20549-2736.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the existing collection of information provided for in the Order Granting a Conditional Exemption under the Securities Exchange Act of 1934 from the Confirmation Requirements of Exchange Act Rule 10b-10(a) for Certain Transactions in Money Market Funds (17 CFR 240.10b-10(a)). The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Rule 10b-10 under the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78a *et seq.*) generally requires broker-dealers to provide customers with specified information relating to their securities transactions at or before the completion of the transactions. Exchange Act Rule 10b-10(b), however, provides an exception from this requirement for certain transactions in money market funds that attempt to maintain a stable net asset value when no sales load or redemption fee is charged. The exception permits broker-dealers to provide transaction information to money market fund shareholders on a monthly, rather than immediate, basis, subject to the conditions. Amendments to Rule 2a-7 (17 CFR 270.2a-7) of the Investment Company Act of 1940 ("Investment Company Act") (15 U.S.C. 80a-1 *et seq.*) among other things, means, absent an exemption, broker-dealers would not be able to continue to rely on the exception under Exchange Act Rule 10b-10(b) for transactions in money market funds operating in accordance with Investment Company Act Rule 2a-7(c)(1)(ii).¹

In 2015, the Commission issued an Order Granting a Conditional Exemption under the Securities Exchange Act of 1934 From The Confirmation Requirements of Exchange Act Rule 10b-10(a) For Certain Transactions In Money Market Funds ("Order")² which allows broker-dealers,

subject to certain conditions, to provide transaction information to investors in any money market fund operating pursuant to Investment Company Act Rule 2a-7(c)(1)(ii) on a monthly basis in lieu of providing immediate confirmations as required under Exchange Act Rule 10b-10(a) ("the Exemption"). Accordingly, to be eligible for the Exemption, a broker-dealer must (1) provide an initial written notification to the customer of its ability to request delivery of immediate confirmations consistent with the written notification requirements of Exchange Act Rule 10b-10(a), and (2) not receive any such request to receive immediate confirms from the customer.

As of December 31, 2023, the Commission estimates there are approximately 206 broker-dealers that clear customer transactions or carry customer funds and securities who would be responsible for providing customer confirmations. The Commission estimates that the cost of the ongoing notification requirements would be minimal, approximately 5% of the initial burden which was previously estimated to be 36 hours per broker-dealer, or approximately 1.8 hours per broker-dealer per year, to provide ongoing notifications, or a total burden of approximately 371 hours annually for the 206 carrying broker-dealers.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by January 31, 2025.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: Austin Gerig, Director/Chief Data Officer, Securities and Exchange Commission, c/o Tanya Ruttenberg, 100 F Street NE, Washington, DC 20549, or send an email to: PRA_Mailbox@sec.gov.

Market Funds, Exchange Act Release No. 34-76480 (Nov. 19, 2015), 80 FR 73849 (Nov. 25, 2015).

Dated: November 25, 2024.

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-28123 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-028, OMB Control No. 3235-0032]

Submission for OMB Review; Comment Request; Extension: Rule 17f-1(b)

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for approval of extension of the previously approved collection of information provided for in Rule 17f-1(b) (17 CFR 240.17f-1(b)), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Under Rule 17f-1(b) under the Exchange Act, approximately 9,500 entities in the securities industry are registered in the Lost and Stolen Securities Program ("Program"). Registration fulfills a statutory requirement that entities report and inquire about missing, lost, counterfeit, or stolen securities. Registration also allows entities in the securities industry to gain access to a confidential database that stores information for the Program.

The Commission staff estimates that 4 new entities will register in the Program each year. The staff estimates that the average number of hours necessary to comply with Rule 17f-1(b) is one-half hour. Accordingly, the staff estimates that the total annual burden for all participants is 2 hours (4 × one-half hour). The Commission staff estimates that compliance staff work at subject entities results in an internal cost of compliance, at an estimated hourly wage of \$344, of \$172 per year per entity (.5 hours × \$344 per hour = \$172 per year). Therefore, the aggregate annual internal cost of compliance is approximately \$688 (\$172 × 4 = \$688).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The 30-day public comment period for this information collection request

¹ See generally Money Market Fund Reform; Amendments to Form PF, Securities Act Release No. 9408, Investment Advisers Act Release No. 3616, Investment Company Act Release No. 30551 (June 5, 2013), 78 FR 36834, 36934 (June 19, 2013); see also Exchange Act Rule 10b-10(b)(1), 17 CFR 240.10b-10(b)(1) (limiting alternative monthly reporting to money market funds that attempt to maintain a stable NAV).

² See Order Granting a Conditional Exemption Under the Securities Exchange Act of 1934 From the Confirmation Requirements of Exchange Act Rule 10b-10(a) for Certain Transactions in Money

opens on December 3, 2024 and ends on January 2, 2025. View the full information request and submit comments at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202409-3235-016 or email comments to MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov.

Dated: November 25, 2024.

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024–28124 Filed 11–29–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101746; File No. SR–NYSE–2024–48]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change to Amend Section 802.01C of the NYSE Listed Company Manual (Price Criteria for Capital or Common Stock) To Restrict the Use of Reverse Stock Splits in Certain Circumstances

November 25, 2024.

On September 30, 2024, New York Stock Exchange LLC (“NYSE”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) ¹ and Rule 19b–4 thereunder, ² a proposed rule change to amend Section 802.01C (Price Criteria for Capital or Common Stock) of the NYSE Listed Company Manual to provide that (i) a company that falls below the price criteria set forth therein and effects a reverse stock split to regain compliance will not be eligible for a compliance period in certain circumstances, and (ii) a company may not effectuate a reverse stock split if it would result in the company falling below continued listing requirements. The proposed rule change was published for comment in the **Federal Register** on October 17, 2024. ³

Section 19(b)(2) of the Act ⁴ provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period

to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission will either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is December 1, 2024. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change, so that it has sufficient time to consider the proposed rule change and comments received. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act, ⁵ designates January 15, 2025, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NYSE–2024–48).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority. ⁶

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024–28116 Filed 11–29–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101730; File No. SR–SAPPHIRE–2024–38]

Self-Regulatory Organizations; MIAx Sapphire, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 402, Criteria for Underlying Securities To List and Trade Options on the Fidelity Wise Origin Bitcoin Fund (the “Fidelity Fund”) and the ARK 21Shares Bitcoin ETF (the “ARK 21 Fund”)

November 25, 2024.

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 November 21, 2024, MIAx Sapphire, LLC (“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 Exchange Rule 402, Criteria for Underlying Securities. The text of the proposed rule change is available on the Exchange’s website at <https://www.miaxglobal.com/markets/us-options/miax-sapphire/rule-filings>, at the Exchange’s principal office, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rule 402, Criteria for Underlying Securities, ³ to allow the Exchange to list and trade options on Fidelity Wise Origin Bitcoin Fund (the “Fidelity Fund”) and the ARK 21Shares Bitcoin ETF (the “ARK 21 Fund” and, with the Fidelity Fund, the “Bitcoin Funds”), designating the Bitcoin Funds as appropriate for options trading on the Exchange. ⁴ This is a competitive filing

³ The Exchange notes that its affiliate exchanges, MIAx Options and MIAx Pearl, submitted substantively identical proposals. The Exchange notes that all the rules of Chapter III of the MIAx Options Exchange, including Rules 307 and 309, are incorporated by reference to MIAx Pearl and MIAx Sapphire. The Exchange also notes that all of the rules of Chapter III of the MIAx Options Exchange, including Rules 307 and 309, and the rules of Chapter IV of the MIAx Options Exchange, including Rule 402, are incorporated by reference to MIAx Emerald.

⁴ On January 10, 2024, the Commission approved proposals by NYSE Arca, Inc., The Nasdaq Stock Market LLC, and Cboe BZX Exchange, Inc. to list and trade the shares of 11 bitcoin-based commodity-based trust shares and trust units, including the iShares Bitcoin Trust. See Securities Exchange Act Release No. 99306 (Jan. 10, 2024), 89

Continued

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 101306 (Oct. 10, 2024), 89 FR 83738. Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-nyse-2024-48/srnyse202448.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ 15 U.S.C. 78s(b)(2).

⁶ 17 CFR 200.30–3(a)(31).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

based on a similar proposal submitted by Cboe Exchange, Inc. (“Cboe”) and approved by the Securities and Exchange Commission (“Commission”).⁵

Current Exchange Rule 402(i)(4) provides that securities deemed appropriate for options trading include shares or other securities (“Exchange Traded Fund Shares” or “ETFs”) that represent certain types of interests,⁶

FR 3008 (Jan. 17, 2024) (order approving File Nos. SR-NYSEARCA-2021-90; SR-NYSEARCA-2023-44; SR-NYSEARCA-2023-58; SR-NASDAQ-2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SR-CboeBZX-2023-044; SR-CboeBZX-2023-072) (“Bitcoin ETP Order”).

⁵ See Securities Exchange Act Release No. 101387 (October 18, 2024), 89 FR 84948 (October 24, 2024) (SR-CBOE-2024-35) (Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, to Permit the Listing and Trading of Options on Bitcoin Exchange Traded Funds).

⁶ See Exchange Rule 402(i), which permits options trading on ETFs that: (1) represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that hold portfolios of securities and/or financial instruments (“Funds”), including, but not limited to, stock index futures contracts, options on futures, options on securities and indices, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse repurchase agreements (the “Financial Instruments”), and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the “Money Market Instruments”) comprising or otherwise based on or representing investments in broad-based indexes or portfolios of securities and/or Financial Instruments and Money Market Instruments (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities and/or Financial Instruments and Money Market Instruments); (2) represent interests in a trust or similar entity that holds a specified non-U.S. currency or currencies deposited with the trust which when aggregated in some specified minimum number may be surrendered to the trust or similar entity by the beneficial owner to receive the specified non-U.S. currency or currencies and pays the beneficial owner interest and other distributions on the deposited non-U.S. currency or currencies, if any, declared and paid by the trust (“Currency Trust Shares”); (3) represent commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency (“Commodity Pool ETFs”); (4) are issued by the are issued by the SPDR® Gold Trust, the iShares COMEX Gold Trust, the iShares Silver Trust, the ETFs Silver Trust, the Aberdeen Standard Physical Gold Trust, the ETFs Palladium Trust, the ETFs Platinum Trust, the Sprott Physical Gold Trust, or the iShares Bitcoin Trust; or (5) represent an interest in a registered investment company (“Investment Company”) organized as an open-end management company or similar entity, that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies,

including interests in certain specific trusts that hold financial instruments, money market instruments, or precious metals (which are deemed commodities).

The Bitcoin Funds are Bitcoin-backed commodity ETFs structured as trusts. Similar to any ETFs currently deemed appropriate for options trading under Exchange Rule 402(i), the investment objective of each Bitcoin Fund is for its shares to reflect the performance of Bitcoin (less the expenses of the trust’s operations), offering investors an opportunity to gain exposure to Bitcoin without the complexities of Bitcoin delivery. As is the case for ETFs currently deemed appropriate for options trading, a Bitcoin Fund’s shares represent units of fractional undivided beneficial interest in the trust, the assets of which consist principally of Bitcoin and are designed to track Bitcoin or the performance of the price of Bitcoin and offer access to the Bitcoin market.⁷ The Bitcoin Funds provide investors with cost-efficient alternatives that allow a level of participation in the Bitcoin market through the securities market. The primary substantive difference between Bitcoin Funds and ETFs currently deemed appropriate for options trading are that ETFs may hold securities, certain financial instruments, and specified precious metals (which are deemed commodities), while Bitcoin Funds hold Bitcoin (which is also deemed a commodity).

The Exchange believes each Bitcoin Fund satisfies the Exchange’s initial listing standards for ETFs on which the Exchange may list options. Specifically, each Bitcoin Fund satisfies the initial listing standards set forth in Exchange Rule 402(i)(5)(i), as is the case for other ETFs on which the Exchange lists options (including trusts that hold commodities). Exchange Rule 402(i)(5)(i) requires that the ETFs must either (1) meet the criteria and standards set forth in Exchange Rule 402(a) or 402(b),⁸ or (2) be available for creation or redemption each business day from or through the issuer in cash or in kind at a price related to net asset value, and

which is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value (“NAV”), and when aggregated in the same specified minimum number, may be redeemed at a holder’s request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined NAV (“Managed Fund Share”); provided that all of the conditions listed in (5)(i) and 5(ii) are met.

⁷ The trust may include minimal cash.

⁸ Subparagraphs a and b of Exchange Rule 402 provide for guidelines to be used by the Exchange when evaluating potential underlying securities for Exchange option transactions.

the issuer must be obligated to issue ETFs in a specified aggregate number even if some or all of the investment assets required to be deposited have not been received by the issuer, subject to the condition that the person obligated to deposit the investments has undertaken to deliver the investment assets as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the issuer, as provided in the respective prospectus. Each Bitcoin Fund satisfies Exchange Rule 402(i)(5)(i)(B), as each is subject to this creation and redemption process.

While not required by the Rules for purposes of options listings, the Exchange believes each Bitcoin Fund satisfies the criteria and guidelines set forth in Exchange Rule 402. Pursuant to Exchange Rule 402, a security (which includes ETFs) on which options may be listed and traded on the Exchange must be duly registered (with the Commission) and be an NMS stock (as defined in Rule 600 of Regulation NMS under the Act, and be characterized by a substantial number of outstanding shares that are widely held and actively traded.⁹ Each Bitcoin Fund is an NMS Stock as defined in Rule 600 of Regulation NMS under the Act.¹⁰ The Exchange believes each Bitcoin Fund is characterized by a substantial number of outstanding shares that are widely held and actively traded.

As of August 7, 2024, the Bitcoin Funds had the following number of shares outstanding:

Bitcoin Fund	Shares outstanding
Fidelity Fund	201,100,100
ARK 21 Fund	45,495,000

Each Bitcoin Fund had significantly more than 7,000,000 shares outstanding (approximately 29 and 6.5 times that amount, respectively), which is the minimum number of shares of a corporate stock that the Exchange generally requires to list options on that stock pursuant to Exchange Rule 402(b)(1). The Exchange believes this demonstrates that each Bitcoin Fund is

⁹ The criteria and guidelines for a security to be considered widely held and actively traded are set forth in Exchange Rule 403(b).

¹⁰ An “NMS stock” means any NMS security other than an option, and an “NMS security” means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan (or an effective national market system plan for reporting transaction in listed options). See 17 CFR 242.600(b)(64) (definition of “NMS security”) and (65) (definition of “NMS stock”).

characterized by a substantial number of outstanding shares.

Further, the below table contains information regarding the number of

beneficial holders of the Bitcoin Funds as of the specified dates:

Bitcoin Fund	Beneficial holders	Date
Fidelity Fund	279,656	6/27/2024
ARK 21 Fund	69,425	6/26/2024

As this table shows, each Bitcoin Fund has significantly more than 2,000 beneficial holders (approximately 140 and 35 times more, respectively), which is the minimum number of holders the Exchange generally requires for corporate stock in order to list options on that stock pursuant to Exchange Rule 402(b)(2). Therefore, the Exchange believes the shares of each Bitcoin Fund are widely held.

As demonstrated above, despite the fact that the Bitcoin Funds had been trading for approximately seven months¹¹ only as of August 7, 2024, the six-month trading volume for each as of that date was substantially higher than 2,400,000 shares (approximately 464 and 124 times that amount, respectively), which is the minimum 12-month volume the Exchange generally requires for a corporate stock in order to list options on that security as set forth in Exchange Rule 402(b)(4).

Additionally, as of August 7, 2024, the trading volume for each Bitcoin Fund was in the top 5% of all ETFs that are currently trading. The Exchange believes this data demonstrates each Bitcoin Fund is characterized as having shares that are actively traded.

Options on the Bitcoin Funds will also be subject to the Exchange's continued listing standards set forth in Exchange Rule 403(g), for ETFs deemed appropriate for options trading pursuant to Exchange Rule 402(i). Specifically, Exchange Rule 403(g) provides that ETFs that were initially approved for options trading pursuant to Exchange Rule 402(i) shall be deemed not to meet the requirements for continued approval, and the Exchange shall not open for trading any additional series of option contracts of the class covering that such ETFs, if the ETFs are delisted from trading pursuant to Exchange Rule 403(b)(4), are halted or suspended from trading in their primary market. Additionally, options on ETFs may be subject to the suspension of opening transactions in any of the following circumstances: (1) in the case of options covering ETFs approved for trading under Exchange Rule 402(i)(5)(i)(A), in accordance with the terms of paragraphs

(b)(1), (2), and (3) of Exchange Rule 403; (2) in the case of options covering ETFs approved for trading under Exchange Rule 402(i)(5)(i)(B), following the initial twelve-month period beginning upon the commencement of trading in the ETFs on a national securities exchange and are defined as an NMS stock, there are fewer than 50 record and/or beneficial holders of such ETFs for 30 or more consecutive trading days; (3) the value of the index or portfolio of securities, non-U.S. currency, or portfolio of commodities including commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or financial instruments and money market instruments on which the ETFs are based is no longer calculated or available; or (4) such other event shall occur or condition exist that in the opinion of the Exchange makes further dealing in such options on the Exchange inadvisable.

Options on each Bitcoin Fund would be physically settled contracts with American-style exercise.¹² Consistent with current Exchange Rule 404, which governs the opening of options series on a specific underlying security (including ETFs), the Exchange will open at least one expiration month for options on each Bitcoin Fund¹³ at the

¹² See Exchange Rule 401, which provides that the rights and obligations of holders and writers are set forth in the Rules of the Options Clearing Corporation ("OCC"); see also OCC Rules, Chapters VIII (which governs exercise and assignment) and Chapter IX (which governs the discharge of delivery and payment obligations arising out of the exercise of physically settled stock option contracts).

¹³ See Exchange Rule 404(b). The monthly expirations are subject to certain listing criteria for underlying securities described within Exchange Rule 404 and its Interpretations and Policies. Monthly listings expire the third Friday of the month. The term "expiration date" (unless separately defined elsewhere in the OCC By-Laws), when used in respect of an option contract (subject to certain exceptions), means the third Friday of the expiration month of such option contract, or if such Friday is a day on which the exchange on which such option is listed is not open for business, the preceding day on which such exchange is open for business. See OCC By-Laws Article I, Section 1. Pursuant to Exchange Rule 404(c), additional series of options of the same class may be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the market price of the underlying stock moves more than five strike prices

commencement of trading on the Exchange and may also list series of options on a Bitcoin Fund for trading on a weekly,¹⁴ monthly,¹⁵ or quarterly¹⁶ basis. The Exchange may also list long-term equity option series ("LEAPS") that expire from 12 to 39 months from the time they are listed.¹⁷

Pursuant to Exchange Rule 404, Interpretation and Policy .06, which governs strike prices of series of options on ETFs, the interval between strike prices of series of options on ETFs approved for options trading pursuant to Exchange Rule 402(i) shall be fixed at a price per share which is reasonably close to the price per share at which the underlying security is traded in the primary market at or about the same time such series of options is first open for trading on the Exchange, or at such intervals as may have been established on another options exchange prior to the initiation of trading on the Exchange. With respect to the Short Term Options Series or Weekly Program, during the month prior to expiration of an option class that is selected for the Short Term Option Series Program, the strike price intervals for the related non-Short Term Option ("Related non-Short Term Option") shall be the same as the strike price intervals for the Short Term Option.¹⁸ Specifically, the Exchange may open for trading Short Term Option Series at strike price intervals of (i) \$0.50 or greater where the strike price is less than \$100, and \$1 or greater where the strike price is between \$100 and \$150 for all option classes that participate in the Short Term Options Series Program; (ii) \$0.50 for option classes that trade in one dollar

from the initial exercise price or prices. Pursuant to Exchange Rule 404(e), new series of options on an individual stock may be added until the beginning of the month in which the options contract will expire. Due to unusual market conditions, the Exchange, in its discretion, may add a new series of options on an individual stock until the close of trading on the business day prior to expiration.

¹⁴ See Exchange Rule 404, Interpretations and Policies .02.

¹⁵ See Exchange Rule 404, Interpretations and Policies .13.

¹⁶ See Exchange Rule 404, Interpretations and Policies .03.

¹⁷ See Exchange Rule 404(d).

¹⁸ See Exchange Rule 404, Interpretations and Policies .02(e).

¹¹ The Bitcoin Funds began trading on January 11, 2024.

increments and are in the Short Term Option Series Program; or (iii) \$2.50 or greater where the strike price is above \$150.¹⁹ Additionally, the Exchange may list series of options pursuant to the \$1 Strike Price Interval Program,²⁰ the \$0.50 Strike Program,²¹ and the \$2.50 Strike Price Program.²² Pursuant to Exchange Rule 510, where the price of a series of options for a Bitcoin Fund is less than \$3.00, the minimum increment will be \$0.05, and where the price is \$3.00 or higher, the minimum increment will be \$0.10²³ consistent with the minimum increments for options on other ETFs listed on the Exchange. Any and all new series of a Bitcoin Fund options that the Exchange lists will be consistent and comply with the expirations, strike prices, and minimum increments set forth in Rules 404 and 510, as applicable.

Bitcoin Fund options will trade in the same manner as any other ETF options on the Exchange. The Exchange Rules that currently apply to the listing and trading of all ETFs options on the Exchange, including, for example, Exchange Rules that govern listing criteria, expiration and exercise prices, minimum increments, position and exercise limits, margin requirements, customer accounts and trading halt procedures will apply to the listing and trading of Bitcoin Funds options on the Exchange in the same manner as they apply to other options on all other ETFs that are listed and traded on the Exchange, including the precious-metal backed commodity ETFs already deemed appropriate for options trading on the Exchange pursuant to current Exchange Rule 402(i)(4).

Position and exercise limits for options on ETFs, including Bitcoin Fund options, are determined pursuant to the Exchange's affiliate MIAX Options Rules 307 and 309, respectively.

Position and exercise limits for ETF options vary according to the number of outstanding shares and the trading volumes of the underlying ETF over the past six months, where the largest in capitalization and the most frequently traded ETFs have an option position and exercise limit of 250,000 contracts (with adjustments for splits, re-capitalizations, etc.) on the same side of the market; and smaller capitalization ETFs have position and exercise limits of 200,000, 75,000, 50,000 or 25,000

contracts (with adjustments for splits, re-capitalizations, etc.) on the same side of the market. The Exchange further notes that the Exchange's affiliate MIAX Options Rule 1502, which governs margin requirements applicable to trading on the Exchange, including options on ETFs, will also apply to the trading of the Trust options.

Notwithstanding the position limits in the Exchange's affiliate MIAX Options Rule 307(d) and exercise limits in the Exchange's affiliate MIAX Options Rule 309, the Exchange proposes the position and exercise limits for the options on the Trust to be 25,000 contracts on the same side pursuant to proposed Supplementary Material .01 to the Exchange's affiliate MIAX Options Rule 307 and proposed Supplementary Material .01 to the Exchange's affiliate MIAX Options Rule 309.

The Exchange represents that the same surveillance procedures applicable to all other options on other ETFs currently listed and traded on the Exchange will apply to Bitcoin Fund options. Also the Exchange represents that it has the necessary systems capacity to support the new option series. The Exchange believes that its existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading options on ETFs, including the proposed Bitcoin Funds.

Today, the Exchange has an adequate surveillance program in place for options. The Exchange intends to apply those same program procedures to Bitcoin Fund options that it applies to the Exchange's other options products.²⁴ The Exchange's staff will have access to the surveillance programs conducted by its affiliate exchanges, MIAX Options and MIAX Pearl with respect to trading in the shares of the underlying Bitcoin Funds when conducting surveillances for market abuse or manipulation in the options on the Bitcoin Funds. Additionally, the Exchange is a member of the Intermarket Surveillance Group ("ISG") under the Intermarket Surveillance Group Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. In addition to obtaining surveillance data from MIAX Options and MIAX Sapphire, the Exchange will be able to obtain information regarding trading in the shares of the underlying Bitcoin

Funds from Cboe and other markets through ISG. In addition, the Exchange has a Regulatory Services Agreement with the Financial Industry Regulatory Authority ("FINRA"). Pursuant to a multi-party 17d-2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market surveillance that are common to rules of all options exchanges.²⁵

The underlying shares of spot bitcoin exchange-traded products ("ETPs"), including the Bitcoin Funds, are also subject to safeguards related to addressing market abuse and manipulation. As the Commission stated in Bitcoin ETP Order:

Each Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market.²⁶

The Exchange states that, given the consistently high correlation between the CME bitcoin futures market and the spot bitcoin market, as confirmed by the Commission through robust correlation analysis, the Commission was able to conclude that such surveillance sharing agreements could reasonably be "expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [Bitcoin ETPs]." ²⁷

In light of surveillance measures related to both options and futures as well as the underlying Bitcoin Funds,²⁸

²⁵ Section 19(g)(1) of the Act, among other things, requires every SRO registered as a national securities exchange or national securities association to comply with the Act, the rules and regulations thereunder, and the SRO's own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members. See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO ("common members"). Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

²⁶ See Bitcoin ETP Order, 89 FR at 3010-11.

²⁷ See Bitcoin ETP Order, 89 FR at 3010-11.

²⁸ See Securities Exchange Act Release Nos. 99290 (January 8, 2024), 89 FR 2338, 2343, 2347-2348 (January 12, 2024) (SR-CboeBZX-2023-044) Notice of Filing of Amendment No. 3 to a Proposed Rule Change to List and Trade Shares of the Fidelity Wise Origin Bitcoin Fund Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares); and 99288 (January 8, 2024), 89 FR 2387, 2392, 2399-2400 (January 12, 2024) (SR-CboeBZX-2023-028) (Notice of Filing of Amendment No. 5 to a Proposed Rule Change To List and Trade Shares of the ARK 21Shares Bitcoin ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares). See also Securities

¹⁹ *Id.*

²⁰ See Exchange Rule 404, Interpretation and Policy .01.

²¹ See Exchange Rule 404, Interpretation and Policy .04.

²² See Exchange Rule 404(f).

²³ See Exchange Rule 510.

²⁴ The surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (e.g., spoofing, marking the close, pinging, phishing).

the Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Bitcoin Funds. Further, the Exchange represents that it will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on Bitcoin Funds.

The Exchange has also analyzed its capacity and represents that it believes the Exchange and Options Price Reporting Authority or “OPRA” have the necessary systems capacity to handle the additional traffic associated with the listing of new series that may result from the introduction of options on Bitcoin Funds up to the number of expirations currently permissible under the Rules. Because the proposal is limited to one class, the Exchange believes any additional traffic that may be generated from the introduction of Bitcoin Funds options will be manageable.

The Exchange believes that offering options on Bitcoin Funds will benefit investors by providing them with an additional, relatively lower cost investing tool to gain exposure to the price of Bitcoin and hedging vehicle to meet their investment needs in connection with Bitcoin-related products and positions. The Exchange expects investors will transact in options on Bitcoin ETPs in the unregulated over-the-counter (“OTC”) options market (if the Commission approves Bitcoin ETPs for exchange-trading),²⁹ but may prefer to trade such options in a listed environment to receive the benefits of trading listing options, including (1) enhanced efficiency in initiating and closing out position; (2) increased market transparency; and (3) heightened counterparty creditworthiness due to the role of OCC as issuer and guarantor of all listed options. The Exchange believes that listing Bitcoin Fund options may cause investors to bring this liquidity to the Exchange, would increase market transparency and enhance the process of price discovery conducted on the

Exchange through increased order flow. The ETFs that hold financial instruments, money market instruments, or precious metal commodities on which the Exchange may already list and trade options are trusts structured in substantially the same manner as Bitcoin Funds and essentially offer the same objectives and benefits to investors, just with respect to different assets. The Exchange notes that it has not identified any issues with the continued listing and trading of any ETFs options, including ETFs that hold commodities (*i.e.*, precious metals) that it currently lists and trades on the Exchange.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.³⁰ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)³¹ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)³² requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that the proposal to list and trade options on the Bitcoin Funds will remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors because offering options on the Bitcoin Funds will provide investors with a greater opportunity to realize the benefits of utilizing options on an ETF based on a Bitcoin Fund, including cost efficiencies and increased hedging strategies. The Exchange believes that offering Bitcoin Funds options will benefit investors by providing them with an additional, relatively lower-cost risk management tool, allowing them to manage, more

easily, their positions and associated risks in their portfolios in connection with exposure to the price of Bitcoin and with Bitcoin-related products and positions. Additionally, the Exchange’s offering of Bitcoin Fund options will provide investors with the ability to transact in such options in a listed market environment as opposed to in the unregulated OTC option market, which would increase market transparency and enhance the process of price discovery conducted on the Exchange through increased order flow to the benefit of all investors. The Exchange also notes that it already lists options on other commodity-based ETFs,³³ which, as described above, are trusts structured in substantially the same manner as Bitcoin Funds and essentially offer the same objectives and benefits to investors, just with respect to a different commodity (*i.e.*, Bitcoin rather than precious metals) and for which the Exchange has not identified any issues with the continued listing and trading of commodity-backed ETF options it currently lists for trading.

The Exchange also believes the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, because it is consistent with current Exchange Rules, previously filed with the Commission. Options on Bitcoin Funds must satisfy the initial listing standards and continued listing standards currently in the Exchange Rules, applicable to options on all ETFs, including ETFs that hold other commodities already deemed appropriate for options trading on the Exchange. Additionally, as demonstrated above, each Bitcoin Fund is characterized by a substantial number of shares that are widely held and actively traded. Bitcoin Fund options will trade in the same manner as any other ETF options—the same Exchange Rules that including permissible expirations, strike prices, minimum increments, position and exercise limits (including as proposed in the filing submitted by Exchange’s affiliate, MIAX Options), and margin requirements, will govern the listing and trading of options on the Bitcoin Funds.

The Exchange represents that it has the necessary systems capacity to support the new Bitcoin Fund options. As discussed above, the Exchange believes that its existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing

Exchange Act Release No. 99306 (Jan. 10, 2024), 89 FR 3008 (Jan. 17, 2024) (order approving File Nos. SR-NYSEARCA-2021-90; SR-NYSEARCA-2023-44; SR-NYSEARCA-2023-58; SR-NASDAQ-2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SR-CboeBZX-2023-044; SR-CboeBZX-2023-072) (“Bitcoin ETP Order”).

²⁹ The Exchange understands from customers that investors have historically transacted in options on ETFs in the OTC options market if such options were not available for trading in a listed environment.

³⁰ 15 U.S.C. 78f(b).

³¹ 15 U.S.C. 78f(b)(5).

³² *Id.*

³³ See Exchange Rule 402(i)(4).

and trading ETF options, including Bitcoin Fund options.

Today, the Exchange has an adequate surveillance program in place for options. The Exchange intends to apply those same program procedures to options on the Bitcoin Fund that it applies to the Exchange's other options products.³⁴ The Exchange's staff will have access to the surveillance programs conducted by its affiliate exchanges, MIAX Options and MIAX Sapphire with respect to the underlying Bitcoin Funds when conducting surveillances for market abuse or manipulation in the options on the Bitcoin Funds. The Exchange will review activity in the underlying Bitcoin Fund when conducting surveillances for market abuse or manipulation in the options on the Bitcoin Funds. Additionally, the Exchange is a member of the ISG under the Intermarket Surveillance Group Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. In addition to obtaining surveillance data from MIAX Options and MIAX Sapphire, the Exchange will be able to obtain information from Cboe and other markets through ISG. In addition, the Exchange has a Regulatory Services Agreement with FINRA. Pursuant to a multi-party 17d-2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market surveillance that are common to rules of all options exchanges.³⁵

The underlying shares of spot bitcoin ETPs, including the Bitcoin Funds, are also subject to safeguards related to addressing market abuse and

manipulation. As the Commission stated in Bitcoin ETP Order:

Each Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market.³⁶

The Exchange states that, given the consistently high correlation between the CME bitcoin futures market and the spot bitcoin market, as confirmed by the Commission through robust correlation analysis, the Commission was able to conclude that such surveillance sharing agreements could reasonably be "expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [Bitcoin ETPs]." ³⁷

In light of surveillance measures related to both options and futures as well as the underlying Bitcoin Funds,³⁸ the Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Bitcoin Funds. Further, the Exchange represents that it will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on the Bitcoin Funds.

Finally, the Commission has previously approved the listing and trading of options on other commodity ETFs structured as a trust, such as SPDR® Gold Trust,³⁹ the iShares COMEX Gold Trust⁴⁰ the iShares Silver

Trust,⁴¹ the ETFS Gold Trust,⁴² and the ETFS Silver Trust.⁴³

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. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to filings submitted by Cboe.⁴⁴

The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act as options on the Bitcoin Funds will be equally available to all market participants who wish to trade such options and will trade generally in the same manner as other options. Further, options on the Bitcoin Funds will be subject to Exchange Rules that currently govern the listing and trading of options on ETFs, including permissible expirations, strike prices, minimum increments, position and exercise limits (including as proposed in the filing submitted by Exchange's affiliate, MIAX Options), and margin requirements. Also, and as stated above, the Exchange already lists options on other commodity ETFs structured as a trust.⁴⁵ Further, the Bitcoin Funds would need to satisfy the maintenance listing standards set forth in the Exchange Rules in the same manner as any other ETF for the Exchange to continue listing options on them.

The Exchange does not believe that the proposal to list to list and trade options on the Trust will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the extent that the advent of Bitcoin Fund options trading on the Exchange may make the Exchange a more attractive marketplace to market participants at other exchanges, such market participants are free to elect to become market participants on the Exchange. Additionally, other options exchanges are free to amend their listing

³⁴ The surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (e.g., spoofing, marking the close, ping, phishing).

³⁵ Section 19(g)(1) of the Act, among other things, requires every SRO registered as a national securities exchange or national securities association to comply with the Act, the rules and regulations thereunder, and the SRO's own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members. See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO ("common members"). Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

³⁶ See Bitcoin ETP Order, 89 FR at 3010-11.

³⁷ See Bitcoin ETP Order, 89 FR at 3010-11.

³⁸ See Securities Exchange Act Release No. 99295 (January 8, 2024), 89 FR 2321, 2334-35 (January 12, 2024) (SR-NASDAQ-2023-016) (Notice of Filing of Amendment No. 1 to a Proposed Rule Change To List and Trade Shares of the iShares Bitcoin Trust Under Nasdaq Rule 5711(d)).

³⁹ See Securities Exchange Act Release No. 57897 (May 30, 2008), 73 FR 32061 (June 5, 2008) (SR-Amex-2008-15; SR-CBOE-2005-11; SR-ISE-2008-12; SR-NYSEArca-2008-52; and SRPhlx-2008-17) (Order Granting Approval of a Proposed Rule Change, as Modified, and Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Changes, as Modified, Relating to Listing and Trading Options on the SPDR Gold Trust).

⁴⁰ See Securities Exchange Act Release No. 59055 (December 4, 2008), 73 FR 75148 (December 10, 2008) (SR-Amex-2008-68; SR-BSE-2008-51; SR-CBOE-2008-72; SR-ISE-2008-58; SRNYSEArca-2008-66; and SR-Phlx-2008-58) (Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Changes Relating to the Listing and Trading Options on Shares of the iShares COMEX Gold Trust and the iShares Silver Trust).

⁴¹ *Id.*

⁴² See Securities Exchange Act Release No. 61483 (February 3, 2010), 75 FR 6753 (February 10, 2010) (SR-CBOE-2010-007; SR-ISE-2009-106; SR-NYSEAmex-2009-86; and SR-NYSEArca-2009-110) (Order Granting Approval of Proposed Rule Changes and Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Relating to Listing and Trading Options on the ETFS Gold Trust and the ETFS Silver Trust).

⁴³ *Id.*

⁴⁴ See *supra* note 5.

⁴⁵ See Exchange Rule 402(i)(4).

rules, as applicable, to permit them to list and trade options on the Bitcoin Funds. The Exchange notes that listing and trading Bitcoin Fund options on the Exchange will subject such options to transparent exchange-based rules as well as price discovery and liquidity, as opposed to alternatively trading such options in the OTC market. The Exchange believes that the proposed rule change may relieve any burden on, or otherwise promote, competition as it is designed to increase competition for order flow on the Exchange in a manner that is beneficial to investors by providing them with a lower-cost option to hedge their investment portfolios. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues that offer similar products. Ultimately, the Exchange believes that offering Bitcoin Fund options for trading on the Exchange will promote competition by providing investors with an additional, relatively low-cost means to hedge their portfolios and meet their investment needs in connection with Bitcoin prices and Bitcoin-related products and positions on a listed options exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act⁴⁶ and Rule 19b-4(f)(6) thereunder.⁴⁷ 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 Act⁴⁸ and subparagraph (f)(6) of Rule 19b-4 thereunder.⁴⁹

A proposed rule change filed under Rule 19b-4(f)(6)⁵⁰ under the Act does not normally become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),⁵¹ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission previously approved the listing of options on the Fidelity Fund and the ARK 21 Fund.⁵² The Exchange has provided information regarding the underlying Bitcoin Funds, including, among other things, information regarding trading volume, the number of beneficial holders, and the market capitalization of the Bitcoin Funds. The proposal also establishes position and exercise limits for options on the Bitcoin Funds and provides information regarding the surveillance procedures that will apply to Bitcoin Fund options. The Commission believes that waiver of the operative delay could benefit investors by providing an additional venue for trading Bitcoin Fund options. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.⁵³

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.

⁵⁰ 17 CFR 240.19b-4(f)(6).

⁵¹ 17 CFR 240.19b-4(f)(6)(iii).

⁵² See Securities Exchange Act Release No. 101387 (October 18, 2024), 89 FR 84948 (October 24, 2024) (SR-Choe-2024-035) (Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds).

⁵³ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-SAPPHIRE-2024-38 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-SAPPHIRE-2024-38. 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-SAPPHIRE-2024-38 and should be submitted on or before December 23, 2024.

⁴⁶ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴⁷ 17 CFR 240.19b-4(f)(6).

⁴⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴⁹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission waives this requirement.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁴

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024–28102 Filed 11–29–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101736; File No. SR–NASDAQ–2024–073]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 9, Section 13, Position Limits, and Options 9, Section 15, Exercise Limits, Regarding Options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF

November 25, 2024.

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 November 21, 2024, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The 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 Nasdaq Options Market LLC (“NOM”) Options 9, Section 13, Position Limits, and Section 15, Exercise Limits.

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed

any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Options 9, Section 13, Position Limits, and Options 9, Section 15, Exercise Limits, to limit the position limits for options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF (collectively “Bitcoin Trusts”).

Recently, Cboe Exchange, Inc. (“Cboe”) received approvals to list options on the Fidelity Wise Origin Bitcoin Fund, and the ARK21Shares Bitcoin ETF.³ Also, recently, NYSE American LLC (“NYSE American”) received approvals to list options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF.⁴ Nasdaq ISE, LLC (“ISE”) filed a rule change to also list and trade options on the Bitcoin Trusts.⁵ NOM’s Options 4 Rules were amended by the ISE rule change as those Rules are incorporated by reference to ISE’s Options 4 Rules, so NOM has the ability to list the options on the Bitcoin Trusts. The Cboe Approval Order and the NYSE American Approval Order stated that the position and exercise limits for each of the Bitcoin Trusts shall be 25,000 contracts. At this time, the Exchange proposes to amend NOM Option 9, Section 13 and Options 9, Section 15 to similarly note that options on the Fidelity Wise Origin Bitcoin Fund, the

ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF shall have position and exercise limits of 25,000 contracts to mirror the Cboe Approval Order and the NYSE American Approval Order, respectively.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁷ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange’s proposal to amend Options 9, Section 13, Position Limits, and Options 9, Section 15, Exercise Limits, to provide that the position and exercise limits for options on each of the Bitcoin Trusts shall be 25,000 contracts is consistent with the Act as it will conform NOM’s options position and exercise limits for each of the Bitcoin Trusts with ISE’s options position and exercise limits on these same Bitcoin Trusts to align those limits.⁸

B. Self-Regulatory Organization’s Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Amending Options 9, Sections 13 and 15 to provide that the position and exercise limits for options on each of the Bitcoin Trusts shall be 25,000 contracts does not impose an undue burden on competition as the position and exercise limits will apply to all trading for options on the Bitcoin Trusts trading on the Exchange as well as those trading on other exchanges that file a similar proposal.⁹

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.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

⁸ The Exchange believes that other exchanges will adopt position and exercise limits of 25,000 contracts for options on each of the Bitcoin Trusts. All Nasdaq affiliated markets have filed to adopt a 25,000 contract position and exercise limit for the Bitcoin Trusts.

⁹ All Nasdaq affiliated markets are filing to adopt a 25,000 contract position and exercise limit for options on the Bitcoin Trusts.

⁵⁴ 17 CFR 200.30–3(a)(12), (59).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 101387 (October 18, 2024), 89 FR 84948 (October 24, 2024) (SR–Cboe–2024–035) (Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds) (“Cboe Approval Order”).

⁴ See Securities Exchange Act Release No. 101386 (October 18, 2024), 89 FR 84960 (October 24, 2024) (SR–NYSEAMER–2024–49) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds) (“NYSE American Approval Order”).

⁵ See SR–ISE–2024–54

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁰ and Rule 19b-4(f)(6) thereunder.¹¹ 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 Act¹² and subparagraph (f)(6) of Rule 19b-4 thereunder.¹³

A proposed rule change filed under Rule 19b-4(f)(6)¹⁴ under the Act does not normally 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 requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission previously approved the listing of options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF.¹⁶ As noted above, Nasdaq's Options 4 Rules were amended by an ISE rule change¹⁷ as those Rules are incorporated by reference to ISE's Options 4 Rules, so

Nasdaq has the ability to list the options on the Bitcoin Trusts. This proposal establishes position and exercise limits for options on the Bitcoin Trusts. The Commission believes that waiver of the operative delay could benefit investors by assuring that trading in Bitcoin Trust options are subject to the same position and exercise limits in place on other exchanges. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.¹⁸

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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-NASDAQ-2024-073 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-2024-073. 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NASDAQ-2024-073 and should be submitted on or before December 23, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-28106 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101744; File No. SR-ISE-2024-54]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To List and Trade Various Bitcoin Options

November 25, 2024.

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 November 21, 2024, Nasdaq ISE, LLC ("ISE" or "Exchange") 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 by the Exchange. The Commission is publishing this notice to

¹⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

¹¹ 17 CFR 240.19b-4(f)(6).

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)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission waives this requirement.

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ 17 CFR 240.19b-4(f)(6)(iii).

¹⁶ See Securities Exchange Act Release No. 101387 (October 18, 2024), 89 FR 84948 (October 24, 2024) (SR-Cboe-2024-035) (Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds). See also Securities Exchange Act Release No. 101386 (October 18, 2024), 89 FR 84960 (October 24, 2024) (SR-NYSEAMER-2024-49) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds).

¹⁷ See SR-ISE-2024-54.

¹⁸ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁹ 17 CFR 200.30-3(a)(12), (59).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 to amend Options 4, Section 3, Criteria for Underlying Securities.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/ise/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 amend Options 4, Section 3, Criteria for Underlying Securities, to allow the Exchange to list and trade options the (1) Fidelity Wise Origin Bitcoin Fund ("Fidelity Fund"); (2) ARK21Shares Bitcoin ETF ("ARK 21 Fund"); (3) Grayscale Bitcoin Trust (BTC) (the "Grayscale Fund" or "GBTC"); (4) Grayscale Bitcoin Mini Trust BTC (the "Grayscale Mini Fund" or "BTC"); (5) and Bitwise Bitcoin ETF (the "Bitwise Fund" or "BITB"), (collectively "Bitcoin Trusts") as "Units" deemed appropriate for options trading on the Exchange. Options on each Bitcoin Trust were approved for trading on other options exchanges.³

³ See Securities Exchange Act Release No. 101387 (October 18, 2024), 89 FR 84948 (October 24, 2024) (SR-Cboe-2024-035) (Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds) ("CBOE-2024-035"). See also Securities Exchange Act Release No. 101386 (October 18, 2024), 89 FR 84960 (October 24, 2024) (SR-NYSEAMER-2024-49) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Permit the Listing and

Currently, Options 4, Section 3(h) provides that securities deemed appropriate for options trading shall include shares or other securities ("Exchange-Traded Fund Shares" or "ETFs") that are traded on a national securities exchange and are defined as an "NMS" stock under Rule 600 of Regulation NMS, and that meet certain criteria specified in Options 4, Section 3(h), including that they:

(i) represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that hold portfolios of securities and/or financial instruments, including, but not limited to, stock index futures contracts, options on futures, options on securities and indices, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse repurchase agreements (the "Financial Instruments"), and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the "Money Market Instruments") comprising or otherwise based on or representing investments in broad-based indexes or portfolios of securities and/or Financial Instruments and Money Market Instruments (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities and/or Financial Instruments and Money Market Instruments) or

(ii) represent interests in a trust or similar entity that holds a specified non-U.S. currency or currencies deposited with the trust when aggregated in some specified minimum number may be surrendered to the trust or similar entity by the beneficial owner to receive the specified non-U.S. currency or currencies and pays the beneficial owner interest and other distributions on the deposited non-U.S. currency or currencies, if any, declared and paid by the trust ("Currency Trust Shares") or

(iii) represent commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency ("Commodity Pool ETFs") or

(iv) represent interests in the SPDR® Gold Trust, the iShares COMEX Gold Trust, the iShares Silver Trust, the Aberdeen Standard Physical Gold Trust, or the iShares Bitcoin Trust or

(v) represents an interest in a registered investment company ("Investment Company") organized as an open-end management company or similar entity, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies, which is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities

Trading of Options on Bitcoin Exchange-Traded Funds) ("NYSEAMER-2024-49").

and/or a cash amount with a value equal to the next determined net asset value ("NAV"), and when aggregated in the same specified minimum number, may be redeemed at a holder's request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined NAV ("Managed Fund Share").

In addition to the aforementioned requirements, Options 4, Section 3(h)(1) and (2) must be met to list options on ETFs.⁴

Proposal

The Exchange proposes to expand the list of ETFs that are appropriate for options trading on the Exchange in Options 3, Section 4(h)(iv) to include the Bitcoin Trusts.⁵

The Bitcoin Trusts are Bitcoin-backed commodity ETFs structured as trusts. Similar to any Unit currently deemed appropriate for options trading under Options 3, Section 4(h), the investment objective of each Bitcoin Trust is for its shares to reflect the performance of Bitcoin (less the expenses of the trust's operations), offering investors an opportunity to gain exposure to Bitcoin without the complexities of Bitcoin delivery. As is the case for Units currently deemed appropriate for options trading, a Bitcoin Trust's shares represent units of fractional undivided beneficial interest in the trust, the assets of which consist principally of Bitcoin and are designed to track Bitcoin or the performance of the price of Bitcoin and offer access to the Bitcoin market.⁶ The Bitcoin Trusts provide investors with cost-efficient alternatives that allow a level of participation in the Bitcoin market through the securities market. The primary substantive difference

⁴ Options 4, Section 3(h)(1) and (2) state that the Exchange-Traded Fund Shares either (i) meet the criteria and guidelines set forth in paragraphs (a) and (b) described herein; or (ii) the Exchange-Traded Fund Shares are available for creation or redemption each business day from or through the issuing trust, investment company, commodity pool or other entity in cash or in kind at a price related to net asset value, and the issuer is obligated to issue Exchange-Traded Fund Shares in a specified aggregate number even if some or all of the investment assets and/or cash required to be deposited have not been received by the issuer, subject to the condition that the person obligated to deposit the investment assets has undertaken to deliver them as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the issuer of the Exchange-Traded Fund Shares, all as described in the Exchange-Traded Fund Shares' prospectus. Also, the Exchange-Traded Fund Shares based on international or global indexes, or portfolios that include non-U.S. securities, shall meet the criteria in Options 4, Section 3(h)(2)(A)-(F).

⁵ Specifically, the Exchange proposes to amend Options 3, Section 4(h)(iv) to include the name of each Bitcoin Trust to enable options to be listed on the Bitcoin Trusts on the Exchange.

⁶ The trust may include minimal cash.

between Bitcoin Trusts and Units currently deemed appropriate for options trading are that Units may hold securities, certain financial instruments, and specified precious metals (which are deemed commodities), while Bitcoin Trusts hold Bitcoin (which is also deemed a commodity).

The Exchange believes each Bitcoin Trust satisfies the Exchange's initial listing standards for Units on which the Exchange may list options. Specifically, each Bitcoin Trust satisfies the initial listing standards set forth in Options 3, Section 4(h), as is the case for other Units on which the Exchange lists options (including trusts that hold commodities). Currently, Options 4, Section 3(h)(1) and (2) requires that Units must either (i) meet the criteria and guidelines set forth in paragraphs (a) and (b) described herein; or (ii) be available for creation or redemption each business day from or through the issuing trust, investment company, commodity pool or other entity in cash or in kind at a price related to net asset value, and the issuer is obligated to issue Exchange-Traded Fund Shares in a specified aggregate number even if some or all of the investment assets and/or cash required to be deposited have not been received by the issuer, subject to the condition that the person obligated to deposit the investment assets has undertaken to deliver them as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to

the issuer of the Exchange-Traded Fund Shares, all as described in the Exchange-Traded Fund Shares' prospectus. Each Bitcoin Trust Fund satisfies Options 4, Section 3(h)(1) and (2), as each is subject to this creation and redemption process.

While not required by the Rules for purposes of options listings, the Exchange believes each Bitcoin Trust satisfies the criteria and guidelines set forth in Options 4, Section 3(b).⁷ Options 4, Section 3(a), a security (which includes a Unit) on which options may be listed and traded on the Exchange must be duly registered (with the Commission) and be an NMS stock (as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934, as amended (the "Act")), and be characterized by a substantial number of outstanding shares that are widely held and actively traded.⁸ Each Bitcoin Trust is an NMS Stock as defined in Rule 600 of Regulation NMS under the Act.⁹ The Exchange believes each Bitcoin Trust is characterized by a substantial number of outstanding shares that are widely held and actively traded.

Fidelity Fund and ARK 21

Cboe Exchange, Inc. ("Cboe") noted in CBOE-2024-035 that, as of August 7, 2024, that the Fidelity Fund had 201,100,100 shares outstanding and the ARK 21 Fund had 45,495,000 shares outstanding. Further, each Bitcoin Trust had significantly more than 7,000,000 shares outstanding (approximately 29

and 6.5 times that amount, respectively), which is the minimum number of shares of a corporate stock that the Exchange generally requires to list options on that stock pursuant to Options 4, Section 3(b).¹⁰ Cboe noted in CBOE-2024-035 that this demonstrated that the Fidelity Fund and the ARK 21 Fund were both characterized by a substantial number of outstanding shares. Further, in CBOE-2024-035, Cboe noted that the Fidelity Fund, as of June 27, 2024, had 279,656 beneficial owners and the ARK 21 Fund, as of June 26, 2024, had 69,425 beneficial owners. Cboe noted that the Fidelity Fund and the ARK 21 Fund both had significantly more than 2,000 beneficial holders (approximately 140 and 35 times more, respectively), which is the minimum number of holders the Exchange generally requires for corporate stock in order to list options on that stock pursuant to Options 4, Section 3(b).¹¹ Therefore, Cboe noted in CBOE-2024-035, that it believed the shares of the Fidelity Fund and the ARK 21 Fund are widely held. Cboe noted in CBOE-2024-035 that it believed that the shares of the Fidelity Fund and the ARK 21 Fund are both actively traded. Cboe noted in CBOE-2024-035 that as of August 7, 2024, the total trading volume (by shares) for each fund for the six-month period of February 8 through August 7, 2024, and the approximate average daily volume ("ADV") (in shares and notional) over the 30-day period of July 9 through August 7, 2024, for each Bitcoin Trust was as follows:

Bitcoin Trust	6-Month trading volume (shares)	30-Day ADV (shares)	30-Day ADV (notional \$)
Fidelity Fund	1,112,861,581	6,014,335	250,354,755
ARK 21 Fund	297,360,739	1,893,335	90,484,307

⁷ ISE Options 4, Section 3(b) states that, in addition, the Exchange shall from time to time establish guidelines to be considered in evaluating potential underlying securities for Exchange options transactions. There are many relevant factors which must be considered in arriving at such a determination, and the fact that a particular security may meet the guidelines established by the Exchange does not necessarily mean that it will be selected as an underlying security. Further, in exceptional circumstances an underlying security may be selected by the Exchange even though it does not meet all of the guidelines. The Exchange may also give consideration to maintaining diversity among various industries and issuers in selecting underlying securities. Notwithstanding the foregoing, however, absent exceptional circumstances, an underlying security will not be selected unless: (1) There are a minimum of seven (7) million shares of the underlying security which are owned by persons other than those required to report their stock holdings under Section 16(a) of the Exchange Act; (2) There are a minimum of 2,000 holders of the underlying security; (3) The issuer is in compliance with any applicable requirements of the Exchange Act; (4) Trading volume (in all

markets in which the underlying security is traded) has been at least 2,400,000 shares in the preceding twelve (12) months; (5) Either: (i) If the underlying security is a "covered security" as defined under Section 18(b)(1)(A) of the Securities Act of 1933: (A) the market price per share of the underlying security has been at least \$3.00 for the previous three consecutive business days preceding the date on which the Exchange submits a certificate to the Clearing Corporation for listing and trading, as measured by the closing price reported in the primary market in which the underlying security is traded; however, (B) the requirements set forth in (5)(i)(A) will be waived during the three days following its initial public offering day for an underlying security having a market capitalization of at least \$3 billion based upon the offering price of its initial public offering, and may be listed and traded starting on or after the second business day following the initial public offering day; or (ii) If the underlying security is not a "covered security," the market price per share of the underlying security has been at least \$7.50 for the majority of business days during the three calendar months preceding the date of selection, as measured by the lowest closing price reported in any market in which the

underlying security traded on each of the subject days. Notwithstanding the requirements set forth in Paragraphs 1, 2, 4 and 5 above, the Exchange may list and trade an options contract if (i) the underlying security meets the guidelines for continued approval in Options 4, Section 4; and (ii) options on such underlying security are traded on at least one other registered national securities exchange.

⁸ The criteria and guidelines for a security to be considered widely held and actively traded are set forth in Options 4, Section 3(b), subject to exceptions.

⁹ An "NMS stock" means any NMS security other than an option, and an "NMS security" means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan (or an effective national market system plan for reporting transaction in listed options). See 17 CFR 242.600(b)(64) (definition of "NMS security") and (65) (definition of "NMS stock").

¹⁰ See supra note 7.

¹¹ See supra note 7.

Cboe noted that as demonstrated above, despite the fact that the Fidelity Fund and the ARK 21 Fund had been trading for approximately seven months (as of January 10, 2024) only as of August 7, 2024, the six-month trading volume for each as of that date was substantially higher than 2,400,000 shares (approximately 464 and 124 times that amount, respectively), which is the minimum 12-month volume the Exchange generally requires for a corporate stock in order to list options

on that security as set forth in Options 4, Section 3(b). Additionally, Cboe noted in in CBOE–2024–035 that as of August 7, 2024, the trading volume for the Fidelity Fund and the ARK 21 Fund was in the top 5% of all ETFs that are currently trading. Cboe noted in CBOE–2024–035 that this data demonstrates the Fidelity Fund and the ARK 21 Fund are characterized as having shares that are actively traded.

Cboe determined the proposed position and exercise limits considering,

among other things, the approximate six-month average daily volume (“ADV”) and outstanding shares of the Fidelity Fund and the ARK 21 Fund noted in the filing (which as discussed above demonstrate that these Bitcoin Trusts are widely held and actively traded and thus justify these conservatively proposed position limits), as set forth in in CBOE–2024–035 and below, along with market capitalization (as of August 7, 2024):

Underlying Bitcoin Trust	Six-month ADV (shares)	Outstanding shares	Market capitalization (\$)
Fidelity Fund	8,902,893	201,100,100	14,217,013,188
ARK 21 Fund	2,378,886	45,495,000	2,487,666,600

Cboe then compared the number of outstanding shares of the Fidelity Fund and the ARK 21 Fund to those of other ETFs. The following table in CBOE–

2024–035 provided the approximate average position (and exercise limit) of ETF options with similar outstanding shares (as of August 27, 2024),

compared to the proposed position and exercise limit for options on the Fidelity Fund and the ARK 21 Fund:

Underlying Bitcoin Trust	Average limit of other ETF options (contracts)	Proposed limit (contracts)	
Fidelity Fund	188,11023	25,000	Cboe noted in Cboe–2024–035 that over 80% of the ETFs used for comparison had a limit of at least 200,000, and more than half had a limit of 250,000. Additionally, the three-month ADV of the majority of the ETFs used for comparison was lower than the Fidelity Fund three-month ADV of 5,665,027 shares.
ARK 21 Fund	108,69624	25,000	Cboe noted in Cboe–2024–035 that nearly 80% of the ETFs used for comparison had a limit of at least 75,000 (and up to 250,000). Additionally, the three-month ADV of the majority of ETFs used for comparison was lower (many more than four times lower) than the ARK 21 Fund three-month ADV of 1,737,327 shares.

Cboe considered current position and exercise limits of options on ETFs with outstanding shares comparable to those of each the Fidelity Fund and the ARK 21 Fund, with the proposed limit significantly lower (between two and ten times lower) than the average limits of the options on the other ETFs. As discussed above in in CBOE–2024–035, the Fidelity Fund and the ARK 21 Fund are actively held and widely traded: (1) each of these Bitcoin Trusts (as of August 7, 2024) had significantly more than 7,000,000 shares outstanding, which is the minimum number of shares

of a corporate stock that the Exchange generally requires to list options on that stock pursuant to Options 4, Section 3(b); (2) the Fidelity Fund and the ARK 21 Fund (as of the dates listed above) had significantly more than 2,000 beneficial holders, which is the minimum number of holders the Exchange generally requires for corporate stock in order to list options on that stock pursuant to Options 4, Section 3(b)(2) and; (3) the Fidelity Fund and the ARK 21 Fund had a six-month trading volume substantially higher than 2,400,000 shares, which is

the minimum 12-month volume the Exchange generally requires for a security in order to list options on that security as set forth in Options 4, Section 3.

Cboe noted in in CBOE–2024–035 that with respect to outstanding shares, if a market participant held the maximum number of positions possible pursuant to the proposed position and exercise limits, the equivalent shares represented by the proposed position/exercise limit would represent the following approximate percentage of current outstanding shares:

Underlying Bitcoin Trust	Proposed position /exercise limit (in equivalent shares)	Outstanding shares	Percentage of outstanding shares (%)
Fidelity Fund	2,500,000	201,100,100	1.2
ARK 21 Fund	2,500,000	45,495,000	5.5

As this table demonstrated in CBOE–2024–035, if a market participant held

the maximum permissible options positions in either the Fidelity Fund or

the ARK 21 Fund and exercised all of them at the same time, that market

participant would control a small percentage of the outstanding shares of the particular underlying Bitcoin Trust. Cboe provided a table in in CBOE–2024–035 noting the equivalent shares

of the position limits applicable to equity options, including ETFs, further represents the percentages of the minimum number of outstanding shares that an underlying stock or ETF must

have to qualify for that position limit (under the second method described above), all of which are higher than the percentages for the Fidelity Fund and the ARK 21 Fund.

	Position/exercise limit (in equivalent shares)	Minimum outstanding shares	Percentage of outstanding shares (%)
2,500,000		6,300,000	40.0
5,000,000		40,000,000	12.5
7,500,000		120,000,000	6.3
20,000,000		240,000,000	8.3
25,000,000		300,000,000	8.3

6,300,000 is the minimum number of outstanding shares an underlying security must have for the Exchange to continue to list options on that security, so this would be the smallest number of outstanding shares permissible for any corporate option that would have a position limit of 25,000 contract. *See* Options 4, Section 3(b). This rule applies to corporate stock options but not ETF options, which currently have no requirement regarding outstanding shares of the underlying ETF for the

Exchange to continue listing options on that ETF. Therefore, there may be ETF options trading for which the 25,000 contract position limits represent an even larger percentage of outstanding shares of the underlying ETF than set forth above.

CBOE–2024–035 provided that the equivalent shares represented by the proposed position and exercise limits for the Fidelity Fund and the ARK 21 Fund as a percentage of outstanding shares of the underlying Bitcoin Trust is significantly lower than the percentage

for the lowest possible position limit for equity options of 25,000 (under 6% compared to 40%) and is lower than that percentage for each current position limit bucket.¹²

GBTC, BTC and BITB

NYSE American LLC (“NYSE American”) noted in NYSEAmerican–2024–49 that, as of August 30, 2024, GBTC, BTC and BITB had the following number of shares outstanding (and corresponding market capitalization):

Bitcoin Trust	Shares outstanding	Market value (08/30/2024) (\$)
GBTC	284,570,100	13,443,091,524
BTC	366,950,100	1,930,157,526
BITB	68,690,000	2,221,640,670

NYSE American noted in NYSEAmerican–2024–49 that, as displayed in the above table, GBTC, BTC and BITB had significantly more than 7,000,000 shares outstanding, which is the minimum number of shares of a corporate stock that the Exchange generally requires to list options on that stock pursuant to Options 4, Section 3(b). NYSE American noted in NYSEAmerican–2024–49 that this demonstrated that GBTC, BTC and BITB are characterized by a substantial number of outstanding shares. Further, as provided in NYSEAmerican–2024–49 the below table contained information regarding the number of beneficial

holders of GBTC, BTC and BITB as of August 14, 2024.

Bitcoin Trust	Beneficial holders (8/14/24)
GBTC	464,364
BTC	13,403
BITB	75,437

As shown in NYSEAmerican–2024–49, the table showed that GBTC, BTC and BITB each had significantly more than 2,000 beneficial holders (approximately 232, 7, and 38 times more, respectively), which is the minimum number of holders the

Exchange generally requires for corporate stock in order to list options on that stock pursuant to Options 4, Section 3(b)(2).¹³ Therefore, NYSE American noted that the shares of each GBTC, BTC and BITB are widely held. In addition, NYSE American noted that the shares of each GBTC, BTC and BITB are actively traded.

NYSEAmerican–2024–49 provided, as of September 30, 2024, that the total trading volume (by shares and notional) for these funds since they began trading¹⁴ and the average daily volume (“ADV”) over the 30-day period of September 1 through September 30, 2024, was as follows:

Bitcoin Trust	Trading volume (shares)	Trading volume (notional \$)	ADV (shares)
GBTC	1,803,567,700	93,472,544,497	3,266,138

¹² As these percentages are based on the minimum number of outstanding shares an underlying security must have to qualify for the applicable position limit, these are the highest

possible percentages that would apply to any option subject to that position and exercise limit.

¹³ *See supra* note 7.

¹⁴ GBTC and BITB began trading on January 11th and BTC began trading on July 31st. Thus, the

measurement period for the trading volume (shares/ notional) was January 11 through September 20, 2024, for GBTC and BITB (*i.e.*, nine months) and July 31 through September 20, 2024, for BTC (*i.e.*, two months).

Bitcoin Trust	Trading volume (shares)	Trading volume (notional \$)	ADV (shares)
BTC	335,492,930	1,792,866,521	6,838,546
BITB	434,815,840	14,433,361,384	1,949,835

As demonstrated above and in NYSEAmerican–2024–49, even though GBTC, BTC and BITB were trading for less than one year (and in the case of the BTC, less than two months), the trading volume for each was substantially higher than 2,400,000 shares (between roughly 165 and 700 times that amount), which is the minimum 12-month volume the Exchange generally requires for a security in order to list options on that security as set forth in Options 4, Section 3(b). NYSE American noted that this data demonstrated that GBTC, BTC and BITB are characterized by a substantial number of outstanding shares that are actively traded.

NYSE American noted in NYSEAmerican–2024–49 that BTC began trading on July 31, 2024, and

therefore had only two months of trading data available at the time of filing NYSEAmerican–2024–49. In terms of total volume, NYSEAmerican–2024–49 provided the below table.

Bitcoin Trust	Total volume (9/30/2024)
GBTC	723,758,100 (6-months).
BTC	335,492,930 (2-months).
BITB	263,965,870 (6-months).

NYSE American noted in NYSEAmerican–2024–49 that based on the most-recent trading volume, GBTC, BTC and BITB exceeded the requisite minimum of 100,000,000 shares

necessary to qualify for the 250,000-contract position and exercise limits. By comparison, NYSE American noted that other options symbols with six-month trading volume less than GBTC, BITB, and BTC were eligible for position and exercise limits of at least 250,000.¹⁵ NYSEAmerican–2024–49 provided, with respect to the outstanding shares of each Bitcoin Trust, if a market participant held the maximum number of contracts possible pursuant to the proposed position and exercise limits (25,000 contracts), the equivalent shares represented by the proposed position/exercise limit (2,500,000 shares) would represent the following approximate percentage of current outstanding shares:

Bitcoin Trust	Proposed position/exercise limit in equivalent shares	Outstanding shares (8/30/24)	Percentage of outstanding shares (%)
GBTC	2,500,000	284,570,100	0.9
BTC	2,500,000	366,950,100	0.7
BITB	2,500,000	68,690,000	3.6

As this table demonstrated in NYSEAmerican–2024–49, if a market participant held the maximum permissible options positions in any one of GBTC, BTB or BITB options and exercised all of them at the same time, that market participant would control a small percentage of the outstanding shares of the underlying GBTC, BTB or

BITB. For example, as noted above, a position limit of 25,000 same side contracts effectively restricts a market participant from holding positions that could result in the receipt of no more than 2,500,000 shares of the applicable Bitcoin Trust (if that market participant exercised all its options). Based on the number of shares outstanding for each

of GBTC, BTB or BITB as of August 30, 2024, NYSE American noted in NYSEAmerican–2024–49 and the table below, that the approximate number of market participants that could hold the maximum of 25,000 same side positions in each of GBTC, BTB and BITB that would equate to the number of shares outstanding of that Bitcoin Trust:

Bitcoin Trust	Shares outstanding	Number of market participants with 25,000 same side positions
GBTC	284,570,100	114
BTC	366,950,100	147
BITB	68,690,000	27

NYSE American concluded in NYSEAmerican–2024–49 that this meant if 114 market participants had 25,000 same side positions in options on GBTC, each of them would have to simultaneously exercise all of those options to create a scenario that may put

the underlying security under stress. Similarly, this means if 147 market participants had 25,000 same side positions in options on BTC, each of them would have to simultaneously exercise all of those options to create a scenario that may put the underlying

security under stress. Finally, this means if 27 market participants had 25,000 same side positions in options on BITB, each of them would have to simultaneously exercise all of those options to create a scenario that may put the underlying security under stress.

¹⁵ See <https://www.theocc.com/Market-Data/Market-Data-Reports/Series-and-Trading-Data/>

Series-Search (including the following symbols that have a position limit of 250,000: GLD, IAU, SLV, SIVR, SGOL).

NYSE American noted in NYSEAmerican–2024–49 that it believed it was highly unlikely for this to occur; however, even if such event did occur, NYSE American would not expect GBTC, BTB or BITC to be under stress because such an event would merely induce the creation of more shares through the trust's creation and redemption process. Further, given that the issuer of each of GBTC, BTB or BITC may create and redeem shares that represent an interest in Bitcoin, NYSE American noted in NYSEAmerican–

2024–49 that it is relevant to compare the size of a position limit to the market capitalization of the Bitcoin market. NYSE American noted in NYSEAmerican–2024–49 that, as of August 30, 2024, the global supply of Bitcoin was 19,747,066, and the price of one Bitcoin was approximately \$59,108.23,39 which equates to a market capitalization of approximately \$1.167 trillion.¹⁶ NYSE American stated in NYSEAmerican–2024–49 that a position and exercise limit of 25,000 same side contracts effectively restricts a market

participant from holding positions that could result in the receipt of no more than 2,500,000 shares of GBTC, BTC, or BITB, as applicable (if that market participant exercised all its options). NYSE American presented the below table with the share price of each of GBTC, BTC and BITB on August 30, 2024, the value of 2,500,000 shares of the particular Bitcoin Trust at that price, and the approximate percentage of that value of the size of the Bitcoin market:

Bitcoin Trust	Aug. 30th share price (\$)	Value of 2,500,000 shares of Bitcoin Trust (\$)	Percentage of Bitcoin market (%)
GBTC	46.75	116,875,000	0.010
BTC	5.20	13,000,000	0.001
BITB	31.95	79,875,000	0.007

NYSE American concluded that, if a market participant with the maximum 25,000 same side contracts in options on GBTC, BTC, or BITB exercised all

positions at one time, such an event would have no practical impact on the Bitcoin market. NYSE American also reviewed the market capitalization of

each Bitcoin Trust relative to the market capitalization of the entire bitcoin market, as of August 30, 2024.

	Bitcoin/shares outstanding	Market value (8/30/2024) (\$)	% of total Bitcoin market (%)
Total Bitcoin Market	19,747,066	\$1,167,214,096,788	100.00
GBTC	284,570,100	\$13,443,091,524	1.15
BTC	366,950,100	\$1,930,157,526	0.17
BITB	68,690,000	\$2,221,640,670	0.19

As shown above and in NYSEAmerican–2024–49, GBTC, BTC and BITB collectively represented approximately 1.51% of the global supply of Bitcoin (19,747,066). Based on the \$46.75 price of a GBTC share on August 30, 2024, a market participant could have redeemed one Bitcoin for approximately 1,264 GBTC shares. Further, NYSE American noted that another 24,967,146,455 GBTC shares could be created before the supply of Bitcoin was exhausted. NYSEAmerican–2024–49 provided that as a result, 9,987 market participants would have to simultaneously exercise 25,000 same side positions in GBTC options to receive shares of the GBTC holding the entire global supply of Bitcoin. NYSEAmerican–2024–49 also provided that based on the \$5.20 price of a BTC share on August 30, 2024, a market participant could have redeemed one Bitcoin for approximately 11,367 BTC shares. Another 224,464,249,382 BTC

shares could be created before the supply of Bitcoin was exhausted. NYSE American stated that as a result, 89,786 market participants would have to simultaneously exercise 25,000 same side positions in BTC options to receive shares of BTC holding the entire global supply of Bitcoin. Similarly, NYSE American noted that based on the \$31.95 price of a BITB share on August 30, 2024, a market participant could have redeemed one Bitcoin for approximately 1,850 BITB shares. NYSEAmerican–2024–49 provided that another 36,532,522,591 BITB shares could be created before the supply of Bitcoin was exhausted. NYSE American concluded that as a result, 14,613 market participants would have to simultaneously exercise 25,000 same side positions in BITB options to receive shares of BITB holding the entire global supply of Bitcoin. NYSE American also concluded that, unlike GBTC, BTB and BITB, the number of shares that

corporations may issue is limited. NYSEAmerican–2024–49 provided that, however, like corporations, which authorize additional shares, repurchase shares, or split their shares, the Bitcoin Trusts may create, redeem, or split shares in response to demand and while the supply of Bitcoin is limited to 21,000,000, it is believed that it will take more than 100 years to fully mine the remaining Bitcoin.¹⁷ NYSE American noted that the supply of Bitcoin is larger than the available supply of most securities.¹⁸ NYSE American concluded that given the significant unlikelihood of any of these events ever occurring, NYSE American noted that it did not believe options on GBTC, BTC and BITB should be subject to position and exercise limits even lower than those proposed (which are already equal to the lowest available limit for equity options in the industry) to protect the supply of Bitcoin. NYSE American also noted in

¹⁶ See <https://www.blockchain.com/explorer/charts/total-bitcoins>.

¹⁷ See <https://www.blockchain.com/explorer/assets/btc> (citing 21 million as the “total supply” of bitcoin).

¹⁸ The market capitalization of Bitcoin would rank in the top 10 among securities. See <https://companiesmarketcap.com/usa/largest-companies-in-the-usa-by-market-cap/>.

NYSEAmerican–2024–49 that it believed the proposed limits are appropriate given position limits for Bitcoin futures. NYSE American noted that the Chicago Mercantile Exchange (“CME”) imposed a position limit of 2,000 futures (for the initial spot month)

on its Bitcoin futures contract.¹⁹ Further, NYSE American provided that on August 28, 2024, CME Aug 24 Bitcoin Futures settled at \$58,950. NYSE American noted that a position of 2,000 CME Bitcoin futures, therefore, would have a notional value of

\$589,500,000. NYSEAmerican–2024–49 provided the following table with the share price of each of GBTC, BTC and BITB on August 28, 2024, and the approximate number of option contracts that equates to that notional value:

Bitcoin Trust	Aug. 28th share price	Number of options contracts
GBTC	46.94	125,585
BTC	5.23	1,127,151
BITB	32.08	183,759

NYSE American stated that approximate number of option contracts for GBTC, BTC and BITB that equate to the notional value of CME Bitcoin futures was significantly higher than the proposed limit of 25,000 options contract for each option on GBTC, BTC and BITB. Further, NYSE American noted that the fact that many options ultimately expire out-of-the-money and thus are not exercised for shares of the underlying, while the delta of a Bitcoin Future is 1, further demonstrated how conservative the proposed limits of 25,000 options contracts are for options on GBTC, BTC and BITB.

The Exchange notes, unlike options contracts, CME position limits are calculated on a net futures-equivalent basis by contract and include contracts that aggregate into one or more base contracts according to an aggregation ratio(s).²⁰ Therefore, if a portfolio includes positions in options on futures, CME would aggregate those positions into the underlying futures contracts in accordance with a table published by CME on a delta equivalent value for the relevant spot month, subsequent spot month, single month and all month position limits.²¹ If a position exceeds position limits because of an option assignment, CME permits market

participants to liquidate the excess position within one business day without being considered in violation of its rules. Additionally, if at the close of trading, a position that includes options exceeds position limits for futures contracts, when evaluated using the delta factors as of that day’s close of trading but does not exceed the limits when evaluated using the previous day’s delta factors, then the position shall not constitute a position limit violation. Considering CME’s position limits on futures for Bitcoin, the Exchange believes that that the proposed same side position limits are more than appropriate for the options on Bitcoin Trusts.

NYSE American noted in NYSEAmerican–2024–049 that the available supply of Bitcoin is not relevant to the determination of position and exercise limits for options overlying the GBTC, BTC and BITB.²² NYSE American noted stated that position and exercise limits are not a tool that should be used to address a potential limited supply of the underlying of an underlying. NYSE American noted that position and exercise limits do not limit the total number of options that may be held, but rather they limit the number of positions a single customer may hold

or exercise at one time.²³ “Since the inception of standardized options trading, the options exchanges have had rules imposing limits on the aggregate number of options contracts that a member or customer could hold or exercise.”²⁴ NYSE American noted that position and exercise limit rules are intended “to prevent the establishment of options positions that can be used or might create incentives to manipulate or disrupt the underlying market so as to benefit the options position. In particular, position and exercise limits are designed to minimize the potential for mini-manipulations and for corners or squeezes of the underlying market. In addition, such limits serve to reduce the possibility for disruption of the options market itself, especially in illiquid options classes.”²⁵

The Exchange notes that a Registration Statement on Form S–1 was filed with the Commission for each of GBTC, BTC and BITB, each of which described the supply of Bitcoin as being limited to 21,000,000 (of which approximately 90% had already been mined), and that the limit would be reached around the year 2140.²⁶ Each Registration Statement permits an unlimited number of shares of the applicable Bitcoin Trust to be created.

¹⁹ See CME Rulebook Chapter 350 (description of CME Bitcoin Futures) and Chapter 5, Position Limit, Position Accountability and Reportable Level Table in the Interpretations & Special Notices. Each CME Bitcoin futures contract is valued at five Bitcoins as defined by the CME CF Bitcoin Reference Rate (“BRR”). See CME Rule 35001.

²⁰ See CME Rulebook Chapter 5, Position Limit, Position Accountability and Reportable Level Table in the Interpretations & Special Notices.

²¹ *Id.*

²² NYSE American in NYSEAmerican–2024–49 stated that it is unaware of any proposed rule change related to position and exercise limits for any equity option (including commodity ETF options) for which the Commission required consideration of whether the available supply of an underlying (whether it be a corporate stock or an ETF) or the contents of an ETF (commodity or otherwise) should be considered when an exchange proposed to establish those limits. See, e.g.,

Securities Exchange Act Release No. 57894 May 30, 2008), 73 FR 32061 (June 5, 2008) (SR–CBOE2005–11) (approval order in which the Commission stated that the “listing and trading of Gold Trust Options will be subject to the exchanges’ rules pertaining to position and exercise limits and margin”). The Exchange notes when the Commission approved this filing, the position limits in Rule 9054 were the same as they are today. For reference, the current position and exercise limits for options on SPDR Gold Shares ETF (“GLD”) and options on iShares Silver Trust (“SLV”) are 250,000 contracts, or 10 times that proposed position and exercise limit for the Bitcoin Trust options.

²³ NYSE American in NYSEAmerican–2024–49 provided an example that supposed an option had a position limit of 25,000 option contracts and there were a total of 10 investors trading that option. If all 10 investors maxed out their positions, that would result in 250,000 option contracts outstanding at that time. However, if 10 more

investors decided to begin trading that option and also maxed out their positions. This would result in 500,000 option contracts outstanding at that time. NYSE American concluded that an increase in the number of investors could cause an increase in outstanding options even if position limits remain unchanged.

²⁴ See Securities Exchange Act Release No. 39489 (December 24, 1997), 63 FR 276 (January 5, 1998) (SRCBOE–1997–11).

²⁵ *Id.*

²⁶ See, e.g., GBTC Form S–1 Registration Statement, at p. 17, <https://www.sec.gov/Archives/edgar/data/1588489/000119312517013693/d157414ds1.htm>; BTC Form S–1 Registration Statement, at p. 21, <https://www.sec.gov/Archives/edgar/data/2015034/000119312524065444/d785023ds1.htm>; and BITB Amendment No 2. to S–1, at p. 47, https://www.sec.gov/Archives/edgar/data/1763415/000199937123000735/bitwise-s1a_120423.htm (“Bitcoin Trusts Reg. Stmts.”).

Further, the Commission approved proposed rule changes that permitted the listing and trading of shares of each of GBTC, BTC and BITB, which approval did not comment on the sufficient supply of Bitcoin or address whether there was a risk that permitting an unlimited number of shares for a Bitcoin Trust would impact the supply of Bitcoin.²⁷ Therefore, the Exchange believes the Commission had ample time and opportunity to consider whether the supply of Bitcoin was sufficient to permit the creation of unlimited Bitcoin Trust shares, and does not believe considering this supply with respect to the establishment of position and exercise limits is appropriate given its lack of relevance to the purpose of position and exercise limits. However, given the significant size of the Bitcoin supply, the proposed positions limits are more than sufficient to protect investors and the market.

Based on the foregoing and notwithstanding the position limits in Options 9, Section 13(d) and exercise limits in Options 9, Section 15(c), ISE proposes the position and exercise limits for the options Fidelity Fund, the ARK 21 Fund, GBTC, BTC and BITB to be 25,000 contracts on the same side pursuant to proposed Supplementary Material .01 to Options 9, Section 13 and proposed Supplementary Material .01 to Options 9, Section 15. Further, Exchange Rules that currently govern the listing and trading of options on ETFs, including permissible expirations, strike prices, minimum increments, and margin requirements, will govern the listing and trading of options on the Bitcoin Trusts. The proposed position limit, and exercise limit, is consistent with the Act as it addresses concerns related to manipulation and protection of investors because the position limit (and exercise limit) is conservative and appropriate given the Bitcoin Trusts are actively traded.

Options on the Bitcoin Trusts will be subject to the Exchange's continued listing standards for options on ETFs set forth in Options 4, Section 4(g). Specifically, options approved for trading pursuant to Options 4, Section 3(h) will not be deemed to meet the requirements for continued approval, and the Exchange shall not open for trading any additional series of option contracts of the class covering such ETFs if the ETFs are delisted from trading as provided in subparagraph (b)(5) of Options 4, Section 4²⁸ or the

ETFs are halted or suspended from trading on their primary market.²⁹ In addition, the Exchange shall consider the suspension of opening transactions in any series of options of the class covering ETFs in any of the following circumstances:

(1) in the case of options covering Exchange-Traded Fund Shares approved pursuant to Options 4, Section 3(h)(A)(i), in accordance with the terms of subparagraphs (b)(1), (2), (3) and (4) of Options 4, Section 4;³⁰

(2) in the case of options covering Fund Shares approved pursuant to Options 4, Section 3(h)(A)(ii),³¹ following the initial twelve-month period beginning upon the commencement of trading in the Exchange-Traded Fund Shares on a national securities exchange and are defined as an "NMS stock" under Rule 600 of Regulation NMS, there were fewer than 50 record and/or beneficial holders of such Exchange-Traded Fund Shares for 30 or more consecutive trading days;

(3) the value of the index or portfolio of securities or non-U.S. currency, portfolio of commodities including commodity futures contracts, options on commodity futures contracts, swaps, forward contracts, options on physical commodities and/or Financial Instruments and Money Market Instruments, on which the Exchange-Traded Fund Shares are based is no longer calculated or available; or

(4) such other event occurs or condition exists that in the opinion of the Exchange makes further dealing in such options on the Exchange inadvisable.

Options on the Bitcoin Trusts would be physically settled contracts with American-style exercise.³² Consistent

Section 3(c), the trading volume of the Original Security (as therein defined) prior to but not after the commencement of trading in the Restructure Security (as therein defined), including 'when-issued' trading, may be taken into account in determining whether the trading volume requirement of (3) of this paragraph (b) is satisfied.

²⁹ See Options 4, Section 4(g).

³⁰ Options 4, Section 4(b)(5)(1) through (4) provides, if: (1) there are fewer than 6,300,000 shares of the underlying security held by persons other than those who are required to report their security holdings under Section 16(a) of the Act, (2) there are fewer than 1,600 holders of the underlying security, (3) the trading volume (in all markets in which the underlying security is traded) has been less than 1,800,000 shares in the preceding twelve (12) months, or (4) the underlying security ceases to be an 'NMS stock' as defined in Rule 600 of Regulation NMS under the Exchange Act. Options 4, Section 3(h)(i) refers to Financial Instruments and Money Market Instruments. In addition, the Exchange proposes to amend the citation to "Options 4, Section 3(h)(A)(i)" herein to "Options 4, Section 3(h)(i)."

³¹ Options 4, Section 3(h)(ii) refers to Currency Trust Shares. In addition, the Exchange proposes to amend the citation to "Options 4, Section 3(h)(A)(ii)" herein to "Options 4, Section 3(h)(ii)."

³² See Options 4, Section 2, Rights and Obligations of Holders and Writers, which provides that the rights and obligations of holders and writers shall be as set forth in the Rules of the Clearing Corporation. See also OCC Rules, Chapter

with current Options 4, Section 5, which governs the opening of options series on a specific underlying security (including ETFs), the Exchange will open at least one expiration month for options on the Bitcoin Trusts and may also list series of options on the Bitcoin Trusts for trading on a weekly³³ or quarterly³⁴ basis. The Exchange may also list long-term equity option series ("LEAPS")³⁵ that expire from twelve to thirty-nine from the time they are listed.

Pursuant to Options 4, Section 5(d), which governs strike prices of series of options on ETFs, the interval between strike prices of series of options on ETFs approved for options trading pursuant to Section 3(h) of Options 4 shall be fixed at a price per share which is reasonably close to the price per share at which the underlying security is traded in the primary market at or about the same time such series of options is first open for trading on the Exchange, or at such intervals as may have been established on another options exchange prior to the initiation of trading on the Exchange. With respect to the Short Term Options Series or Weekly Program, during the month prior to expiration of an option class that is selected for the Short Term Option Series Program, the strike price intervals for the related non-Short Term Option ("Related non-Short Term Option") shall be the same as the strike price intervals for the Short Term Option.³⁶ Specifically, the Exchange may open for trading Short Term Option Series at strike price intervals of (i) \$0.50 or greater where the strike price is less than \$100, and \$1 or greater where the strike price is between \$100 and \$150 for all option classes that participate in the Short Term Options Series Program; (ii) \$0.50 for option classes that trade in one dollar increments and are in the Short Term Option Series Program; or (iii) \$2.50 or greater where the strike price is above \$150.³⁷ Additionally, the Exchange may list series of options pursuant to the \$1 Strike Price Interval

VIII, which governs exercise and assignment, and Chapter IX, which governs the discharge of delivery and payment obligations arising out of the exercise of physically settled stock option contracts. OCC Rules can be located at: https://www.theocc.com/getmedia/9d3854cd-b782-450f-bcf7-33169b0576ce/occ_rules.pdf.

³³ See Supplementary .03 to Options 4, Section 5.

³⁴ See Supplementary .04 to Options 4, Section 5.

³⁵ See Options 4, Section 8.

³⁶ See Supplementary Material .03(e) to Options 4, Section 5.

³⁷ *Id.*

²⁷ See NYSEAMER-2024-49.

²⁸ Options 4, Section 4(b)(5) provides, If an underlying security is approved for options listing and trading under the provisions of Options 4,

Program,³⁸ the \$0.50 Strike Program,³⁹ the \$2.50 Strike Price Program,⁴⁰ and the \$5 Strike Program.⁴¹ Options 3, Section 3 governs the minimum increment for bids and offers for both equity and index options. Pursuant to Options 3, Section 3, where the price of a series of options for the Bitcoin Trusts is less than \$3.00 the minimum increment will be \$0.05, and where the price is \$3.00 or higher, the minimum increment will be \$0.10⁴² consistent with the minimum increments for options on other ETFs listed on the Exchange. Any and all new series of options on the Bitcoin Trusts that the Exchange lists will be consistent and comply with the expirations, strike prices, and minimum increments set forth in Options 4, Section 5 and Options 3, Section 3, as applicable.

Today, the Exchange has an adequate surveillance program in place for options. The Exchange intends to apply those same program procedures to options the Bitcoin Trusts that it applies to the Exchange's other options products.⁴³ ISE's market surveillance staff would have access to the surveillances conducted by Nasdaq⁴⁴ with respect to the Bitcoin Trusts and would review activity in the underlying Bitcoin Trusts when conducting surveillances for market abuse or manipulation in the options on the Bitcoin Trusts. Additionally, ISE is a member of the Intermarket Surveillance Group ("ISG") under the Intermarket Surveillance Group Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. In addition, ISE has a Regulatory Services Agreement with the Financial Industry Regulatory Authority ("FINRA"). Pursuant to a multi-party 17d-2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market

surveillance that are common to rules of all options exchanges.⁴⁵

The Exchange represents that the same surveillance procedures applicable to all other options on other ETFs currently listed and traded on the Exchange will apply to options on the Bitcoin Trusts. Also, the Exchange represents that it has the necessary systems capacity to support the new option series. The Exchange believes that its existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading options on ETFs, including the proposed options on the Bitcoin Trusts. The underlying shares of spot bitcoin ETPs, including the Bitcoin Trusts, are also subject to safeguards related to addressing market abuse and manipulation. As the Commission stated in the orders approving proposals of several exchanges to list and trade shares of spot bitcoin-based exchange-traded products:⁴⁶

Each Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market.⁴⁷

The Exchange states that, given the consistently high correlation between the CME bitcoin futures market and the spot bitcoin market, as confirmed by the Commission through robust correlation

analysis, the Commission was able to conclude that such surveillance sharing agreements could reasonably be "expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [Bitcoin ETPs]." ⁴⁸ In light of surveillance measures related to both options and futures as well as the underlying Bitcoin Trusts,⁴⁹ the Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Bitcoin Trusts.

The Exchange has also analyzed its capacity and represents that it believes the Exchange and the Options Price Reporting Authority or "OPRA" have the necessary systems capacity to handle the additional traffic associated with the listing of new series that may result from the introduction of options on the Bitcoin Trusts up to the number of expirations currently permissible under the Exchange Rules. Because the proposal is limited to one class, the Exchange believes any additional traffic that may be generated from the introduction of the options on the Bitcoin Trust will be manageable.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁵⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁵¹ 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section (6)(b)(5)⁵² requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that the proposal to list and trade options on the Bitcoin Trusts will remove impediments to and perfect the mechanism of a free and open market and a national market system and, in

³⁸ See Supplementary Material .01 to Options 4, Section 5.

³⁹ See Supplementary Material .05 to Options 4, Section 5.

⁴⁰ See Supplementary Material .02 to Options 4, Section 5.

⁴¹ See Supplementary Material .06 to Options 4, Section 5.

⁴² Options that are eligible to participate in the Penny Interval Program have a minimum increment of \$0.01 below \$3.00 and \$0.50 above \$3.00. See Supplementary Material .01 to Options 3, Section 3.

⁴³ The surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (e.g., spoofing, marking the close, ping, phishing).

⁴⁴ The Nasdaq Stock Market LLC is an affiliated market of ISE.

⁴⁵ Section 19(g)(1) of the Act, among other things, requires every SRO registered as a national securities exchange or national securities association to comply with the Act, the rules, and regulations thereunder, and the SRO's own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members. See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO ("common members"). Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

⁴⁶ See Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008, 3009 (January 17, 2024) (SR-NYSEArca-2021-90; SR-NYSEArca-2023-44; SR-NYSEArca-2023-58; SR-NASDAQ-2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SR-CboeBZX-2023-044; and SR-CboeBZX-2023-072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) ("Bitcoin ETP Approval Order").

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 15 U.S.C. 78f(b).

⁵¹ 15 U.S.C. 78f(b)(5).

⁵² 15 U.S.C. 78(f)(b)(5).

general, protect investors because offering options on the Bitcoin Trusts will provide investors with an opportunity to realize the benefits of utilizing options on a Bitcoin Trust, including cost efficiencies and increased hedging strategies. The Exchange believes that offering options on the Bitcoin Trusts will benefit investors by providing them with a relatively lower-cost risk management tool, which will allow them to manage their positions and associated risk in their portfolios more easily in connection with exposure to the price of Bitcoin and with Bitcoin-related products and positions. Additionally, the Exchange's offering of options on the Bitcoin Trusts will provide investors with the ability to transact in such options in a listed market environment as opposed to in the unregulated OTC options market, which would increase market transparency and enhance the process of price discovery conducted on the Exchange through increased order flow to the benefit of all investors. The Exchange also notes that it already lists options on other commodity-based Units,⁵³ which, as described above, are trusts structured in substantially the same manner as Bitcoin Trusts and essentially offer the same objectives and benefits to investors, just with respect to a different commodity (*i.e.*, Bitcoin rather than precious metals) and for which the Exchange has not identified any issues with the continued listing and trading of commodity-backed Unit options it currently lists for trading.

The Exchange also believes the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, because it is consistent with current Exchange Rules previously filed with the Commission. Options on the Bitcoin Trusts satisfy the initial listing standards and continued listing standards currently in the Exchange Rules applicable to options on all Units, including Units that hold other commodities already deemed appropriate for options trading on the Exchange. Additionally, as demonstrated above, each Bitcoin Trust is characterized by a substantial number of shares that are widely held and actively traded. Options on the Bitcoin Trusts will trade in the same manner as any other Unit options—the same Exchange Rules that currently govern the listing and trading of all Unit options, including permissible expirations, strike prices and minimum increments, and applicable margin

requirements, will govern the listing and trading of options on Bitcoin Trusts in the same manner.

The Exchange also believes the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, because it is consistent with current Exchange Rules previously filed with the Commission. Options on Bitcoin Trusts satisfy the initial listing standards and continued listing standards currently in the Exchange Rules applicable to options on all ETFs and ETPs, including ETPs that hold other commodities already deemed appropriate for options trading on the Exchange. Additionally, as demonstrated above, each Bitcoin Trust is characterized by a substantial number of shares that are widely held and actively traded. Options on the Bitcoin Trust will trade in the same manner as any other ETF or ETP options—the same Exchange Rules that currently govern the listing and trading of options, including permissible expirations, strike prices, minimum increments, and margin requirements, will govern the listing and trading of options on Bitcoin Trusts in the same manner.

The proposed position and exercise limit for options on the Bitcoin Trusts is 25,000 contracts. These position and exercise limits are the lowest position and exercise limits available in the options industry, are extremely conservative and more than appropriate given the Bitcoin Trusts' market capitalization, average daily volume, number of beneficial holders, and high number of outstanding shares.⁵⁴ The proposed position and exercise limits are consistent with the Act as they addresses concerns related to manipulation and protection of investors because the position and exercise limits are extremely conservative and more than appropriate given the Bitcoin Trusts are actively traded.

Today, the Exchange has an adequate surveillance program in place for options. The Exchange intends to apply those same program procedures to options the Bitcoin Trusts that it applies to the Exchange's other options

⁵⁴ The Exchange notes that IBIT—which has been approved for options trading—represents a larger percentage of the bitcoin market than all proposed Bitcoin Trusts. As noted herein, the Bitcoin Trusts collectively represent approximately 1.51% of the bitcoin market. By comparison, IBIT options have an approved position limit of 25,000 contracts per side, which represents 4% of total underlying spot BTC liquidity, and IBIT is the most liquid spot Bitcoin ETF.

products.⁵⁵ ISE's market surveillance staff would have access to the surveillances conducted by Nasdaq⁵⁶ with respect to the Bitcoin Trusts and would review activity in the underlying Bitcoin Trusts when conducting surveillances for market abuse or manipulation in the options on the Bitcoin Trusts. Additionally, ISE is a member of the Intermarket Surveillance Group ("ISG") under the Intermarket Surveillance Group Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. ISE would be able to obtain information regarding trading and shares of the Bitcoin Trusts from their primary listing market, and from other markets that trade shares of the Bitcoin Trusts, through ISG. In addition, ISE has a Regulatory Services Agreement with the Financial Industry Regulatory Authority ("FINRA"). Pursuant to a multi-party 17d-2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market surveillance that are common to rules of all options exchanges.⁵⁷

The Exchange represents that the same surveillance procedures applicable to all other options on other ETFs currently listed and traded on the Exchange will apply to options on the Bitcoin Trusts. Also, the Exchange represents that it has the necessary systems capacity to support the new option series. The Exchange believes that its existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading options on ETFs, including the proposed options on the Bitcoin Trusts. The underlying shares of spot bitcoin ETPs, including

⁵⁵ The surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (*e.g.*, spoofing, marking the close, ping, phishing).

⁵⁶ The Nasdaq Stock Market LLC is an affiliated market of ISE.

⁵⁷ Section 19(g)(1) of the Act, among other things, requires every SRO registered as a national securities exchange or national securities association to comply with the Act, the rules, and regulations thereunder, and the SRO's own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members. *See* 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO ("common members"). Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

⁵³ *See* Options 4, Section 3(h)(iv).

the Bitcoin Trusts, are also subject to safeguards related to addressing market abuse and manipulation. As the Commission stated in its order approving proposals of several exchanges to list and trade shares of spot bitcoin-based exchange-traded products (“Bitcoin ETP Order”):

Each Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market.⁵⁸

The Exchange states that, given the consistently high correlation between the CME bitcoin futures market and the spot bitcoin market, as confirmed by the Commission through robust correlation analysis, the Commission was able to conclude that such surveillance sharing agreements could reasonably be “expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [Bitcoin ETPs].”⁵⁹ In light of surveillance measures related to both options and futures as well as the underlying Bitcoin Trusts,⁶⁰ the Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Bitcoin Trusts.

The Exchange has also analyzed its capacity and represents that it believes the Exchange and the Options Price Reporting Authority or “OPRA” have the necessary systems capacity to handle the additional traffic associated with the listing of new series that may result from the introduction of options on the Bitcoin Trusts up to the number of expirations currently permissible under the Exchange Rules. Because the proposal is limited to one class, the Exchange believes any additional traffic that may be generated from the introduction of the options on the Bitcoin Trusts will be manageable.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act as Bitcoin Trusts would need to satisfy the initial listing standards set forth in the Exchange Rules in the same manner as any other ETF before the Exchange could list options on them.

Additionally, options on the Bitcoin Trusts will be equally available to all market participants who wish to trade such options. The Exchange Rules currently applicable to the listing and trading of options on ETFs on the Exchange will apply in the same manner to the listing and trading of all options on Bitcoin Trusts. Also, and as stated above, the Exchange already lists options on other commodity-based ETPs.

The Exchange does not believe that the proposal to list and trade options on Bitcoin Trusts will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the extent that the advent of options on the Bitcoin Trusts trading on the Exchange may make the Exchange a more attractive marketplace to market participants at other exchanges, such market participants are free to elect to become market participants on the Exchange. As noted herein, this is a competitive filing as the Commission recently approved the listing and trading of options on an ETP that, like the Bitcoin Trusts, holds bitcoin.⁶¹ Additionally, other options exchanges are free to amend their listing rules, as applicable, to permit them to list and trade options on Bitcoin Trusts. The Exchange notes that listing and trading options on Bitcoin Trust on the Exchange will subject such options to transparent exchange-based rules as well as price discovery and liquidity, as opposed to alternatively trading such options in the OTC market.

The Exchange believes that the proposed rule change may relieve any burden on, or otherwise promote, competition as it is designed to increase competition for order flow on the Exchange in a manner that is beneficial to investors by providing them with a lower-cost option to hedge their investment portfolios. The Exchange

notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues that offer similar products. Ultimately, the Exchange believes that offering options on the Bitcoin Trusts for trading on the Exchange will promote competition by providing investors with an additional, relatively low-cost means to hedge their portfolios and meet their investment needs in connection with Bitcoin prices and Bitcoin-related products and positions on a listed options exchange.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act⁶² and Rule 19b-4(f)(6) thereunder.⁶³ 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 Act⁶⁴ and subparagraph (f)(6) of Rule 19b-4 thereunder.⁶⁵

A proposed rule change filed under Rule 19b-4(f)(6)⁶⁶ under the Act does not normally become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),⁶⁷ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission previously approved the listing of options on the Fidelity Wise

⁵⁸ See Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008, 3009 (January 17, 2024) (File Nos. SR-NYSEArca-2021-90; SR-NYSEArca-2023-44; SR-NYSEArca-2023-58; SR-NASDAQ-2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SRCboeBZX-2023-044; and SR-CboeBZX-2023-072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *supra* note 3.

⁶² 15 U.S.C. 78s(b)(3)(A)(iii).

⁶³ 17 CFR 240.19b-4(f)(6).

⁶⁴ 15 U.S.C. 78s(b)(3)(A)(iii).

⁶⁵ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission waives this requirement.

⁶⁶ 17 CFR 240.19b-4(f)(6).

⁶⁷ 17 CFR 240.19b-4(f)(6)(iii).

Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust (BTC), and the Bitwise Bitcoin ETF.⁶⁸ The Exchange has provided information regarding the underlying Bitcoin Trusts, including, among other things, information regarding trading volume, the number of beneficial holders, and the market capitalization of the Bitcoin Trusts. The proposal also establishes position and exercise limits for options on the Bitcoin Trusts and provides information regarding the surveillance procedures that will apply to Bitcoin Trust options. The Commission believes that waiver of the operative delay could benefit investors by providing an additional venue for trading Bitcoin Trust options. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.⁶⁹

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-ISE-2024-54 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-ISE-2024-54. 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-ISE-2024-54 and should be submitted on or before December 23, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷⁰

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-28114 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101743; File No. SR-BX-2024-048]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt an OTTO Protocol

November 25, 2024.

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 November 15, 2024, Nasdaq BX, Inc. ("BX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt a new protocol, "Ouch to Trade Options" or "OTTO" and establish pricing for this new protocol.³

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

⁶⁸ See Securities Exchange Act Release No. 101387 (October 18, 2024), 89 FR 84948 (October 24, 2024) (SR-Cboe-2024-035) (Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds). See also Securities Exchange Act Release No. 101386 (October 18, 2024), 89 FR 84960 (October 24, 2024) (SR-NYSEAMER-2024-49) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds).

⁶⁹ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁷⁰ 17 CFR 200.30-3(a)(12), (59).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ On November 15, 2024, BX is withdrawing SR-BX-2024-019 and is filing this rule change.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BX proposes to offer a new order entry protocol called OTTO. Today, BX Participants may enter orders into the Exchange through the "Financial Information eXchange" or "FIX."⁴ The proposed new OTTO protocol is identical to the OTTO protocol offered today on 3 Nasdaq affiliated exchanges, Nasdaq ISE, LLC ("ISE"), Nasdaq GEMX, LLC ("GEMX") and Nasdaq MRX, LLC ("MRX").

The OTTO protocol is a proprietary protocol of Nasdaq, Inc. The Exchange continues to innovate and modernize technology so that it may continue to compete among options markets. The ability to continue to innovate with technology and offer new products to market participants allows BX to remain competitive in the options space which currently has eighteen options markets and potential new entrants.

OTTO Protocol

As proposed, OTTO would allow Participants and their Sponsored Customers⁵ to connect, send, and receive messages related to orders, auction orders, and auction responses to the Exchange. OTTO features would include the following: (1) options symbol directory messages (e.g., underlying and complex instruments); (2) System⁶ event messages (e.g., start of

trading hours messages and start of opening); (3) trading action messages (e.g., halts and resumes); (4) execution messages; (5) order messages; (6) risk protection triggers and cancel notifications; (7) auction notifications; (8) auction responses; and (9) post trade allocation messages. The Exchange notes that unlike FIX, which offers routing capability, OTTO does not permit routing. The Exchange proposes to include this description of OTTO in new Options 3, Section 7(e)(1)(B) and re-letter current "B" as "C".

Only one order protocol is required for a BX Participant to submit orders into BX. Only BX Participants may utilize ports on BX. Any market participant that sends orders to a BX Participant would not need to utilize a port. The BX Participant may send all orders, proprietary and agency, through one port to BX. Participants may elect to obtain multiple ports to organize their business,⁷ however only one port is necessary for a Participant to enter orders on BX.

Participants may elect to enter their orders through FIX, OTTO, or both protocols, although both protocols are not necessary. Participants may prefer one protocol as compared to another protocol, for example, the ability to route may cause a Participant to utilize FIX and a Participant that desires to execute an order locally may prefer OTTO. Also, the OTTO Port offers lower latency as compared to the FIX Port, which may be attractive to Participants depending on their trading behavior. Nasdaq believes that the addition of OTTO will provide BX Participants with additional choice when submitting orders to BX.

While the Exchange has no way of predicting with certainty the amount or type of OTTO Ports market participants will in fact purchase, the Exchange anticipates that some Participants will subscribe to multiple OTTO Ports in combination with FIX Ports. The Exchange notes that Options

provides participants with monitoring and risk management capabilities to facilitate participation in a "locked-in" trading environment; and (C) the data feeds described in Options 3, Section 23. See BX Options 1, Section 1(a)(59).

⁷ For example, a Participant may desire to utilize multiple FIX or OTTO Ports for accounting purposes, to measure performance, for regulatory reasons, segregating order flow among different trading desks, or other determinations that are specific to that Participant. A market participant may utilize multiple ports in some cases to send multiple orders through different ports to avoid any latency or queuing of orders. The Exchange notes that to the extent that different OTTO Ports are used to send multiple orders as compared to sending multiple orders through one OTTO Port the difference from a latency standpoint would be in nanoseconds.

Participants may use varying number of OTTO ports based on their business needs.

Other Amendments

In connection with offering OTTO, the Exchange proposes to amend other rules within Options 3. Each amendment is described below.

Options 3, Section 7

BX proposes to amend Options 3, Section 7, Types of Orders and Quote Protocols. Specifically, BX proposes to amend Options 3, Section 7 (b)(2) that describes the Immediate-or-Cancel" or "IOC" order. Today, Options 3, Section 7(b)(2)(B) notes that an IOC order may be entered through FIX or SQF, provided that an IOC order entered by a Market Maker through SQF is not subject to the Order Price Protection, the Market Order Spread Protection, or Size Limitation in Options 3, Section 15(a)(1), (a)(2), and (b)(2), respectively. The Exchange proposes to add "OTTO" to the list of protocols to note that an IOC order may also be entered through OTTO.

BX also proposes to amend the "DAY" order in Options 3, Section 7(b)(3) that currently provides that a Day order may be entered through FIX. With the addition of OTTO, a Day order may also be entered through OTTO.

BX also proposes to amend the "Good Til Cancelled" or "GTC" order which currently does not specify that a GTC order may be entered through FIX. GTC orders would only be able to be entered through FIX and not OTTO. The Exchange proposes to amend Options 3, Section 7(b)(4) to add a sentence to note that GTC orders may be entered through FIX.

Options 3, Section 8

BX proposes to amend Options 3, Section 8, Options Opening Process. BX proposes to amend Options 3, Section 8(l) that describes the Opening Process Cancel Timer. The Opening Process Cancel Timer represents a period of time since the underlying market has opened. If an option series has not opened before the conclusion of the Opening Process Cancel Timer, a Participant may elect to have orders returned by providing written notification to the Exchange. Today, these orders include all non-Good Til Cancelled Orders received over the FIX protocol. The Exchange proposes to add the OTTO protocol as well to the rule text language in that paragraph.

Options 3, Section 12

The Exchange proposes to amend the Options 3, Section 12, Crossing Orders.

⁴ FIX is an interface that allows Participants and their Sponsored Customers to connect, send, and receive messages related to orders and auction orders and responses to and from the Exchange. Features include the following: (1) execution messages; (2) order messages; and (3) risk protection triggers and cancel notifications. In addition, a BX Participant may elect to utilize FIX to send a message and PRISM Order, as defined within Options 3, Section 13, to all BX Participants that opt in to receive Requests for PRISM requesting that it submit the sender's PRISM Order with responder's Initiating Order, as defined within Options 3, Section 13, into the Price Improvement Auction ("PRISM") mechanism, pursuant to Options 3, Section 13 ("Request for PRISM"). See Options 3, Section 7(e)(1)(A).

⁵ General 2, Section 22 describes Sponsored Access arrangements.

⁶ The term "System" or "Trading System" means the automated system for order execution and trade reporting owned and operated by BX as the BX Options market. The BX Options market comprises: (A) an order execution service that enables Participants to automatically execute transactions in option series; and provides Participants with sufficient monitoring and updating capability to participate in an automated execution environment; (B) a trade reporting service that submits "locked-in" trades for clearing to a registered clearing agency for clearance and settlement; transmits last-sale reports of transactions automatically to the Options Price Reporting Authority for dissemination to the public and industry; and

Specifically, the Exchange proposes to amend Customer Crossing Orders in Options 3, Section 12(a) that currently provides Public Customer-to-Public Customer Cross Orders are automatically executed upon entry provided that the execution is at or between the best bid and offer on the Exchange and (i) is not at the same price as a Public Customer Order on the Exchange's limit order book and (ii) will not trade through the NBBO. Public Customer-to-Public Customer Cross Orders must be entered through FIX. The Exchange proposes to remove the sentence that provides that Public Customer-to-Public Customer Cross Orders must be entered through FIX because they will be able to be entered through both FIX and OTTO.

Options 3, Section 17

The Exchange proposes to amend the Kill Switch at Options 3, Section 17. The Kill Switch provides Participants with an optional risk management tool to promptly cancel and restrict orders. With the introduction of OTTO, the Exchange proposes to align its Kill Switch rule text with MRX's Kill Switch.⁸ The Exchange proposes to note in Options 3, Section 17(a) that BX Participants may initiate a message(s) to the System to promptly cancel and restrict their order activity on the Exchange, as is the case today, as described in section (a)(1). This amendment simply rewords the rule text without a substantive amendment to the rule text.

The Exchange proposes to renumber Options 3, Section 17(a)(i) and (ii) as (a)(1) and (2). Current Options 3, Section 17(a)(i) states, "If orders are cancelled by the BX Participant utilizing the Kill Switch, it will result in the cancellation of all orders requested for the Identifier(s). The BX Participant will be unable to enter additional orders for the affected Identifier(s) until re-entry has been enabled pursuant to section (a)(ii)." The Exchange proposes to instead provide, "A BX Participant may submit a request to the System through FIX or OTTO to cancel all existing orders and restrict entry of additional orders for the requested Identifier(s) on a user level on the Exchange." With the addition of OTTO, the Exchange notes that both FIX and OTTO orders may be cancelled. Further, today, BX Participants utilize an interface to send a message to the Exchange to initiate a Kill Switch.⁹ The Exchange notes that in

lieu of the interface, BX Participants will only be able to initiate a cancellation of their orders by sending a mass purge request through FIX or OTTO. This change will align the Kill Switch functionality to that of ISE, GEMX and MRX Options 3, Section 17 and will enable BX Participants to initiate the Kill Switch more seamlessly without the need to utilize a separate interface. When initiating a cancellation of their orders by sending a mass purge request through FIX or OTTO, Participants will be able to submit a Kill Switch request on a user level only. This is a change from the ability to cancel orders on either a user or group level¹⁰ with the interface. The Exchange proposes to amend Options 3, Section 17(a) to note this change by removing the words "or group" and the following sentence that applies to a group.¹¹

Finally, the Exchange proposes to amend proposed Options 3, Section 17(a)(2) to align to MRX's rule text by providing "Once a BX Participant initiates a Kill Switch pursuant to (a)(1) above . . ." in the first sentence. This amendment simply rewords the rule text without a substantive amendment to the rule text.

Options 3, Section 18

The Exchange proposes to amend Options 3, Section 18, Detection of Loss of Communication. The Exchange proposes to add OTTO to Options 3, Section 18 as OTTO would also be subject to this rule. Today, when the SQF Port or the FIX Port detects the loss of communication with a Participant's Client Application because the Exchange's server does not receive a Heartbeat message for a certain time period, the Exchange will automatically logoff the Participant's affected Client Application and automatically cancel all of the Participant's open quotes through SQF and open orders through FIX. Quotes and orders are cancelled across all Client Applications that are associated with the same BX Options Market Maker ID and underlying issues.

At this time, the Exchange proposes to permit orders entered through OTTO to be cancelled similar to FIX orders when the Exchange's server does not receive a Heartbeat message for a certain time period. The Exchange is proposing to

amend Options 3, Section 18 to also rearrange the rule text to add the word "Definitions" next to "a" and move the rule text in current "a" to "b" and re-letter the other paragraphs accordingly. Also, the Exchange proposes to define "Session of Connectivity" for purposes of this rule to mean each time the Participant connects to the Exchange's System. Further, each new connection, intra-day or otherwise, is a new Session of Connectivity. The Exchange proposes to use the new definition throughout Options 3, Section 18.

Similar to FIX, when the OTTO Port detects the loss of communication with a Participant's Client Application because the Exchange's server does not receive a Heartbeat message for a certain time period, the Exchange will automatically logoff the Participant's affected Client Application and automatically cancel all of the Participant's open orders through OTTO. Orders would be cancelled across all Client Applications that are associated with the same BX Options Market Maker ID and underlying issues. The Exchange proposes to update Options 3, Section 18 to provide in proposed Options 3, Section 18(a)(3) that the OTTO Port is the Exchange's proprietary System component through which Participants communicate their orders from the Client Application. Further, the Exchange would note in proposed Options 3, Section 18(c) that when the OTTO Port detects the loss of communication with a Participant's Client Application because the Exchange's server does not receive a Heartbeat message for a certain time period ("nn" seconds), the Exchange will automatically logoff the Participant's affected Client Application and if the Participant has elected to have its orders cancelled pursuant to proposed Section 18(f), automatically cancel all orders. Proposed Options 3, Section 18(f) would provide that the default period of "nn" seconds for OTTO Ports would be fifteen (15) seconds for the disconnect and, if elected, the removal of orders. A Participant may determine another time period of "nn" seconds of no technical connectivity, as required in proposed paragraph (c), to trigger the disconnect and, if so elected, the removal of orders and communicate that time to the Exchange. The period of "nn" seconds may be modified to a number between one hundred (100) milliseconds and 99,999 milliseconds for OTTO Ports prior to each Session of Connectivity to the Exchange. This feature may be disabled for the removal of orders;

⁸ See MRX Options 3, Section 17.

⁹ See Securities Exchange Act Release No. 76116 (October 8, 2015), 80 FR 62147 (October 15, 2015) (SR-BX-2015-050) (Order Approving Proposed Rule Change To Adopt a Kill Switch).

¹⁰ A permissible group could include all badges associated with a Market Maker. Today, a Participant is able to set up these groups in the interface to include all or some of the Identifiers associated with the Participant firm so that a GUI Kill Switch request could apply to this pre-defined group.

¹¹ The Exchange proposes to remove this sentence, "Permissible groups must reside within a single broker-dealer" as the group option would no longer exist.

however, the Participant will be disconnected.

Proposed Options 3, Section 18(f)(1) would provide that if the Participant changes the default number of “nn” seconds, that new setting shall be in effect throughout the current Session of Connectivity and will then default back to fifteen seconds. The Participant may change the default setting prior to each Session of Connectivity. Finally, as proposed in Options 3, Section 18(f)(2), if the time period is communicated to the Exchange by calling Exchange operations, the number of “nn” seconds selected by the Participant will persist for each subsequent Session of Connectivity until the Participant either contacts Exchange operations by phone and changes the setting or the Participant selects another time period through the Client Application prior to the next Session of Connectivity. The trigger for OTTO Ports is event and Client Application specific. The automatic cancellation of the BX Options Market Maker’s open orders for OTTO Ports entered into the respective OTTO Ports via a particular Client Application will neither impact nor determine the treatment of orders of the same or other Participants entered into the OTTO Ports via a separate and distinct Client Application. The proposed amendments for OTTO mirror the manner in which FIX Ports are treated when the Exchange’s server does not receive a Heartbeat message for a certain time period for a FIX Port.¹²

Pricing

BX proposes to amend its Pricing Schedule at Options 7, Section 3, BX Options Market—Ports and other Services, to adopt a port fee for the new OTTO protocol of \$650 per port, per month, per account number. OTTO would be an additional order entry protocol for BX Participants in addition to FIX, which is currently utilized by BX Participants to enter orders into BX. The Exchange currently assesses a FIX Port Fee of \$650 per port, per month, per account number.¹³ The Exchange will provide each Participant the first FIX Port at no cost to submit orders into BX. BX Participants utilizing the first FIX Port offered at no cost do not need to purchase an OTTO Port, which is optional.

The Exchange also proposes to add OTTO to the list of ports that are capped at \$7,500 on BX. Today, the maximum

monthly fees in the aggregate for FIX Port, CTI Port, FIX DROP Port, BX Depth Port and BX TOP Port Fees on BX is \$7,500.¹⁴ These ports are available to all BX Participants. To the extent that a Participant expended more than \$7,500 for FIX or OTTO Ports in a month, BX would not charge a Participant for additional FIX or OTTO Ports, respectively, beyond the cap.

Implementation

The Exchange will implement this rule change on or before December 20, 2025. The Exchange will announce the operative date to Participants in an Options Trader Alert.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁶ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

OTTO Protocol

The Exchange’s proposal to adopt OTTO is consistent with the Act because OTTO would provide BX Participants with an alternative protocol to submit orders to the Exchange. As proposed, BX would offer the first FIX Port at no cost to submit orders into BX, which would remove impediments to and perfect the mechanism of a free and open market. While BX Participants may elect to obtain multiple ports to organize their business,¹⁷ only one order port is necessary for a Participant to enter orders on BX. A BX Participant may send all orders, proprietary and agency, through one port to BX without incurring any cost with this proposal. In the alternative, BX Participants may elect to obtain multiple ports to organize their business.¹⁸

With the addition of OTTO, a BX Participant may elect to enter their orders through FIX, OTTO, or both protocols, although both protocols are not necessary. Each BX Participant

would receive one FIX Port at no cost, thereby promoting just and equitable principles of trade. The Exchange notes that Participants may prefer one order protocol as compared to another order protocol, for example, the ability to route an order may cause a Participant to utilize FIX and a Participant that desires to execute an order locally may utilize OTTO. Also, the OTTO Port offers lower latency as compared to the FIX Port, which may be attractive to Participants depending on their trading behavior. With this proposal, BX Participant may organize their business as they chose with the ability to send orders to BX at no cost. The proposed new OTTO protocol is identical to the OTTO protocol offered today on ISE, GEMX, and MRX.

Other Amendments

In connection with offering OTTO, the Exchange proposes to amend other rules within Options 3 to make clear where the FIX and OTTO protocols may be utilized. IOC Orders may be entered through FIX, OTTO or SQF. A Day order may be entered through FIX or OTTO. A GTC order may only be entered through FIX. A Public Customer-to-Public Customer Cross Order may be entered through FIX or OTTO. Other processes such the Opening Cancel Timer would impact FIX and OTTO equally.

The Exchange’s proposal to amend the Kill Switch at Options 3, Section 17 to align its rule text in proposed Options 3, Section 17(a) and (a)(2) with MRX’s Options 3, Section 17 is consistent with the Act because it does not substantively amend the functionality beyond removing the group level cancel capability. The Exchange’s proposal to amend proposed Options 3, Section 17(a)(2) to specify that FIX and OTTO orders may be cancelled is consistent with the Act as it will make clear that all orders entered on BX may be purged through the Kill Switch. Finally, allowing BX Participants to send a mass purge request through FIX or OTTO, in lieu of an interface, is consistent with Act and the protection of investors and the general public because it will enable BX Participants to initiate the Kill Switch more seamlessly without the need to utilize a separate interface. Further, utilizing the order protocols directly, in lieu of the interface, will align the Kill Switch functionality to that of ISE, GEMX and MRX. When initiating a cancellation of their orders by sending a mass purge request through FIX or OTTO, Participants will be able to submit a Kill Switch request on a user level only because the purge

¹² The Exchange proposes to update internal cross-references to accommodate relocated text.

¹³ The term “account number” means a number assigned to a Participant. Participants may have more than one account number. See Options 1, Section 1(a)(2). Account numbers are free on BX.

¹⁴ See BX Options 7, Section 3(i).

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ For example, a Participant may desire to utilize multiple FIX or OTTO Ports for accounting purposes, to measure performance, for regulatory reasons or other determinations that are specific to that Participant.

¹⁸ For example, a Participant may desire to utilize multiple FIX or OTTO Ports for accounting purposes, to measure performance, for regulatory reasons or other determinations that are specific to that Participant.

will be specific to a FIX or OTTO user for these ports.

Finally, the Detection of Loss of Communication would apply equally to FIX and OTTO. The Exchange believes that its proposal is consistent with the Act and protects investors as the Exchange is making clear what types of order types and other mechanisms may utilize OTTO. Today, BX Participants utilize FIX to enter their orders. Despite the fact that OTTO would not be available for the GTC Time-In-Force modifier, the Exchange notes that one FIX Port is being provided to Participants at no cost. Today, FIX is the only manner in which to enter orders into BX.

Pricing

Proposed Port Fees Are Reasonable, Equitable and Not Unfairly Discriminatory

The Exchange believes that its proposal furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁹ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. This belief is based on comparability: the proposed fees are comparable to,

and in some cases less than, those of similarly situated exchanges.

The proposed fees for BX OTTO are nearly identical to fees on MRX²⁰ and GEMX²¹ for OTTO, an identical protocol. Additionally, the proposed fees for BX OTTO are comparable to those of its closest competitors, Cboe C2 Exchange, Inc. ("C2"), MEMX LLC ("MEMX"),²² MIAX Emerald, LLC ("Emerald")²³ and Cboe EDGX Exchange, Inc.'s ("BatsEDGX")²⁴ based on market share. Below is a chart comparing BX to affiliated Nasdaq exchanges that have an identical OTTO Port.

Exchange	Market share (%)	OTTO	First free FIX port	Cap
BX	2	\$650 per port, per month, per account number.	yes	OTTO Port subject to monthly cap of \$7,500.
MRX	2.5	\$650 per port, per month, per account number.	yes	OTTO Port currently subject to monthly cap of \$7,500.
GEMX	2.4	\$650 per port, per month, per account number.	no	OTTO Port currently subject to monthly cap of \$7,500.

Below is a chart comparing BX to unaffiliated exchanges with comparable logical ports.

Exchange	Market share (%)	Proprietary port	First free port	Cap
BX	2	\$650 per port, per month, per account number.	yes	OTTO Port subject to monthly cap of \$7,500.
C2	2.8	BOE Port fee of \$650 per port	no	no.
MEMX	2.3	MEMO SBE Port fee of \$450 per port ..	no	no.
Emerald	3.6	Emerald does not offer a proprietary port similar to OTTO.	no	no.
BatsEDGX	3.6	BOE Port fee of \$750 per port, per month.	no	no.

The Exchange's analysis utilizes the below graph representing the market

share²⁵ for each of the eighteen options markets based on total options contracts

traded in 2024 through October 28, 2024.

¹⁹ See 15 U.S.C. 78f(b)(4) and (5).

²⁰ MRX offers one free FIX Port to its Members and assesses the same OTTO Port fee of \$650 per port, per month, per account number. MRX also offers a free FIX Disaster Recovery Port. Today, BX does not assess Disaster Recovery Port fees. Finally, today, MRX offers a \$7,500 monthly cap for OTTO Ports, CTI Ports, FIX Ports, FIX Drop Ports and all Disaster Recovery Ports. BX's proposed monthly cap is \$7,500 and includes the same ports as MRX, except that BX also includes two data ports in addition to the other ports, BX Depth Ports and BX Top Ports. BX Depth Ports and BX Top Ports are assessed fees of \$650 per port, per month. Therefore, BX's proposed cap can also be obtained

utilizing BX Depth Port and BX Top Port in addition to the same ports that MRX aggregates for purposes of the monthly cap.

²¹ GEMX does not offer the first FIX Port for free and assesses the same OTTO Port fee of \$650 per port, per month, per account number. Also, GEMX caps OTTO Ports, CTI Ports, FIX Ports, FIX Drop Ports and all Disaster Recovery Ports at \$7,500 a month the same as the proposed fee for BX.

²² MEMX assesses \$450 per port for an order entry port.

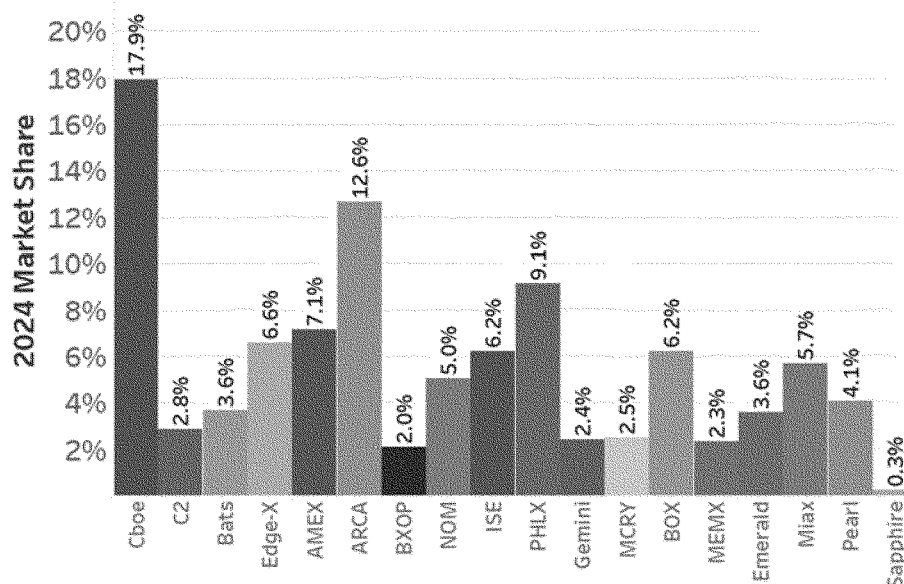
²³ Emerald assesses \$550 for the first FIX Port, \$350 for 2 through 5 FIX Ports and \$150 for over 5 FIX Ports.

²⁴ BatsEDGX assesses \$750 per port, per month for a Logical Port.

²⁵ Market share is the percentage of volume on a particular exchange relative to the total volume across all exchanges, and indicates the amount of order flow directed to that exchange. High levels of market share enhance the value of trading and ports. Total contracts include both multi-list options and proprietary options products. Proprietary options products are products with intellectual property rights that are not multi-listed. BX does not list proprietary products.

US Options Market Share

Data using total options contracts traded from start of 2024 - October 28, 2024



Source: OCC, Nasdaq Economic Research

MRX

MRX has market share of 2.5% which is comparable to BX's market share of 2.0%. MRX offers one free FIX Port to its Members and assesses the same OTTO Port fee of \$650 per port, per month, per account number. MRX also offers a free FIX Disaster Recovery Port. Today, BX does not assess Disaster Recovery Port fees. Finally, today, MRX offers a \$7,500 monthly cap for OTTO Ports, CTI Ports, FIX Ports, FIX Drop Ports and all Disaster Recovery Ports. BX's proposed monthly cap is \$7,500 and includes the same ports as MRX, except that BX also includes two data ports in addition to the other ports, BX Depth Ports and BX Top Ports. BX Depth Ports and BX Top Ports are assessed fees of \$650 per port, per month. Therefore, BX's proposed cap can also be obtained utilizing BX Depth Port and BX Top Port in addition to the same ports that MRX aggregates for purposes of the monthly cap. The proposed fees are nearly identical to MRX's OTTO fees.

GEMX

GEMX has market share of 2.4% which is comparable to BX's market share of 2.0%. GEMX does not offer the first FIX Port for free and assesses the same OTTO Port fee of \$650 per port, per month, per account number. Also, GEMX caps OTTO Ports, CTI Ports, FIX Ports, FIX Drop Ports and all Disaster Recovery Ports at \$7,500 a month the same as the proposed fee for BX. The

proposed fees are nearly identical to GEMX's fees.

C2

C2 has market share of 2.8% which is comparable to BX's market share of 2.0%. C2 assesses \$650 per port for its Binary Order Entry ("BOE") Logical Port, a Cboe proprietary order entry protocol.²⁶ BOE provide users the ability to enter order/quotes. Unlike BOE, OTTO is only for order submission and is similarly a proprietary protocol. While OTTO is subject to a cap, BOE's logical port fee is applicable when used to enter up to 20,000 orders per trading day per logical port as measured on average in a single month. Each incremental usage of up to 20,000 per day per logical port will incur an additional logical port fee of \$650 per month. Incremental usage will be determined on a monthly basis based on the average orders per day entered in a single month across all of a market participant's subscribed BOE Logical Ports. OTTO does not have a similar limitation on its port for number of orders which would require additional ports if the orders per day were exceeded. With its proposal, BX is offering the first FIX at no cost, while C2 does not offer any ports at no cost. The proposed fees are similar to C2's fees.

²⁶ https://cdn.cboe.com/resources/membership/US_Options_BOE_Specification.pdf.

MEMX

MEMX has market share of 2.3% which is comparable to BX's market share of 2.0%. MEMX assesses \$450 per port for an order entry port. MEMO SBE, a binary, proprietary protocol used for order submission on MEMX Options,²⁷ would be similar to OTTO. MEMX does not cap its fees and also does not offer any ports at no cost. The proposed fees are higher than MEMX's fees. MEMX is a new options market that only recently began trading as compared to BX which began trading in 2012. Typically, new options entrants have no port fees²⁸ or lower port fees.

Emerald

Emerald has market share of 3.6% which is comparable to BX's market share of 2.0%. Emerald assesses \$550 for the first FIX Port, \$350 for 2 through 5 FIX Ports and \$150 for over 5 FIX Ports. FIX is a universal protocol while BX OTTO is a proprietary protocol. Emerald offers a FIX Port but not a similar proprietary logical port.²⁹ Emerald does not cap its fees and does not offer a FIX Port at no cost. The proposed fees are similar to Emerald's FIX fees for the first port and higher for subsequent Emerald FIX ports, however

²⁷ See MEMO SBE V1.12 specifications. Specifications must be downloaded from MEMX's website to be viewed.

²⁸ MRX had no port fees for the first 6 years of trading.

²⁹ https://www.miaxglobal.com/miax_emerald_user_manual.pdf.

Emerald does not offer any FIX ports at no cost.

BatsEDGX

BatsEDGX has market share of 3.6% which is comparable to BX's market share of 2.0%. BatsEDGX assesses \$750 per port, per month for its Binary Order Entry ("BOE") Logical Port, a Cboe proprietary order entry protocol.³⁰ BOE provide users the ability to enter order/quotes. Unlike BOE, OTTO is only for order submission and is similarly a proprietary protocol. BatsEDGX does not cap its fees and also does not offer any ports at no cost. The proposed fees are lower than BatsEDGX's fees.

In summary, (i) the proposed OTTO Port fees are (i) substantially similar to GEMX and MRX; (ii) comparable to C2; (iii) comparable, but less than BatsEDGX; and (iv) comparable, but higher than MEMX. Emerald offers a FIX Port but not a similar proprietary logical port.

The Proposal is equitable as the proposed fees would apply to all BX Participants in a uniform manner. Each BX Participant would be entitled to the first FIX Port at no cost. Also, the proposed BX OTTO fees would be assessed uniformly to each BX Participant that subscribes to OTTO. Finally, the proposed monthly cap would be applied uniformly to all BX Participants. The Proposal is not unfairly discriminatory. BX OTTO, a new protocol, would be an optional protocol available to all Participants on a non-discriminatory basis.

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.

OTTO Protocol

The OTTO protocol is a proprietary protocol of Nasdaq, Inc. The Exchange continues to innovate and modernize technology so that it may continue to compete among options markets. The ability to continue to innovate with technology and offer new products to market participants allows BX to remain competitive in the options space which currently has eighteen options markets and potential new entrants. The Exchange's proposal to adopt an OTTO Protocol does not impose an undue burden on intramarket competition. Today, all BX Participants utilize FIX to send orders to BX. The Exchange would

offer each BX Participant the first FIX Port at no cost with this proposal. With the addition of OTTO Ports, a BX Participant may elect to enter their orders through FIX, OTTO, or both protocols, although both protocols are not necessary. The Exchange's proposal to adopt an OTTO Protocol does not impose an undue burden on intermarket competition as other options exchanges offer multiple protocols today such as ISE, GEMX and MRX.

Other Amendments

The Exchange's proposal to amend other rules within Options 3 to make clear where the FIX and OTTO protocols may be utilized does not impose an undue burden on intramarket competition as these rules will apply in the same manner to all Participants. The Exchange's proposal to amend other rules within Options 3 to make clear where the FIX and OTTO protocols may be utilized does not impose an undue burden on intermarket competition as other options exchanges may elect to utilize their order entry protocols in different ways.

Pricing

Nothing in the proposal burdens inter-market competition (the competition among self-regulatory organizations) because approval of the Proposal does not impose any burden on the ability of other options exchanges to compete. BX OTTO fees are comparable to, and in some cases less than, those of other exchanges, as discussed above.

Nothing in the Proposal burdens intra-market competition (the competition among consumers of exchange data) because BX OTTO is available to any Participant at the same price and any Participant that elects to subscribe to OTTO may do so on a non-discriminatory basis.

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 Act³¹ and subparagraph (f)(6) of Rule 19b-4 thereunder.³²

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-BX-2024-048 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-BX-2024-048. 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

³¹ 15 U.S.C. 78s(b)(3)(A)(iii).

³² 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.

³⁰ https://cdn.cboe.com/resources/membership/US_Options_BOE_Specification.pdf.

available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-BX-2024-048 and should be submitted on or before December 23, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-28113 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101745; File No. SR-SAPPHIRE-2024-37]

Self-Regulatory Organizations; MIAX Sapphire, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 402, Criteria for Underlying Securities, To List and Trade Options on the Grayscale Bitcoin Trust, the Grayscale Bitcoin Mini Trust, and the Bitwise Bitcoin ETF

November 25, 2024.

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 November 21, 2024, MIAX Sapphire, LLC ("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 Exchange Rule 402, Criteria for

Underlying Securities. The text of the proposed rule change is available on the Exchange's website at <https://www.miaxglobal.com/markets/us-options/miax-sapphire/rule-filings>, at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange³ proposes to amend Exchange Rule 402, Criteria for Underlying Securities, to allow the Exchange to list and trade options on the following exchange-traded products: the Grayscale Bitcoin Trust (BTC) (the "Grayscale Fund" or "GBTC"), the Grayscale Bitcoin Mini Trust BTC (the "Grayscale Mini Fund" or "BTC"), and the Bitwise Bitcoin ETF (the "Bitwise Fund" or "BITB" and, collectively, the "Bitcoin Funds" or "Funds").⁴ As noted

above, MIAX's rules governing position limits and exercise limits for options positions are incorporated by reference into the MIAX Sapphire Rulebook and are therefore MIAX Sapphire rules applicable to market participants on MIAX Sapphire. MIAX is filing a substantively similar proposal to list and trade options on the Bitcoin Funds. That filing includes proposed change to Exchange Rules 307 (position limits) and 309 (exercise limits), which changes will be incorporated by reference into the MIAX Sapphire Rulebook.

The Exchange notes that this is a competitive filing based on a similar proposal submitted by NYSE American LLC ("NYSE American"), which was approved by the Commission.⁵ The Commission also recently approved a rule proposal by Nasdaq ISE, LLC ("ISE") to allow the listing and trading of options on iShares Bitcoin Trust (or IBIT), which is a trust that holds bitcoin (referred to herein as the "ISE IBIT Approval Order").⁶ As discussed herein, the Exchange believes, like the recently-approved options on IBIT, options on the Bitcoin Funds would permit hedging, and allow for more liquidity, better price efficiency, and less volatility with respect to the underlying Funds. Further, permitting the listing of such options would enhance the transparency and efficiency of markets in these and correlated products.

Current Exchange Rule 402(i)(4) provides that securities deemed appropriate for options trading include shares or other securities ("Exchange Traded Fund Shares" or "ETFs") that represent certain types of interests,⁷

044; SR-CboeBZX-2023-072) ("Bitcoin ETP Order").

⁵ See Securities Exchange Act Release No. 101386 (October 18, 2024), 89 FR 84960 (October 24, 2024) (SR-NYSEAMER-2024-49) (Self-Regulatory Organizations; NYSE American LLC; Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds).

⁶ See Securities Exchange Act Release No. 101128 (September 20, 2024), 89 FR 78942 (September 26, 2024) (SR-ISE-2024-03) (Notice of Filing of Amendment Nos. 4 and 5 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1, 4, and 5, to Permit the Listing and Trading of Options on the iShares Bitcoin Trust ("IBIT") ("ISE IBIT Approval Order").

⁷ See Exchange Rule 402(i), which permits options trading on ETFs that: (1) represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that hold portfolios of securities and/or financial instruments ("Funds"), including, but not limited to, stock index futures contracts, options on futures, options on securities and indices, equity caps, collars and floors, swap agreements, forward contracts, repurchase

³³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange notes that its affiliate options exchanges, Miami International Securities Exchange, LLC ("MIAX") and MIAX PEARL, LLC ("MIAX Pearl"), plan to submit (or have already submitted) substantively identical proposals to list and trade options on the Bitcoin Funds. The Exchange notes that all the rules of Chapter III of MIAX, including Exchange Rules 307 and 309, are incorporated by reference to the MIAX Pearl and MIAX Sapphire Rulebooks. The Exchange also notes that all of the rules of Chapter III of MIAX, including Exchange Rules 307 and 309, and the rules of Chapter IV of MIAX, including Exchange Rule 402, are incorporated by reference into the Exchange's affiliate, MIAX Emerald, LLC ("MIAX Emerald").

⁴ On January 10, 2024, the Securities and Exchange Commission ("Commission") approved proposals by NYSE Arca, Inc., The Nasdaq Stock Market LLC, and Cboe BZX Exchange, Inc. to list and trade the shares of 11 bitcoin-based commodity-based trust shares and trust units, including the iShares Bitcoin Trust. See Securities Exchange Act Release No. 99306 (Jan. 10, 2024), 89 FR 3008 (Jan. 17, 2024) (order approving File Nos. SR-NYSEARCA-2021-90; SR-NYSEARCA-2023-44; SR-NYSEARCA-2023-58; SR-NASDAQ-2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SR-CboeBZX-2023-

including interests in certain specific trusts that hold financial instruments, money market instruments, or precious metals (which are deemed commodities).

The Bitcoin Funds are Bitcoin-backed commodity ETFs structured as trusts. Similar to any ETFs currently deemed appropriate for options trading under Exchange Rule 402(i), the investment objective of each Bitcoin Fund is for its shares to reflect the performance of Bitcoin (less the expenses of the trust's operations), offering investors an opportunity to gain exposure to Bitcoin without the complexities of Bitcoin delivery. As is the case for ETFs currently deemed appropriate for options trading, a Bitcoin Fund's shares represent units of fractional undivided beneficial interest in the trust, the assets of which consist principally of Bitcoin and are designed to track Bitcoin or the performance of the price of Bitcoin and offer access to the Bitcoin market.⁸ The Bitcoin Funds provide investors with cost-efficient alternatives that allow a level of participation in the Bitcoin market through the securities market. The primary substantive difference between Bitcoin Funds and ETFs currently deemed appropriate for options trading are that ETFs may hold

securities, certain financial instruments, and specified precious metals (which are deemed commodities), while Bitcoin Funds hold Bitcoin (which is also deemed a commodity).

The Exchange believes each Bitcoin Fund satisfies the Exchange's initial listing standards for ETFs on which the Exchange may list options.⁹ Specifically, each Bitcoin Fund satisfies the initial listing standards set forth in Exchange Rule 402(i)(5)(i), as is the case for other ETFs on which the Exchange lists options (including trusts that hold commodities). Exchange Rule 402(i)(5)(i) requires that the ETFs must either (1) meet the criteria and standards set forth in Exchange Rule 402(a) or 402(b),¹⁰ or (2) be available for creation or redemption each business day from or through the issuer in cash or in kind at a price related to net asset value, and the issuer must be obligated to issue units in a specified aggregate number even if some or all of the investment assets required to be deposited have not been received by the issuer, subject to the condition that the person obligated to deposit the investments has undertaken to deliver the investment assets as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting

of cash or cash equivalents satisfactory to the issuer, as provided in the respective prospectus. Each Bitcoin Fund satisfies Exchange Rule 402(i)(5)(i)(B), as each is subject to this creation and redemption process.

While not required by the Rules for purposes of options listings, the Exchange believes each Bitcoin Fund satisfies the criteria and guidelines set forth in Exchange Rule 402. Pursuant to Exchange Rule 402, a security (which includes ETFs) on which options may be listed and traded on the Exchange must be duly registered (with the Commission) and be an NMS stock (as defined in Rule 600 of Regulation NMS under the Act, and be characterized by a substantial number of outstanding shares that are widely held and actively traded.¹¹ Each Bitcoin Fund is an NMS Stock as defined in Rule 600 of Regulation NMS under the Act.¹² The Exchange believes each Bitcoin Fund is characterized by a substantial number of outstanding shares that are widely held and actively traded.

Pursuant to the data presented in the NYSE American filing,¹³ as of August 30, 2024, the Bitcoin Funds had the following number of shares outstanding (and corresponding market capitalization):

Bitcoin fund	Shares outstanding	Market value (8/30/2024)
GBTC	284,570,100	\$13,443,091,524
BTC	366,950,100	1,930,157,526
BITB	68,690,000	2,221,640,670

As shown above, each Bitcoin Fund had significantly more than 7,000,000 shares outstanding (approximately 29 and 6.5 times that amount, respectively), which is the minimum

number of shares of a corporate stock that the Exchange generally requires to list options on that stock pursuant to Exchange Rule 402(b)(1). The Exchange believes this demonstrates that each

Bitcoin Fund is characterized by a substantial number of outstanding shares.

Further, according to the NYSE American filing,¹⁴ the below table

agreements and reverse repurchase agreements (the "Financial Instruments"), and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the "Money Market Instruments") comprising or otherwise based on or representing investments in broad-based indexes or portfolios of securities and/or Financial Instruments and Money Market Instruments (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities and/or Financial Instruments and Money Market Instruments); (2) represent interests in a trust or similar entity that holds a specified non-U.S. currency or currencies deposited with the trust which when aggregated in some specified minimum number may be surrendered to the trust or similar entity by the beneficial owner to receive the specified non-U.S. currency or currencies and pays the beneficial owner interest and other distributions on the deposited non-U.S. currency or currencies, if any, declared and paid by the trust ("Currency Trust Shares"); (3) represent commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on

commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency ("Commodity Pool ETFs"); (4) are issued by the are issued by the SPDR® Gold Trust, the iShares COMEX Gold Trust, the iShares Silver Trust, the ETFs Silver Trust, the Aberdeen Standard Physical Gold Trust, the ETFs Palladium Trust, the ETFs Platinum Trust, or the Sprott Physical Gold Trust; or (5) represent an interest in a registered investment company ("Investment Company") organized as an open-end management company or similar entity, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies, which is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value ("NAV"), and when aggregated in the same specified minimum number, may be redeemed at a holder's request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined NAV ("Managed Fund Share");

provided that all of the conditions listed in subparagraphs (5)(i) and 5(ii) are met.

⁸ The trust may include minimal cash.

⁹ Subparagraphs (a) and (b) of Exchange Rule 402 provide for guidelines to be used by the Exchange when evaluating potential underlying securities for Exchange option transactions.

¹⁰ See Exchange Rule 402(a)–(b).

¹¹ The criteria and guidelines for a security to be considered widely held and actively traded are set forth in Exchange Rule 402(b), subject to exceptions.

¹² An "NMS stock" means any NMS security other than an option, and an "NMS security" means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan (or an effective national market system plan for reporting transaction in listed options). See 17 CFR 242.600(b)(64) (definition of "NMS security") and (65) (definition of "NMS stock").

¹³ See *supra* note 5.

¹⁴ See *supra* note 5.

contains information regarding the number of beneficial holders of the Bitcoin Funds as of August 14, 2024:

Bitcoin fund	Beneficial holders (8/14/24)
GBTC	464,364
BTC	13,403
BITB	75,437

As this table shows, each Bitcoin Fund has significantly more than 2,000 beneficial holders (approximately 232, 7, and 38 time more, respectively), which is the minimum number of holders the Exchange generally requires for corporate stock in order to list options on that stock pursuant to Exchange Rule 402(b)(2). Therefore, the Exchange believes the shares of each Bitcoin Fund are widely held.

In addition, the Exchange believes the shares of each Bitcoin Fund are actively traded. Further, according to the NYSE American filing,¹⁵ as of September 30, 2024, the total trading volume (by shares and notional) for these funds since they began trading¹⁶ and the average daily volume (“ADV”) over the 30-day period of September 1 through September 30, 2024, was as follows:¹⁷

Bitcoin fund	Trading volume (shares)	Trading volume (notional \$)	ADV (shares)
GBTC	1,803,567,700	93,472,544,497	3,266,138
BTC	335,492,930	1,792,866,521	6,838,546
BITB	434,815,840	14,433,361,384	1,949,835

As demonstrated above, even though these Bitcoin Funds have been trading for less than one year, the trading volume for each is substantially higher than 2,400,000 shares (between roughly 165 and 700 times that amount), which is the minimum 12-month volume the Exchange generally requires for a security in order to list options on that security as set forth in Exchange Rule 402(b). The Exchange believes this data demonstrates each Bitcoin Fund is characterized by a substantial number of outstanding shares that are actively traded.

In addition to satisfying the Exchange’s initial listing standards, options on the Bitcoin Funds will be subject to the Exchange’s continued listing standards as set forth in Exchange Rule 403(g).¹⁸ Pursuant to

Exchange Rule 403(g), the Exchange will not open for trading any additional series of option contracts covering a fund traded on the Exchange if such fund ceases to be an “NMS stock” as provided for Exchange Rule 402(b) or the fund is halted from trading on its primary market.¹⁹ Additionally, options on funds traded on the Exchange may be subject to the suspension of opening transactions as follows: (1) the fund no longer meets the terms of Exchange Rule 403(b); (2) following the initial twelve-month period beginning upon the commencement of trading of the fund, there are fewer than 50 record and/or beneficial holders of the fund for 30 or more consecutive trading days; (3) the value of the underlying commodity is no longer calculated or available; or (4) such other event occurs or condition

exists that in the opinion of the Exchange makes further dealing on the Exchange inadvisable.

Options on each Bitcoin Fund will be physically settled contracts with American-style exercise.²⁰ Consistent with Exchange Rule 404, which governs the opening of options series on a specific underlying security (including ETFs and ETPs), the Exchange will open at least one expiration month for options on each Bitcoin Fund²¹ at the commencement of trading on the Exchange and may also list series of options on Bitcoin Funds for trading on a weekly,²² monthly,²³ or quarterly²⁴ basis. The Exchange may also list long-term equity option series (“LEAPS”) that expire from twelve to thirty-nine months from the time they are listed.²⁵

¹⁵ See *supra* note 5.

¹⁶ As noted by NYSE American, GBTC and BITB began trading on January 11th and BTC began trading on July 31st. Thus, the measurement period for the trading volume (shares/notional) is January 11 through September 20, 2024, for GBTC and BITB (*i.e.*, nine months) and July 31 through September 20, 2024, for BTC (*i.e.*, two months). See *supra* note 5.

¹⁷ See FactSet, 9/30/2024, available at <https://www.factset.com/data-attribution>.

¹⁸ The Exchange proposes to amend Exchange Rule 402(i)(4) to include the Bitcoin Funds in the list of ETPs deemed “Exchange-Traded Fund Shares”—of ETFs—for purposes of the continued listing standards set forth in Exchange Rule 403(g). See proposed Exchange Rule 402(i)(4). For avoidance of doubt, the Exchange refers “funds” rather than “ETFs” to make clear that the Bitcoin Funds are subject to these continued listing standards.

¹⁹ See Exchange Rule 403(g).

²⁰ See Exchange Rule 401 (Rights and Obligations of Holders and Writers), which provides that the

rights and obligations of holders and writers of option contracts of any class of options dealt in on the Exchange shall be as set forth in the Rules of the Options Clearing Corporation (“OCC”). See also OCC Rules, Chapter VIII, which governs exercise and assignment, and Chapter IX, which governs the discharge of delivery and payment obligations arising out of the exercise of physically settled stock option contracts. OCC Rules can be located at: <https://www.theocc.com/getmedia/9d3854cd-b782-450f-bcf7-33169b0576ce/occrules.pdf>.

²¹ See Exchange Rule 404. The monthly expirations are subject to certain listing criteria for underlying securities described within Exchange Rule 402. Monthly listings expire the third Friday of the month. The term “expiration date” (unless separately defined elsewhere in the OCC By-Laws), when used in respect of an option contract (subject to certain exceptions), means the third Friday of the expiration month of such option contract, or if such Friday is a day on which the exchange on which such option is listed is not open for business, the preceding day on which such exchange is open for business. See OCC By-Laws Article I, Section 1.

Pursuant to Exchange Rule 404(c), additional series of options of the same class may be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the market price of the underlying stock moves more than five strike prices from the initial exercise price or prices. Pursuant to Exchange Rule 404(e), new series of options on an individual stock may be added until the beginning of the month in which the options contract will expire. Due to unusual market conditions, the Exchange, in its discretion, may add a new series of options on an individual stock until the close of trading on the business day prior to expiration.

²² See Exchange Rule 404, Interpretation and Policy .02.

²³ See Exchange Rule 404, Interpretation and Policy .13.

²⁴ See Exchange Rule 404, Interpretation and Policy .03.

²⁵ See Exchange Rule 406.

Pursuant to Exchange Rule 404(g), which governs strike prices of series of options on ETFs, the interval between strike prices of series of options on Bitcoin Funds will be \$1 or greater when the strike price is \$200 or less and \$5 or greater where the strike price is over \$200.²⁶ Additionally, the Exchange may list series of options pursuant to the \$1 Strike Price Interval Program,²⁷ the \$0.50 Strike Program,²⁸ and the \$2.50 Strike Price Program.²⁹ Pursuant to Exchange Rule 510, where the price of a series of a Bitcoin Fund option is less than \$3.00, the minimum increment will be \$0.05, and where the price is \$3.00 or higher, the minimum increment will be \$0.10.³⁰ Any and all new series of Bitcoin Fund options that the Exchange lists will be consistent and comply with the expirations, strike prices, and minimum increments set forth in Exchange Rules 404 and 510, as applicable. Further, the Exchange notes that MIAX Chapter XV Rules (Margin), which governs margin requirements applicable to the trading of all options on the Exchange as that chapter of rules is incorporated by reference into the MIAX Sapphire Rulebook, including options on ETFs and ETPs, will also apply to the trading of Bitcoin Fund options.

Position and Exercise Limits

As mentioned above, the rules for position and exercise limits for options, including options on Bitcoin Funds, are determined pursuant to MIAX Rules 307 and 309, respectively, as incorporated by reference into the MIAX Sapphire Rulebook. Position and exercise limits for options vary according to the number of outstanding shares and the trading volumes of the underlying security over the past six months, where the largest in capitalization and the most frequently traded funds have an option position and exercise limit of 250,000 contracts (with adjustments for splits, re-capitalizations, etc.) on the

same side of the market; and smaller capitalization funds have position and exercise limits of 200,000, 75,000, 50,000 or 25,000 contracts (with adjustments for splits, re-capitalizations, etc.) on the same side of the market.³¹

Position limits are designed to limit the number of options contracts traded on the Exchange in an underlying security that an investor, acting alone or in concert with others directly or indirectly, may control. The purpose of position limits, which are set forth in MIAX Rule 307, is to address potential manipulative schemes and adverse market impacts surrounding the use of options, such as disrupting the market in the security underlying the options. As such, position limits must balance concerns regarding mitigating potential manipulation and the cost of inhibiting potential hedging activity that investors may use for legitimate economic purposes. To achieve this balance, the Exchange proposes to set the position and exercise limits for the options on the Bitcoin Funds at 25,000 contracts, a limit which has already been approved for IBIT at a competing exchange, an ETP that (like the Bitcoin Funds) holds bitcoin.³² Capping the position limit at 25,000 contracts, the lowest limit available in options, would address concerns related to manipulation and protection of investors as this number is conservative for the Bitcoin Funds and

therefore appropriate given their liquidity. While the Exchange believes that the proposed 25,000-contract position limit is conservative for options on the Bitcoin Funds, it nonetheless believes that, for the reasons set forth below, evidence exists to support a much higher position limit.³³

As shown in the table below, provided in the NYSE American filing,³⁴ GBTC, BITB and BTC would easily qualify for the 250,000-contract position limit available to other ETFs and ETPs pursuant to the criterion in MIAX Rule 307, which requires that, for the most recent six-month period, trading volume for the underlying security be at least 100,000,000 shares.³⁵ As noted in the NYSE American filing, BTC began trading on July 31, 2024, and therefore had only two months of trading data available at the time of the NYSE American filing, as shown below.³⁶

Bitcoin fund	Total volume (9/30/2024)
GBTC	723,758,100 (6-months).
BTC	335,492,930 (2-months).
BITB	263,965,870 (6-months).

Thus, based on the most-recent trading volume, each Bitcoin Fund exceeded the requisite minimum of 100,000,000 shares necessary to qualify for the 250,000-contract position and exercise limits. By comparison, other options symbols with six-month trading volume less than GBTC, BITB, and BTC are eligible for position and exercise limits of at least 250,000.³⁷

³³ The Exchange may file a subsequent rule change to amend the position and exercise limit for options on any or all the Bitcoin Funds based on additional data regarding trading activity, to continue to balance any concerns regarding manipulation. A higher position limit would allow institutional investors to utilize options on the Bitcoin Funds for prudent risk management purposes.

³⁴ See *supra* note 5.

³⁵ Per MIAX Rule 307, to qualify for the 250,000-contract position limit for options, the underlying security must (i) have trading volume of at least 100,000,000 shares during the most recent six-month trading period; or (ii) have trading volume of at least 75,000,000 shares during the most recent six-month trading period and have at least 300,000,000 shares currently outstanding.

³⁶ See *supra* note 5. See FactSet, 9/30/2024, <https://www.factset.com/data-attribution>. For avoidance of doubt, the Exchange notes that this chart depicts the most recent six months (at the time the NYSE American filing was filed) of trading data by shares for GBTC and BITB whereas the earlier chart (that depicts volume by notional and shares) covered the first nine months of trading. For BTC, both charts depict the same two-month trading volume by shares.

³⁷ See <https://www.theocc.com/Market-Data/Market-Data-Reports/Series-and-Trading-Delta/Series-Search> (including the following symbols that

Continued

²⁶ The Exchange notes that for options listed pursuant to the Short Term Option Series Program, the Monthly Options Series Program, and the Quarterly Options Series Program, Exchange Rules 404, Interpretation and Policies .02, .03, and .13, specifically set forth intervals between strike prices on Short Term Option Series, Quarterly Options Series, and Monthly Options Series, respectively.

²⁷ See Exchange Rule 404, Interpretation and Policy .01.

²⁸ See Exchange Rule 404, Interpretation and Policy .04.

²⁹ See Exchange Rule 404(f).

³⁰ See Exchange Rule 510(a). If options on a Bitcoin Fund are eligible to participate in the Penny Interval Program, the minimum increment of \$0.01 below \$3.00 and \$0.50 above \$3.00 would apply. See Exchange Rule 510(a)(3). See also Exchange Rule 510(c) (which describes the requirements for the Penny Interval Program).

³¹ See MIAX Rule 307. For an option to be eligible for the 50,000-contract limit, the security underlying the option must have most recent six-month trading volume of at least 20,000,000 shares, or most recent six-month trading volume of at least 15,000,000 shares and at least 40,000,000 shares currently outstanding. For an option to be eligible for the 75,000-contract limit, the underlying security must have most recent six-month trading volume of at least 40,000,000 shares, or most recent six-month trading volume of at least 30,000,000 shares and at least 120,000,000 shares currently outstanding. For an option to be eligible for the 200,000-contract limit, the underlying security must have most recent six-month trading volume of at least 80,000,000 shares, or most recent six-month trading volume of at least 60,000,000 shares and at least 240,000,000 shares currently outstanding. For an option to be eligible for the 250,000-contract limit, the security underlying the option must have most recent six-month trading volume of at least 100,000,000 shares, or most recent six-month trading volume of at least 75,000,000 shares and at least 300,000,000 shares currently outstanding. The 25,000-contract limit applies to options on underlying securities that do not qualify for a higher contract limit. See MIAX Rule 307. In addition, Interpretation and Policy .01 to MIAX Rule 307 establishes higher position limits for options on certain ETFs.

³² See Securities Exchange Act Release No. 101128 (September 20, 2024), 89 FR 78942 (September 26, 2024) (SR-ISE-2024-03) (Notice of Filing of Amendment Nos. 4 and 5 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1, 4, and 5, to Permit the Listing and Trading of Options on the iShares Bitcoin Trust ("IBIT") ("ISE IBIT Approval Order").

With respect to the outstanding shares of each Bitcoin Fund, if a market participant held the maximum number of contracts possible pursuant to the proposed position and exercise limits (25,000 contracts), the equivalent shares represented by the proposed position/exercise limit (2,500,000 shares) would represent the following approximate percentage of current outstanding shares, according to the data presented in the NYSE American filing:³⁸

Bitcoin Fund	Proposed position/ exercise limits in equivalent shares	Outstanding shares (8/30/24)	Percentage of outstanding shares
GBTC	2,500,000	284,570,100	0.9
BTC	2,500,000	366,950,100	0.7
BITB	2,500,000	68,690,000	3.6

As this table demonstrates, if a market participant held the maximum permissible options positions in one of the Bitcoin Fund options and exercised all of them at the same time, that market participant would control a small percentage of the outstanding shares of the underlying Bitcoin Fund. For example, as noted above, a position limit of 25,000 same side contracts effectively restricts a market participant from holding positions that could result in the receipt of no more than 2,500,000 shares of the applicable Bitcoin Fund (if that market participant exercised all its options). Based on data presented in the NYSE American filing regarding the number of shares outstanding for each Bitcoin Fund as of August 30, 2024, the table below sets forth the approximate number of market participants that could hold the maximum of 25,000 same side positions in each Bitcoin Fund that would equate to the number of shares outstanding of that Bitcoin Fund:³⁹

Bitcoin Fund	Shares outstanding	Number of market participants with 25,000 same side positions
GBTC	284,570,100	114
BTC	366,950,100	147
BITB	68,690,000	27

This means if 114 market participants had 25,000 same side positions in options on GBTC, each of them would have to simultaneously exercise all of those options to create a scenario that may put the underlying security under stress. Similarly, this means if 147 market participants had 25,000 same side positions in options on BTC, each of them would have to simultaneously exercise all of those options to create a scenario that may put the underlying security under stress. Finally, this means if 27 market participants had 25,000 same side positions in options on BITB, each of them would have to simultaneously exercise all of those options to create a scenario that may put the underlying security under stress.

The Exchange believes it is highly unlikely for this to occur; however, even if such event did occur, the Exchange would not expect any of the Bitcoin Fund to be under stress because such an event would merely induce the creation of more shares through the trust's creation and redemption process.

Further, given that the issuer of each Bitcoin Fund may create and redeem shares that represent an interest in Bitcoin, the Exchange believes it is relevant to compare the size of a position limit to the market capitalization of the Bitcoin market. As of August 30, 2024, the global supply of Bitcoin was 19,747,066, and the price of one Bitcoin was approximately \$59,108.23, which equates to a market

capitalization of approximately \$1.167 trillion.⁴⁰ Consider the proposed position and exercise limit of 25,000 option contracts for each Bitcoin Fund option. A position and exercise limit of 25,000 same side contracts effectively restricts a market participant from holding positions that could result in the receipt of no more than 2,500,000 shares of GBTC, BTC, or BITB, as applicable (if that market participant exercised all its options). The following table from the NYSE American filing shows the share price of each Bitcoin Fund on August 30, 2024, the value of 2,500,000 shares of the Bitcoin Fund at that price, and the approximate percentage of that value of the size of the Bitcoin market:⁴¹

Bitcoin Fund	Aug. 30th share price (\$)	Value of 2,500,000 shares of Bitcoin Funds (\$)	Percentage of Bitcoin market
GBTC	46.75	116,875,000	0.010
BTC	5.20	13,000,000	0.001
BITB	31.95	79,875,000	0.007

Therefore, if a market participant with the maximum 25,000 same side

contracts in options on GBTC, BTC, or BITB exercised all positions at one time,

such an event would have no practical impact on the Bitcoin market. As

have a position limit of 250,000: GLD, IAU, SLV, SIVR, SGOL).

³⁸ See *supra* note 5.

³⁹ See *supra* note 5.

⁴⁰ See <https://www.blockchain.com/explorer/charts/total-bitcoins>.

⁴¹ See *supra* note 5.

described in the NYSE American filing, the below chart shows the market

capitalization of each Bitcoin Fund relative to the market capitalization of

the entire bitcoin market, as of August 30, 2024.⁴²

	Bitcoin/shares outstanding	Market value (8/30/2024)	Percentage of Total bitcoin market
Total Bitcoin Market	\$19,747,066	\$1,167,214,096,788	100.00
GBTC	284,570,100	13,443,091,524	1.15
BTC	366,950,100	1,930,157,526	0.17
BITB	68,690,000	2,221,640,670	0.19

As shown above, the Bitcoin Funds collectively represent approximately 1.51% of the global supply of Bitcoin (19,747,066). Based on the \$46.75 price of a GBTC share on August 30, 2024, a market participant could have redeemed one Bitcoin for approximately 1,264 GBTC shares. Another 24,967,146,455 GBTC shares could be created before the supply of Bitcoin was exhausted. As a result, 9,987 market participants would have to simultaneously exercise 25,000 same side positions in GBTC options to receive shares of the GBTC holding the entire global supply of Bitcoin. Similarly, based on the \$5.20 price of a BTC share on August 30, 2024, a market participant could have redeemed one Bitcoin for approximately 11,367 BTC shares. Another 224,464,249,382 BTC shares could be created before the supply of Bitcoin was exhausted. As a result, 89,786 market participants would have to simultaneously exercise 25,000 same side positions in BTC options to receive shares of BTC holding the entire

global supply of Bitcoin. Similarly, based on the \$31.95 price of a BITB share on August 30, 2024, a market participant could have redeemed one Bitcoin for approximately 1,850 BITB shares. Another 36,532,522,591 BITB shares could be created before the supply of Bitcoin was exhausted. As a result, 14,613 market participants would have to simultaneously exercise 25,000 same side positions in BITB options to receive shares of BITB holding the entire global supply of Bitcoin. Unlike the Bitcoin Funds, the number of shares that corporations may issue is limited. However, like corporations, which authorize additional shares, repurchase shares, or split their shares, the Bitcoin Funds may create, redeem, or split shares in response to demand. While the supply of Bitcoin is limited to 21,000,000, it is believed that it will take more than 100 years to fully mine the remaining Bitcoin.⁴³ The supply of Bitcoin is larger than the available supply of most securities.⁴⁴ Given the

significant unlikelihood of any of these events ever occurring, the Exchange does not believe options on the Bitcoin Funds should be subject to position and exercise limits even lower than those proposed (which are already equal to the lowest available limit for equity options in the industry) to protect the supply of Bitcoin.

The Exchange also believes the proposed limits are appropriate given position limits for Bitcoin futures. For example, the Chicago Mercantile Exchange ("CME") imposes a position limit of 2,000 futures (for the initial spot month) on its Bitcoin futures contract.⁴⁵ On August 28, 2024, CME Aug 24 Bitcoin Futures settled at \$58,950. A position of 2,000 CME Bitcoin futures, therefore, would have a notional value of \$589,500,000. The following table shows the share price of each Bitcoin Fund on August 28, 2024, and the approximate number of option contracts that equates to that notional value:⁴⁶

Bitcoin Fund	Aug. 28th share price	Number of option contracts
GBTC	46.94	125,585
BTC	5.23	1,127,151
BITB	32.08	183,759

The approximate number of option contracts for each Bitcoin Fund that equate to the notional value of CME Bitcoin futures is significantly higher than the proposed limit of 25,000 options contract for each Bitcoin Fund option. The fact that many options ultimately expire out-of-the-money and thus are not exercised for shares of the underlying, while the delta of a Bitcoin Future is 1, further demonstrates how conservative the proposed limits of 25,000 options contracts are for the Bitcoin Fund options.

The Exchange notes, unlike options contracts, CME position limits are calculated on a net futures-equivalent basis by contract and include contracts that aggregate into one or more base contracts according to an aggregation ratio(s).⁴⁷ Therefore, if a portfolio includes positions in options on futures, CME would aggregate those positions into the underlying futures contracts in accordance with a table published by CME on a delta equivalent value for the relevant spot month, subsequent spot month, single month and all month

position limits.⁴⁸ If a position exceeds position limits because of an option assignment, CME permits market participants to liquidate the excess position within one business day without being considered in violation of its rules. Additionally, if at the close of trading, a position that includes options exceeds position limits for futures contracts, when evaluated using the delta factors as of that day's close of trading but does not exceed the limits when evaluated using the previous day's delta factors, then the position

⁴² See *supra* note 5.

⁴³ See <https://www.blockchain.com/explorer/assets/btc> (citing 21 million as the "total supply" of bitcoin).

⁴⁴ The market capitalization of Bitcoin would rank in the top 10 among securities. See <https://>

companiesmarketcap.com/usa/largest-companies-in-the-usa-by-market-cap/.

⁴⁵ See CME Rulebook Chapter 350 (description of CME Bitcoin Futures) and Chapter 5, Position Limit, Position Accountability and Reportable Level Table in the Interpretations & Special Notices. Each CME Bitcoin futures contract is valued at five

Bitcoins as defined by the CME CF Bitcoin Reference Rate ("BRR"). See CME Rule 3500.1.

⁴⁶ See *supra* note 5.

⁴⁷ See CME Rulebook Chapter 5, Position Limit, Position Accountability and Reportable Level Table in the Interpretations & Special Notices.

⁴⁸ *Id.*

shall not constitute a position limit violation. Considering CME's position limits on futures for Bitcoin, the Exchange believes that that the proposed same side position limits are more than appropriate for the Bitcoin Fund options.

The Exchange believes the available supply of Bitcoin is not relevant to the determination of position and exercise limits for options overlying the Bitcoin Funds.⁴⁹ Position and exercise limits are not a tool that should be used to address a potential limited supply of the underlying of an underlying. Position and exercise limits do not limit the total number of options that may be held, but rather they limit the number of positions a single customer may hold or exercise at one time.⁵⁰ "Since the inception of standardized options trading, the options exchanges have had rules imposing limits on the aggregate number of options contracts that a member or customer could hold or exercise."⁵¹ Position and exercise limit rules are intended "to prevent the establishment of options positions that can be used or might create incentives to manipulate or disrupt the underlying market so as to benefit the options position. In particular, position and exercise limits are designed to minimize the potential for mini-manipulations and for corners or squeezes of the underlying market. In addition, such limits serve to reduce the possibility for

disruption of the options market itself, especially in illiquid options classes."⁵²

The Exchange notes that a Registration Statement on Form S-1 was filed with the Commission for each Bitcoin Fund, each of which described the supply of Bitcoin as being limited to 21,000,000 (of which approximately 90% had already been mined), and that the limit would be reached around the year 2140.⁵³ Each Registration Statement permits an unlimited number of shares of the applicable Bitcoin Fund to be created. Further, the Commission approved proposed rule changes that permitted the listing and trading of shares of each Bitcoin Fund, which approval did not comment on the sufficient supply of Bitcoin or address whether there was a risk that permitting an unlimited number of shares for a Bitcoin Fund would impact the supply of Bitcoin.⁵⁴ Therefore, the Exchange believes the Commission has ample time and opportunity to consider whether the supply of Bitcoin was sufficient to permit the creation of unlimited Bitcoin Fund shares, and does not believe considering this supply with respect to the establishment of position and exercise limits is appropriate given its lack of relevance to the purpose of position and exercise limits. However, given the significant size of the Bitcoin supply, the proposed positions limits are more than sufficient to protect investors and the market.

Based on the foregoing, the Exchange believes the proposal to list options on the Bitcoin Funds with positions and exercise limits of 25,000 on the same side, the lowest position limit available in the options industry, is conservative and appropriate given the market capitalization, average daily volume, and high number of outstanding shares for each of the Bitcoin Funds. The proposed position and exercise limits reasonably and appropriately balance the liquidity provisioning in the market against the prevention of manipulation. The Exchange believes these proposed limits are effectively designed to prevent an individual customer or entity from establishing options positions that could be used to manipulate the market

of the underlying Bitcoin Funds as well as the Bitcoin market.⁵⁵

As described herein, options on the Bitcoin Funds will trade in the same manner as any other ETF or ETP options on the Exchange. The Exchange Rules that currently apply to the listing and trading of options on the Exchange, including, for example, Rules that govern listing criteria, expiration and exercise prices, minimum increments, margin requirements, customer accounts and trading halt procedures will apply to the listing and trading of Bitcoin Funds on the Exchange in the same manner as they apply to all other ETFs and ETPs that are listed and traded on the Exchange, including the precious metal-backed commodity ETPs already deemed appropriate for options trading on the Exchange pursuant to Exchange Rule 404. Further, as described above, Exchange Rules regarding position and exercise limits will likewise apply to options on the Bitcoin Funds except that, as proposed, the position and exercise limits will be set at 25,000 on the same side.

* * * * *

The Exchange notes that options on Bitcoin Funds would not be available for trading until The Options Clearing Corporation ("OCC") represents to the Exchange that it is fully able to clear and settle such options. The Exchange has also analyzed its capacity and represents that it and The Options Price Reporting Authority ("OPRA") have the necessary systems capacity to handle the additional traffic associated with the listing of options on Bitcoin Funds. The Exchange believes any additional traffic that would be generated from the trading of options on Bitcoin Funds would be manageable. The Exchange represents that Exchange Members⁵⁶ will not have a capacity issue as a result of this proposed rule change.

The Exchange represents that the same surveillance procedures⁵⁷ applicable to all other options currently listed and traded on the Exchange will apply to options on Bitcoin Funds, and that it has the necessary systems capacity to support the new option series. The Exchange's existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing and trading options on ETFs and ETPs, such as (existing)

⁴⁹ The Exchange is unaware of any proposed rule change related to position and exercise limits for any equity option (including commodity ETF options) for which the Commission required consideration of whether the available supply of an underlying (whether it be a corporate stock or an ETF) or the contents of an ETF (commodity or otherwise) should be considered when an exchange proposed to establish those limits. See, e.g., Securities Exchange Act Release No. 57894 May 30, 2008), 73 FR 32061 (June 5, 2008) (SR-CBOE-2005-11) (approval order in which the Commission stated that the "listing and trading of Gold Trust Options will be subject to the exchanges' rules pertaining to position and exercise limits and margin"). The Exchange notes the position limits in Exchange Rule 307 are the same as when the Commission approved this filing. For reference, the current position and exercise limits for options on SPDR Gold Shares ETF ("GLD") and options on iShares Silver Trust ("SLV") are 250,000 contracts, or 10 times that proposed position and exercise limit for the Bitcoin Fund options.

⁵⁰ For example, suppose an option has a position limit of 25,000 option contracts and there are a total of 10 investors trading that option. If all 10 investors max out their positions, that would result in 250,000 option contracts outstanding at that time. However, suppose 10 more investors decide to begin trading that option and also max out their positions. This would result in 500,000 option contracts outstanding at that time. An increase in the number of investors could cause an increase in outstanding options even if position limits remain unchanged.

⁵¹ See Securities Exchange Act Release No. 39489 (December 24, 1997), 63 FR 276 (January 5, 1998) (SR-CBOE-1997-11).

⁵² *Id.*

⁵³ See, e.g., GBTC Form S-1 Registration Statement, at p. 17, <https://www.sec.gov/Archives/edgar/data/1588489/000119312517013693/d157414ds1.htm>; BTC Form S-1 Registration Statement, at p. 21, <https://www.sec.gov/Archives/edgar/data/2015034/000119312524065444/d785023ds1.htm>; and BITB Amendment No 2, to S-1, at p. 47, https://www.sec.gov/Archives/edgar/data/1763415/000199937123000735/bitwise-s1a_120423.htm ("Bitcoin Funds Reg. Stmts.").

⁵⁴ See Bitcoin ETP Approval Order.

⁵⁵ See Securities Exchange Act Release No. 39489 (December 24, 1997), 63 FR 276 (January 5, 1998) (SR-CBOE-1997-11).

⁵⁶ See Exchange Rule 100.

⁵⁷ The surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (e.g., spoofing, marking the close, ping, phishing).

precious metal-commodity backed ETP options as well as the proposed options on Bitcoin Funds. The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of options on Bitcoin Funds in all trading sessions and to deter and detect violations of Exchange rules. The Exchange's staff will have access to the surveillance programs conducted by its affiliate exchanges, MIAX and MIAX Pearl, with respect to trading in the shares of the underlying trust for each Fund when conducting surveillances for market abuse or manipulation in the options on the Funds. Additionally, the Exchange is a member of the Intermarket Surveillance Group ("ISG") under the Intermarket Surveillance Group Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. In addition to obtaining surveillance data from MIAX and MIAX Pearl, the Exchange will be able to obtain information regarding trading in the shares of the underlying Bitcoin Funds from NYSE American and other markets through ISG. In addition, the Exchange has a Regulatory Services Agreement with the Financial Industry Regulatory Authority ("FINRA"). Pursuant to a multi-party 17d-2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market surveillances.⁵⁸ Further, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on the Bitcoin Funds.

The underlying shares of spot bitcoin ETPs, including the Bitcoin Funds, are also subject to safeguards related to addressing market abuse and manipulation. As the Commission stated in its order approving proposals of several exchanges to list and trade shares of spot bitcoin-based exchange-traded products ("Bitcoin ETP Order"):

⁵⁸ Section 19(g)(1) of the Act, among other things, requires every SRO registered as a national securities exchange or national securities association to comply with the Act, the rules and regulations thereunder, and the SRO's own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members. See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO. Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

Each Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market.⁵⁹

The Exchange states that, given the consistently high correlation between the CME bitcoin futures market and the spot bitcoin market, as confirmed by the Commission through robust correlation analysis, the Commission was able to conclude that such surveillance sharing agreements could reasonably be "expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [Bitcoin ETPs]." ⁶⁰

In light of surveillance measures related to both options and futures as well as the underlying Bitcoin Funds,⁶¹ the Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Bitcoin Funds.

Finally, quotation and last sale information for ETFs is available via the Consolidated Tape Association ("CTA") high speed line. Quotation and last sale information for such securities is also available from the exchange on which such securities are listed. Quotation and last sale information for options on Bitcoin Funds will be available via OPRA and major market data vendors.

The Exchange believes that offering options on Bitcoin Funds will benefit

investors by providing them with an additional, relatively lower cost investing tool to gain exposure to the price of Bitcoin and hedging vehicle to meet their investment needs in connection with Bitcoin-related products and positions. The Exchange expects investors will transact in options on Bitcoin Funds in the unregulated over-the-counter ("OTC") options market,⁶² but may prefer to trade such options in a listed environment to receive the benefits of trading listed options, including (1) enhanced efficiency in initiating and closing out position; (2) increased market transparency; and (3) heightened contra-party creditworthiness due to the role of OCC as issuer and guarantor of all listed options. The Exchange believes that listing Bitcoin Fund options may cause investors to bring this liquidity to the Exchange, would increase market transparency and enhance the process of price discovery conducted on the Exchange through increased order flow. The Exchange notes that the ETPs that hold precious metal commodities on which the Exchange may already list and trade options are trusts structured in substantially the same manner as Bitcoin Funds and essentially offer the same objectives and benefits to investors, just with respect to different assets. The Exchange notes that it has not identified any issues with the continued listing and trading of options on any ETFs or ETPs that hold commodities (*i.e.*, precious metals) that it currently lists and trades on the Exchange.

Finally, the Exchange notes that applicable Exchange rules will require that customers receive appropriate disclosure before trading options in Bitcoin Funds.⁶³ Further, brokers opening accounts and recommending options transactions must comply with relevant customer suitability standards.⁶⁴

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Act⁶⁵ in general and furthers the objectives of Section 6(b)(5)

⁵⁹ See Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008, 3009 (January 17, 2024) (File Nos. SR-NYSEArca-2021-90; SR-NYSEArca-2023-44; SR-NYSEArca-2023-58; SR-NASDAQ2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX2023-040; SR-CboeBZX-2023-042; SR-CboeBZX-2023-044; and SR-CboeBZX-2023-072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units).

⁶⁰ See Bitcoin ETP Order, 89 FR at 3010-11.

⁶¹ See Amendment No. 2 to Proposed Rule Change to List and Trade Shares of the Grayscale Bitcoin Trust (BTC) under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) (SR-NYSEARCA-2021-90), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-nysearca-2021-90/srnysearca202190-358659-884182.pdf>; Amendment No. 2 to Proposed Rule Change to List and Trade Shares of the Bitwise Bitcoin ETF under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) (SR-NYSEARCA-2023-44), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-nysearca-2023-44/srnysearca202344-358800-884322.pdf>; and Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the Grayscale Bitcoin Mini Trust Under NYSE Arca Rule 8.201-E, Commodity-Based Trust Shares, Securities Exchange Act Release No. 100290 (June 6, 2024), 89 FR 49931 (June 12, 2024) (SR-NYSEARCA-2024-45).

⁶² The Exchange understands from customers that investors have historically transacted in options on ETFs in the OTC options market if such options were not available for trading in a listed environment.

⁶³ See MIAX Rules 1307(b) and (e), which are incorporated by reference into the MIAX Sapphire Rulebook.

⁶⁴ See MIAX Rule 1309, which is incorporated by reference into the MIAX Sapphire Rulebook.

⁶⁵ 15 U.S.C. 78f(b).

of the Act⁶⁶ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes that the proposal to list and trade options on Bitcoin Funds will remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors because offering options on Bitcoin Funds will provide investors with an opportunity to realize the benefits of utilizing options on a Bitcoin Fund, including cost efficiencies and increased hedging strategies.

The Exchange believes that offering Bitcoin Fund options will benefit investors by providing them with a relatively lower-cost risk management tool, which will allow them to manage their positions and associated risk in their portfolios more easily in connection with exposure to the price of Bitcoin and with Bitcoin-related products and positions. Additionally, the Exchange's offering of Bitcoin Fund options will provide investors with the ability to transact in such options in a listed market environment as opposed to in the unregulated OTC options market, which would increase market transparency and enhance the process of price discovery conducted on the Exchange through increased order flow to the benefit of all investors. The Exchange also notes that it already lists options on other commodity-based ETPs,⁶⁷ which, as described above, are trusts structured in substantially the same manner as Bitcoin Funds and essentially offer the same objectives and benefits to investors, just with respect to a different commodity (*i.e.*, Bitcoin rather than precious metals) and for which the Exchange has not identified any issues with the continued listing and trading of commodity-backed ETP options it currently lists for trading.

The Exchange also believes the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, because it is consistent with current Exchange Rules previously filed with the Commission. Options on Bitcoin Funds satisfy the initial listing standards and continued listing standards currently in the Exchange Rules applicable to options on all ETFs and ETPs, including

ETPs that hold other commodities already deemed appropriate for options trading on the Exchange. Additionally, as demonstrated above and in the NYSE American filing,⁶⁸ each Bitcoin Fund is characterized by a substantial number of shares that are widely held and actively traded. Bitcoin Fund options will trade in the same manner as any other ETF or ETP options—the same Exchange Rules that currently govern the listing and trading of options, including permissible expirations, strike prices, minimum increments, and margin requirements, will govern the listing and trading of options on Bitcoin Funds in the same manner.

The proposed position and exercise limit for options on the Bitcoin Funds is 25,000 contracts. These position and exercise limits are the lowest position and exercise limits available in the options industry, are extremely conservative and more than appropriate given the Bitcoin Funds' market capitalization, average daily volume, number of beneficial holders, and high number of outstanding shares.⁶⁹ The proposed position and exercise limits are consistent with the Act as they addresses concerns related to manipulation and protection of investors because the position and exercise limits are extremely conservative and more than appropriate given the Bitcoin Funds are actively traded.

The Exchange represents that it has the necessary systems capacity to support the new Bitcoin Fund options. The Exchange believes that its existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing and trading options, including Bitcoin Fund options. The Exchange's existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing and trading options on ETFs and ETPs, such as (existing) precious metal-commodity backed ETP options as well as the proposed options on Bitcoin Funds. The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of options on Bitcoin Funds in all trading sessions

and to deter and detect violations of Exchange rules. Specifically, the Exchange's market surveillance staff will have access to the surveillances conducted by its affiliates, MIAX and MIAX Pearl, with respect to the Bitcoin Funds and would review activity in the underlying Funds when conducting surveillances for market abuse or manipulation in the options on the Trust. Additionally, the Exchange is a member of the ISG under the Intermarket Surveillance Group Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. In addition, the Exchange has a Regulatory Services Agreement with the FINRA and, as noted herein, pursuant to a multi-party 17d-2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market surveillances. Further, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on the Bitcoin Funds.

The underlying shares of spot bitcoin ETPs, including the Bitcoin Funds, are also subject to safeguards related to addressing market abuse and manipulation. As the Commission stated in its order approving proposals of several exchanges to list and trade shares of spot bitcoin-based ETPs, "[e]ach Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market.⁷⁰ The Exchange states that, given the consistently high correlation between the CME bitcoin futures market and the spot bitcoin market, as confirmed by the Commission through robust correlation analysis, the Commission was able to conclude that such surveillance sharing agreements could reasonably be "expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the

⁶⁸ See *supra* note 5.

⁶⁹ The Exchange notes that IBIT—which has been approved for options trading—represents a larger percentage of the bitcoin market than all three Bitcoin Funds. See ISE IBIT Approval Order, *supra* note 6. As noted herein, the Bitcoin Funds collectively represent approximately 1.51% of the bitcoin market. By comparison, IBIT options have an approved position limit of 25,000 contracts per side, which represents 4% of total underlying spot BTC liquidity, and IBIT is the most liquid spot Bitcoin ETF. See *id.*

⁶⁶ 15 U.S.C. 78f(b)(5).

⁶⁷ See Exchange Rule 402(i)(4).

⁷⁰ See Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008, 3009 (January 17, 2024) (File Nos. SR-NYSEArca-2021-90; SR-NYSEArca-2023-44; SR-NYSEArca-2023-58; SR-NASDAQ2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX2023-040; SR-CboeBZX-2023-042; SR-CboeBZX-2023-044; and SR-CboeBZX-2023-072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units).

[Bitcoin ETPs].”⁷¹ In light of surveillance measures related to both options and futures as well as the underlying Bitcoin Funds,⁷² the Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Bitcoin Funds. Further, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on Bitcoin ETPs.

Finally, the Exchange notes that this proposal will remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors because applicable Exchange rules will require that customers receive appropriate disclosure before trading options in Bitcoin Funds⁷³ and will require that brokers opening accounts and recommending options transactions comply with relevant customer suitability standards.⁷⁴

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.

Intramarket Competition: The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act as Bitcoin Funds would need to satisfy the initial listing standards set forth in the Exchange Rules in the same manner as any other ETF before the Exchange could list options on them. Additionally, Bitcoin Fund options will be equally available to all market participants who wish to trade such

options. The Exchange Rules currently applicable to the listing and trading of options on ETFs on the Exchange will apply in the same manner to the listing and trading of all options on Bitcoin Funds. Also, and as stated above, the Exchange already lists options on other commodity-based ETPs.⁷⁵

Intermarket Competition: The Exchange does not believe that the proposal to list and trade options on Bitcoin Funds will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the extent that the advent of Bitcoin Fund options trading on the Exchange may make the Exchange a more attractive marketplace to market participants at other exchanges, such market participants are free to elect to become market participants on the Exchange. As noted herein, this is a competitive filing as the Commission recently approved the listing and trading of options on the Bitcoin Funds,⁷⁶ as well as another ETP that, like the Bitcoin Funds, holds bitcoin.⁷⁷ Additionally, other options exchanges are free to amend their listing rules, as applicable, to permit them to list and trade options on Bitcoin Funds. The Exchange notes that listing and trading Bitcoin Fund options on the Exchange will subject such options to transparent exchange-based rules as well as price discovery and liquidity, as opposed to alternatively trading such options in the OTC market. The Exchange believes that the proposed rule change may relieve any burden on, or otherwise promote, competition as it is designed to increase competition for order flow on the Exchange in a manner that is beneficial to investors by providing them with a lower-cost option to hedge their investment portfolios. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues that offer similar products. Ultimately, the Exchange believes that offering Bitcoin Fund options for trading on the Exchange will promote competition by providing investors with an additional, relatively low-cost means to hedge their portfolios and meet their investment needs in connection with Bitcoin prices and Bitcoin-related products and positions on a listed options exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act⁷⁸ and Rule 19b-4(f)(6) thereunder.⁷⁹ 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 Act⁸⁰ and subparagraph (f)(6) of Rule 19b-4 thereunder.⁸¹

A proposed rule change filed under Rule 19b-4(f)(6)⁸² under the Act does not normally become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),⁸³ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission previously approved the listing of options on the Grayscale Bitcoin Trust, the Grayscale Bitcoin Mini Trust, and the Bitwise Bitcoin ETF.⁸⁴ The Exchange has provided information regarding the underlying Bitcoin Funds, including, among other things, information regarding trading volume, the number of beneficial holders, and the market capitalization of

⁷¹ See Bitcoin ETP Order, 89 FR at 3010–11.

⁷² See Amendment No. 2 to Proposed Rule Change to List and Trade Shares of the Grayscale Bitcoin Trust (BTC) under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) (SR–NYSEARCA–2021–90), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-nysearca-2021-90/srnysearca202190-358659-884182.pdf>; Amendment No. 2 to Proposed Rule Change to List and Trade Shares of the Bitwise Bitcoin ETF under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) (SR–NYSEARCA–2023–44), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-nysearca-2023-44/srnysearca202344-358800-884322.pdf>; and Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the Grayscale Bitcoin Mini Trust Under NYSE Arca Rule 8.201–E, Commodity-Based Trust Shares, Securities Exchange Act Release No. 100290 (June 6, 2024), 89 FR 49931 (June 12, 2024) (SR–NYSEARCA–2024–45).

⁷³ See MIAx Rules 1307(b) and (e).

⁷⁴ See MIAx Rule 1309.

⁷⁵ See Exchange Rule 402(i).

⁷⁶ See *supra* note 5.

⁷⁷ See ISE IBIT Approval Order, *supra* note 6.

⁷⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

⁷⁹ 17 CFR 240.19b-4(f)(6).

⁸⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

⁸¹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission waives this requirement.

⁸² 17 CFR 240.19b-4(f)(6).

⁸³ 17 CFR 240.19b-4(f)(6)(iii).

⁸⁴ See Securities Exchange Act Release No. 101386 (October 18, 2024), 89 FR 84960 (October 24, 2024) (SR–NYSEAMER–2024–49) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds).

the Bitcoin Funds. The proposal also establishes position and exercise limits for options on the Bitcoin Funds and provides information regarding the surveillance procedures that will apply to Bitcoin Fund options. The Commission believes that waiver of the operative delay could benefit investors by providing an additional venue for trading Bitcoin Fund options. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.⁸⁵

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-SAPPHIRE-2024-37 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-SAPPHIRE-2024-37. 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-SAPPHIRE-2024-37 and should be submitted on or before December 23, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸⁶

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-28115 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-221, OMB Control No. 3235-0232]

Submission for OMB Review; Comment Request; Extension: Form 1-E, Regulation E

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the "Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Form 1-E (17 CFR 239.200) under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) ("Securities Act") is the form that

a small business investment company ("SBIC") or business development company ("BDC") uses to notify the Commission that it is claiming an exemption under Regulation E from registering its securities under the Securities Act. Rule 605 of Regulation E (17 CFR 230.605) under the Securities Act requires an SBIC or BDC claiming such an exemption to file an offering circular with the Commission that must also be provided to persons to whom an offer is made. Form 1-E requires an issuer to provide the names and addresses of the issuer, its affiliates, directors, officers, and counsel; a description of events which would make the exemption unavailable; the jurisdictions in which the issuer intends to offer the securities; information about unregistered securities issued or sold by the issuer within one year before filing the notification on Form 1-E; information as to whether the issuer is presently offering or contemplating offering any other securities; and exhibits, including copies of the rule 605 offering circular and any underwriting contracts.

The Commission uses the information provided in the notification on Form 1-E and the offering circular to determine whether an offering qualifies for the exemption under Regulation E. The Commission estimates that, each year, one issuer files two notifications on Form 1-E, together with offering circulars, with the Commission.¹ Based on the Commission's experience with disclosure documents, we estimate that the burden from compliance with Form 1-E and the offering circular requires approximately 100 hours per filing. The annual burden hours for compliance with Form 1-E and the offering circular would be 200 hours (2 responses × 100 hours per response). Estimates of the burden hours are made solely for the purposes of the PRA, and are not derived from a comprehensive or even a representative survey or study of the costs of SEC rules and forms.

Compliance with the information collection requirements of the rules is necessary to obtain the benefit of relying on the rules. The information provided on Form 1-E and in the offering circular will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it

¹ According to Commission records, one issuer filed two notifications on Form 1-E, together with offering circulars, during 2013 and 2014. According to Commission records, during 2015, 2016, and 2017, one issuer filed seven notifications on Form 1-E, together with offering circulars; no Form 1-E has been filed with the Commission since 2017.

⁸⁵ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁸⁶ 17 CFR 200.30-3(a)(12), (59).

displays a currently valid OMB control number.

The 30-day public comment period for this information collection request opens on December 3, 2024 and closes on January 2, 2025. The public may view the full information request and submit comments at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202408-3235-029 or email comments to MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov.

Dated: November 26, 2024.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024–28221 Filed 11–29–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101739; File No. SR–BOX–2024–28]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rules 3120 (Position Limits) and 5020 (Criteria for Underlying Securities) To Permit Options Trading on Bitcoin Funds

November 25, 2024.

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 November 21, 2024, BOX Exchange LLC (“Exchange” or “BOX Options”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The 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 Rules 3120 (Position Limits), 5020 (Criteria for Underlying Securities) to permit options trading on Bitcoin Funds. Additionally, the Exchange proposes to amend Rule 5055 (FLEX Equity Options). The text of the proposed rule change is available from the principal office of the Exchange, at the Commission’s Public Reference Room and also on the Exchange’s internet website at <https://rules.boxexchange.com/rulefilings>.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rules 3120 (Position Limits) and 5020 (Criteria for Underlying Securities) to permit options trading on Grayscale Bitcoin Trust (BTC) (the “Grayscale Fund” or “GBTC”), the Grayscale Bitcoin Mini Trust BTC (the “Grayscale Mini Fund” or “BTC”), and the Bitwise Bitcoin ETF (the “Bitwise Fund” or “BITB” and, collectively, the “Bitcoin Funds” or “Funds”) on BOX. Additionally, the Exchange proposes to amend Rule 5055 (FLEX Equity Options). Specifically, the Exchange proposes to amend Rule 5020(h) to allow the Exchange to list and trade options on the following exchange-traded products: the Grayscale Fund, the Grayscale Mini Fund, and the Bitwise Fund.³ This is a competitive filing that is based on a proposal recently submitted by NYSE American LLC (“NYSE American”) and approved by the Commission.⁴

³ See proposed Rule 5020(h). On January 11, 2024, GBTC and BITB began trading on NYSE Arca, Inc. (“NYSE Arca”), after the Commission approved rule changes to list and trade shares of “Bitcoin-Based Commodity-Based Trust Shares” pursuant to Rule 8.201–E(c)(1) (Commodity-Based Trust Shares), including GBTC and BITB. See Securities Exchange Act Release No. 99306 (January 10, 2024) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units), 89 FR 3008 (January 17, 2024) (SR–NYSEARCA–2023–44; SR–NYSEARCA–2021–90). On July 13, 2024, after receiving approval of the Commission, BTC began trading on NYSE Arca. See Securities Exchange Act Release No. 100610 (July 26, 2024) (Order Granting Approval of Proposed Rule Changes, as Modified by Amendment No. 1, to List and Trade Share of BTC pursuant to NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares)), 89 FR 62821 (August 1, 2024) (SR–NYSEARCA–2023–45).

⁴ See Securities Exchange Act Release No. 101386 (October 18, 2024), 89 FR 84960 (October 24, 2024) (Notice of Filing of Amendment No. 3 and Order

As discussed herein and as provided in the NYSE American Approval Order, the Exchange believes options on the Bitcoin Funds would permit hedging, and allow for more liquidity, better price efficiency, and less volatility with respect to the underlying Funds. Further, permitting the listing of such options would enhance the transparency and efficiency of markets in these and correlated products. Rule 5020(h) provides that, subject to certain other criteria set forth in the Rule, securities deemed appropriate for options trading include Exchange-Traded Fund Shares (or ETFs), that represent certain types of interests⁵ and exchange-traded products (“ETPs”) structured as trusts that hold precious metals (which are deemed

Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, to Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds) (SR–NYSEAMER–2024–49, as amended) (“NYSE American Approval Order”).

⁵ See Rule 5020(h), which permits options trading on ETFs that are traded on a national securities exchange and are defined as an “NMS stock” in Rule 600 of Regulation NMS and that (i) represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that hold portfolios of securities and/or financial instruments, including, but not limited to, stock index futures contracts, options on futures, options on securities and indices, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse repurchase agreements (the “Financial Instruments”) and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the “Money Market Instruments”) comprising or otherwise based on or representing investments in broad-based indexes or portfolios of securities and/or Financial Instruments and Money Market Instruments (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities and/or Financial Instruments and Money Market Instruments); or (ii) represent interests in a trust that holds a specified non-U.S. currency deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency or currencies and pays the beneficial owner interest and other distributions on the deposited non-U.S. currency or currencies, if any, declared and paid by the trust (“Currency Trust Shares”); or (iii) represent commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency (“Commodity Pool ETFs”) or (iv) represent interests in the SPDR® Gold Trust, the iShares COMEX Gold Trust, the iShares Silver Trust, the abrdn Gold ETF Trust, the abrdn Silver ETF Trust, the abrdn Palladium ETF Trust, the abrdn Platinum ETF Trust, the Sprott Physical Gold Trust or the iShares Bitcoin Trust; provided that all of the conditions in Rules 5020(h)(1) and (2) are met.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

commodities).⁶ Like ETPs backed by precious metals (*i.e.*, commodities), the Exchange proposes to allow options trading on the Bitcoin Funds that hold Bitcoin—which is also deemed a commodity.⁷ The Bitcoin Funds are structured as trusts that hold Bitcoin. Like ETFs and ETPs currently deemed appropriate for options trading, the investment objective of each Bitcoin Fund trust is for its shares to reflect the performance of Bitcoin (less the expenses of the trust's operations), offering investors an opportunity to gain exposure to Bitcoin without the complexities of Bitcoin delivery. Each Bitcoin Fund's shares represent units of fractional undivided beneficial interest in the trust, the assets of which consist principally of Bitcoin and are designed to track Bitcoin or the performance of the price of Bitcoin and offer access to the Bitcoin market.⁸ The Bitcoin Funds provide investors with cost-efficient alternatives that allow a level of participation in the Bitcoin market through the securities market. The Exchange believes each Bitcoin Fund satisfies the Exchange's initial listing standards set forth in Rule 5020(a).⁹ The Exchange notes that the Bitcoin Funds also satisfy the listing standard applied to ETFs traded on the Exchange that they be available for creation and redemption each business day as set forth in Rule 5020(h).¹⁰ First, each of the Bitcoin Funds satisfy the criteria and guidelines set forth in Rule 5020(a). Pursuant to Rule 5020(a), a security on which options may be listed and traded on the Exchange must be duly registered (with the Commission) and be an NMS stock (as defined in Rule 600 of Regulation NMS under the Act) and be characterized by a substantial number of outstanding shares that are widely held

and actively traded.¹¹ Each of the Bitcoin Funds is an NMS Stock as defined in Rule 600 of Regulation NMS under the Act.¹²

As provided in the NYSE American Approval Order, the Exchange believes each Bitcoin Fund is characterized by a substantial number of outstanding shares that are widely held and actively traded. Specifically, as shown in the NYSE American Approval Order, each of the Bitcoin Funds had significantly more than 7,000,000 shares outstanding, which is the minimum number of shares of a corporate stock that the Exchange generally requires to list options on that stock pursuant to Rule 5020(b). The Exchange believes this demonstrates that each Bitcoin Fund is characterized by a substantial number of outstanding shares.

Further as provided in the NYSE American Approval, each Bitcoin Fund has significantly more than 2,000 beneficial holders (approximately 232, 7, and 38 times more, respectively), which is the minimum number of holders the Exchange generally requires for corporate stock in order to list options on that stock pursuant to Rule 5020(b)(2). Therefore, the Exchange believes the shares of each Bitcoin Fund are widely held.

In addition, as provided in the NYSE American Approval Order, the Exchange believes the shares of each Bitcoin Fund are actively traded. Specifically, even though these Bitcoin Funds have been trading for less than one year, the trading volume for each is substantially higher than 2,400,000 shares (between roughly 165 and 700 times that amount), which is the minimum 12-month volume the Exchange generally requires for a security in order to list options on that security as set forth in Rule 5020(b). The Exchange believes this data demonstrates each Bitcoin Fund is characterized by a substantial number of outstanding shares that are actively traded.

In addition to satisfying the Exchange's initial listing standards, options on Bitcoin Funds will be subject to the Exchange's continued listing standards as set forth in Rule 5030(h).

¹¹ The criteria and guidelines for a security to be considered widely held and actively traded are set forth in Rule 5020(b), subject to exceptions.

¹² An "NMS stock" means any NMS security other than an option, and an "NMS security" means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan (or an effective national market system plan for reporting transactions in listed options). See 17 CFR 242.600(b)(64) (definition of "NMS security") and (65) (definition of "NMS stock").

Pursuant to Rule 5030(b), the Exchange will not open for trading any additional series of option contracts covering a fund traded on the Exchange if such fund ceases to be an "NMS stock" as provided for in Rule 5030(a) or the fund is halted from trading on its primary market.¹³ Additionally, options on funds traded on the Exchange may be subject to the suspension of opening transactions as follows: (1) the fund no longer meets the terms of Rule 5030(b); (2) following the initial twelve-month period beginning upon the commencement of trading of the fund, there are fewer than 50 record and/or beneficial holders of the fund for 30 or more consecutive trading days; (3) the value of the underlying commodity is no longer calculated or available; or (4) such other event occurs or condition exists that in the opinion of the Exchange makes further dealing on BOX inadvisable. Options on each Bitcoin Fund will be physically settled contracts with American-style exercise.¹⁴ Consistent with Rule 5050, which governs the opening of options series on a specific underlying security (including ETFs and ETPs), BOX will open at least one expiration month for options on each Bitcoin Fund¹⁵ at the commencement of trading on the Exchange and may also list series of options on Bitcoin Funds for trading on

¹³ See Rule 5030(h).

¹⁴ See Rule 5010 (Rights and Obligations of Holders and Writers), which provides that the rights and obligations of holders and writers of option contracts of any class of options dealt in on the Exchange shall be as set forth in the Rules of the Clearing Corporation. See also OCC Rules, Chapter VIII, which governs exercise and assignment, and Chapter IX, which governs the discharge of delivery and payment obligations arising out of the exercise of physically settled stock option contracts. OCC Rules can be located at: <https://www.theocc.com/getmedia/9d3854cd-b782-450f-bcf7-33169b0576ce/occrules.pdf>.

¹⁵ See Rule 5050(b). The standard expirations are subject to certain listing criteria for underlying securities described within Rule 5020. Standard listings expire the third Friday of the month. The term "expiration date" (unless separately defined elsewhere in the OCC By-Laws), when used in respect of an option contract (subject to certain exceptions), means the third Friday of the expiration month of such option contract, or if such Friday is a day on which the exchange on which such option is listed is not open for business, the preceding day on which such exchange is open for business. See OCC By-Laws Article I, Section 1. Pursuant to Rule 5050(c), additional series of options of the same class may be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the market price of the underlying stock moves more than five strike prices from the initial exercise price or prices. New series of options on an individual stock may be added until the beginning of the month in which the options contract will expire. Due to unusual market conditions, the Exchange, in its discretion, may add a new series of options on an individual stock until the close of trading on the business day prior to expiration.

⁶ See Rule 5020(h) (permitting the listing and trading of options on certain ETPs backed by precious metals.)

⁷ See proposed Rule 5020(h).

⁸ The trust may include minimal cash.

⁹ Rule 5020(a) provides for guidelines to be used by the Exchange when evaluating potential underlying securities for Exchange option transactions.

¹⁰ Rule 5020(h)(1) requires that ETFs must be available for creation or redemption each business day from or through the issuer in cash or in kind at a price related to net asset value, and the issuer must be obligated to issue ETFs in a specified aggregate number even if some or all of the investment assets required to be deposited have not been received by the issuer, subject to the condition that the person obligated to deposit the investments has undertaken to deliver the investment assets as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the issuer, as provided in the respective prospectus.

a weekly,¹⁶ monthly,¹⁷ or quarterly¹⁸ basis. BOX may also list long-term equity option series (“LEAPS”) that expire from twelve to one hundred eighty months from the time they are listed.¹⁹ Pursuant to IM–5050–1(b), which governs strike prices of series of options on ETFs, the interval between strike prices of series of options on Bitcoin Funds will be \$1 or greater when the strike price is \$200 or less and \$5 or greater where the strike price is over \$200.²⁰ Additionally, BOX may list series of options pursuant to the \$1 Strike Price Interval Program,²¹ the \$0.50 Strike Program,²² and the \$2.50 Strike Price Program.²³ Pursuant to Rule 7050, where the price of a series of a Bitcoin Fund option is less than \$3.00, the minimum increment will be \$0.05, and where the price is \$3.00 or higher, the minimum increment will be \$0.10.²⁴ Any and all new series of Bitcoin Fund options that BOX lists will be consistent and comply with the expirations, strike prices, and minimum increments set forth in Rules 5050 and 7050, as applicable. Further, the Exchange notes that Rule Series 10100, which governs margin requirements applicable to the trading of all options on BOX, including options on ETFs and ETPs, will also apply to the trading of Bitcoin Fund options.

Rule 5055(e)(2)(i) permits the Exchange to authorize for trading a FLEX Equity Option class on any equity security if it may authorize for trading a Non-FLEX Equity Option class on that equity security pursuant to Rule 5020.²⁵ At this time, the Exchange is not proposing to permit Bitcoin Fund options to trade as FLEX Equity Options.²⁶ The Exchange therefore

proposes to modify Rule 5055(e)(2)(i) to specify this exception, which will add clarity and transparency to Exchange Rules.²⁷

Position and Exercise Limits

NYSE American’s Approval Order stated that the position and exercise limits for Bitcoin Funds shall be 25,000 contracts. At this time, the Exchange proposes to amend IM–3120–2 to similarly note that Bitcoin Fund options position limits shall be 25,000 contracts to mirror NYSE American’s Approval Order. Rule 3140 provides that the exercise limits shall be determined in the manner described in Rule 3120, therefore the exercise limits would also be 25,000 contracts.

The Exchange has also analyzed its capacity and represents that it and The Options Price Reporting Authority (“OPRA”) have the necessary systems capacity to handle the additional traffic associated with the listing of options on Bitcoin Funds. The Exchange believes any additional traffic that would be generated from the trading of options on Bitcoin Funds would be manageable. The Exchange represents that Participants will not have a capacity issue as a result of this proposed rule change.

The Exchange represents that the same surveillance procedures applicable to all other options currently listed and traded on BOX will apply to options on Bitcoin Funds, and that BOX has the necessary systems capacity to support the new option series. The Exchange’s existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing and trading options on ETFs and ETPs, such as (existing) precious metal-commodity backed ETP options as well as the proposed options on Bitcoin Funds. The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of options on Bitcoin Funds and to deter and detect violations of Exchange rules. Additionally, the Exchange is a member of the Intermarket Surveillance Group (“ISG”) under the Intermarket Surveillance Group Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. The Exchange would be able to obtain information regarding trading in shares of the Bitcoin Funds from NYSE Arca, Inc. (“Arca”) and other markets that trade shares of the Bitcoin Funds through ISG. In addition, the Exchange

has a Regulatory Services Agreement with the Financial Industry Regulatory Authority (“FINRA”). Pursuant to a multi-party 17d–2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market surveillances.²⁸ Further, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on the Bitcoin Funds.

The underlying shares of spot bitcoin ETPs, including the Bitcoin Funds, are also subject to safeguards related to addressing market abuse and manipulation. As the Commission stated in its order approving proposals of several exchanges to list and trade shares of spot bitcoin-based exchange-traded products (“Bitcoin ETP Order”): Each Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market.²⁹ Given the consistently high correlation between the CME bitcoin futures market and the spot bitcoin market, as confirmed by the Commission through robust correlation analysis, the Commission was able to conclude that such surveillance sharing agreements could reasonably be “expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the

²⁸ Section 19(g)(1) of the Act, among other things, requires every SRO registered as a national securities exchange or national securities association to comply with the Act, the rules and regulations thereunder, and the SRO’s own rules, and, absent reasonable justification or excuse, enforce compliance by its members and persons associated with its members. See 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d–2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO. Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

²⁹ See Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008, 3009 (January 17, 2024) (File Nos. SR–NYSEArca–2021–90; SR–NYSEArca–2023–44; SR–NYSEArca–2023–58; SR–NASDAQ–2023–016; SR–NASDAQ–2023–019; SR–CboeBZX–2023–028; SR–CboeBZX–2023–038; SR–CboeBZX–2023–040; SR–CboeBZX–2023–042; SR–CboeBZX–2023–044; and SR–CboeBZX–2023–072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units).

¹⁶ See IM–5050–6.

¹⁷ See IM–5050–13.

¹⁸ See IM–5050–4.

¹⁹ See Rule 5070.

²⁰ The Exchange notes that for options listed pursuant to the Short Term Option Series Program, the Monthly Options Series Program, and the Quarterly Options Series Program, IM–5050–6, IM–5050–13, and IM–5050–4, specifically set forth intervals between strike prices on Quarterly Options Series, Short Term Option Series, and Monthly Options Series, respectively.

²¹ See BOX IM–5050–2.

²² See BOX IM–5050–5.

²³ See BOX IM–5050–3.

²⁴ If options on a Bitcoin Fund are eligible to participate in the Penny Interval Program, the minimum increment of \$0.01 below \$3.00 and \$0.05 above \$3.00 would apply. See Rule 7050(a)(3). See also Rule 7260 (which describes the requirements for the Penny Interval Program).

²⁵ See Rule 5055(e)(2)(i).

²⁶ The Exchange would be required to submit a separate rule filing to permit the Exchange to authorize for trading FLEX Equity Options on the Bitcoin Funds (which filing may propose changes to existing FLEX Equity Option position limits for such options if appropriate).

²⁷ See proposed Rule 5055(e)(2)(i).

[Bitcoin ETPs].”³⁰ In light of surveillance measures related to both options and futures as well as the underlying Bitcoin Funds,³¹ the Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Bitcoin Funds.

The Exchange notes quotation and last sale information for ETFs is available via the Consolidated Tape Association (“CTA”) high speed line. Quotation and last sale information for such securities is also available from the exchange on which such securities are listed. Quotation and last sale information for options on Bitcoin Funds will be available via OPRA and major market data vendors. The Exchange believes that offering options on Bitcoin Funds will benefit investors by providing them with an additional, relatively lower cost investing tool to gain exposure to the price of Bitcoin and hedging vehicle to meet their investment needs in connection with Bitcoin-related products and positions. The Exchange believes that listing Bitcoin Fund options may cause investors to bring this liquidity to BOX, which would increase market transparency and enhance the process of price discovery conducted on BOX through increased order flow.

Finally, the Exchange notes that applicable Exchange rules will require that customers receive appropriate disclosure before trading options in Bitcoin Funds.³² Further, brokers opening accounts and recommending options transactions must comply with relevant customer suitability standards.³³

2. Statutory Basis

The Exchange believes that the proposal is consistent with the

requirements of Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),³⁴ in general, and Section 6(b)(5) of the Act,³⁵ 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, 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.

In particular, the Exchange believes that the proposal to list and trade options on Bitcoin Funds will remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors because offering options on Bitcoin Funds will provide investors with an opportunity to realize the benefits of utilizing options on a Bitcoin Fund, including cost efficiencies and increased hedging strategies. The Exchange believes that offering Bitcoin Fund options will benefit investors by providing them with a relatively lower-cost risk management tool, which will allow them to manage their positions and associated risk in their portfolios more easily in connection with exposure to the price of Bitcoin and with Bitcoin-related products and positions. Additionally, the Exchange’s offering of Bitcoin Fund options will provide investors with the ability to transact in such options in a listed market environment as opposed to in the unregulated OTC options market, which would increase market transparency and enhance the process of price discovery conducted on BOX through increased order flow to the benefit of all investors. The Exchange also notes that BOX already lists options on other commodity-based ETPs,³⁶ which, as described above, are trusts structured in substantially the same manner as Bitcoin Funds and essentially offer the same objectives and benefits to investors, just with respect to a different commodity (*i.e.*, Bitcoin rather than precious metals) and for which the Exchange has not identified any issues with the continued listing and trading of commodity-backed ETP options it currently lists for trading. The Exchange also believes the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system,

because it is consistent with current Exchange Rules previously filed with the Commission. Options on Bitcoin Funds satisfy the initial listing standards and continued listing standards currently in the Exchange Rules applicable to options on all ETFs and ETPs, including ETPs that hold other commodities already deemed appropriate for options trading on BOX. Additionally, as demonstrated above, each Bitcoin Fund is characterized by a substantial number of shares that are widely held and actively traded. Bitcoin Fund options will trade in the same manner as any other ETF or ETP options—the same Exchange Rules that currently govern the listing and trading of options, including permissible expirations, strike prices, minimum increments, and margin requirements, will govern the listing and trading of options on Bitcoin Funds in the same manner.

The Exchange believes the proposed rule change to exclude the Bitcoin Funds from being eligible for trading as FLEX Equity Options is consistent with the Act, because without this prohibition, trading a FLEX Equity Option in the Bitcoin Funds would otherwise establish different position and exercise limits than those proposed herein.³⁷ The proposed position and exercise limit for options on the Bitcoin Funds is 25,000 contracts. These position and exercise limits are the lowest position and exercise limits available in the options industry, are extremely conservative and more than appropriate given the Bitcoin Funds’ market capitalization, average daily volume, number of beneficial holders, and high number of outstanding shares. The proposed position and exercise limits are consistent with the Act as they address concerns related to manipulation and protection of investors because the position and exercise limits are extremely conservative and more than appropriate given the Bitcoin Funds are actively traded.

The Exchange also believes the proposed rule change to Rule 5055(e), to make clear that options on the Bitcoin Funds are not eligible for FLEX trading, will remove impediments to and perfect the mechanism of a free and open market and a national market system because it adds clarity and transparency to Exchange Rules making them easier to navigate and understand to the

³⁰ See Bitcoin ETP Order, 89 FR at 3010–11.

³¹ See Amendment No. 2 to Proposed Rule Change to List and Trade Shares of the Grayscale Bitcoin Trust (BTC) under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) (SR–NYSEARCA–2021–90), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-nysearca-2021-90/srnysearca202190-358659-884182.pdf>; Amendment No. 2 to Proposed Rule Change to List and Trade Shares of the Bitwise Bitcoin ETF under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) (SR–NYSEARCA–2023–44), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-nysearca-2023-44/srnysearca202344-358800-884322.pdf>; and Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the Grayscale Bitcoin Mini Trust Under NYSE Arca Rule 8.201–E, Commodity-Based Trust Shares, Securities Exchange Act Release No. 100290 (June 6, 2024), 89 FR 49931 (June 12, 2024) (SR–NYSEARCA–2024–45).

³² See Rules 4020(b), (e) and 4100.

³³ See Rule 4040.

³⁴ 15 U.S.C. 78f(b).

³⁵ 15 U.S.C. 78f(b)(5).

³⁶ See Rule 5020(h).

³⁷ The Exchange would be required to submit a separate rule filing to permit the Exchange to authorize for trading FLEX Equity Options on the Bitcoin Funds (which filing may propose changes to existing FLEX Equity Option position limits for such options if appropriate).

benefit of investors and the public interest. The Exchange represents that BOX has the necessary systems capacity to support the new Bitcoin Fund options. The Exchange believes that its existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing and trading options, including Bitcoin Fund options. The Exchange's existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing and trading options on ETFs and ETPs, such as (existing) precious metal-commodity backed ETP options as well as the proposed options on Bitcoin Funds.

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of options on Bitcoin Funds and to deter and detect violations of Exchange rules. Additionally, the Exchange is a member of the ISG under the Intermarket Surveillance Group Agreement. ISG members work together to coordinate surveillance and investigative information sharing in the stock, options, and futures markets. The Exchange would be able to obtain information regarding trading in shares of the Bitcoin Funds from Arca and other markets that trade shares of the Bitcoin Funds through ISG. In addition, the Exchange has a Regulatory Services Agreement with FINRA and, as noted herein, pursuant to a multi-party 17d-2 joint plan, all options exchanges allocate regulatory responsibilities to FINRA to conduct certain options-related market surveillances. Further, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on the Bitcoin Funds. The underlying shares of spot bitcoin ETPs, including the Bitcoin Funds, are also subject to safeguards related to addressing market abuse and manipulation. As the Commission stated in its order approving proposals of several exchanges to list and trade shares of spot bitcoin-based ETPs, "[e]ach Exchange has a comprehensive surveillance-sharing agreement with the CME via their common membership in the Intermarket Surveillance Group. This facilitates the sharing of information that is available to the CME through its surveillance of its markets, including its surveillance of the CME bitcoin futures market.³⁸ Given the

consistently high correlation between the CME bitcoin futures market and the spot bitcoin market, as confirmed by the Commission through robust correlation analysis, the Commission was able to conclude that such surveillance sharing agreements could reasonably be "expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [Bitcoin ETPs]."³⁹ In light of surveillance measures related to both options and futures as well as the underlying Bitcoin Funds,⁴⁰ the Exchange believes that existing surveillance procedures are designed to deter and detect possible manipulative behavior which might potentially arise from listing and trading the proposed options on the Bitcoin Funds. Further, the Exchange will implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on Bitcoin ETPs.

Finally, the Exchange notes that this proposal will remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors because applicable Exchange rules will require that customers receive appropriate disclosure before trading options in Bitcoin Funds⁴¹ and will require that brokers opening accounts and recommending options transactions comply with relevant customer suitability standards.⁴² The Exchange notes the proposed rule change is substantively the same as a rule change proposed by NYSE American which the Commission recently approved.⁴³

NASDAQ-2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SR-CboeBZX-2023-044; and SR-CboeBZX-2023-072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units).

³⁹ See Bitcoin ETP Order, 89 FR at 3010-11.

⁴⁰ See Amendment No. 2 to Proposed Rule Change to List and Trade Shares of the Grayscale Bitcoin Trust (BTC) under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) (SR-NYSEARCA-2021-90), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-nysearca-2021-90/srnysearca202190-358659-884182.pdf>; Amendment No. 2 to Proposed Rule Change to List and Trade Shares of the Bitwise Bitcoin ETF under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) (SR-NYSEARCA-2023-44), filed Jan. 5, 2024, available at <https://www.sec.gov/comments/sr-nysearca-2023-44/srnysearca202344-358800-884322.pdf>; and Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the Grayscale Bitcoin Mini Trust Under NYSE Arca Rule 8.201-E, Commodity-Based Trust Shares, Securities Exchange Act Release No. 100290 (June 6, 2024), 89 FR 49931 (June 12, 2024) (SR-NYSEARCA-2024-45).

⁴¹ See Rules 4020(b), (e) and 4100.

⁴² See Rule 4040.

⁴³ See *supra* note 4.

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. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to a filing submitted by NYSE American that was recently approved by the Commission.⁴⁴

Intramarket Competition: The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act as Bitcoin Funds would need to satisfy the initial listing standards set forth in the Exchange Rules in the same manner as any other ETF before the Exchange could list options on them. Additionally, Bitcoin Fund options will be equally available to all market participants who wish to trade such options. The Exchange Rules currently applicable to the listing and trading of options on ETFs on BOX will apply in the same manner to the listing and trading of all options on Bitcoin Funds. Also, and as stated above, the Exchange already lists options on other commodity-based ETPs.⁴⁵

Intermarket Competition: The Exchange does not believe that the proposal to list and trade options on Bitcoin Funds will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the extent that the advent of Bitcoin Fund options trading on BOX may make BOX a more attractive marketplace to market participants at other exchanges, such market participants are free to elect to become market participants on BOX. As noted herein, this is a competitive filing as the Commission recently approved the listing and trading of the Bitcoin Funds on another options exchange.⁴⁶ Additionally, other options exchanges are free to amend their listing rules, as applicable, to permit them to list and trade options on Bitcoin Funds. The Exchange notes that listing and trading Bitcoin Fund options on BOX will subject such options to transparent exchange-based rules as well as price discovery and liquidity, as opposed to alternatively trading such options in the OTC market. The Exchange believes that the proposed rule change may relieve any burden on, or otherwise promote,

⁴⁴ See *supra* note 4.

⁴⁵ See Rule 5020(h).

⁴⁶ See *supra* note 4.

³⁸ See Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008, 3009 (January 17, 2024) (File Nos. SR-NYSEArca-2021-90; SR-NYSEArca-2023-44; SR-NYSEArca-2023-58; SR-

competition as it is designed to increase competition for order flow on BOX in a manner that is beneficial to investors by providing them with a lower-cost option to hedge their investment portfolios. The Exchange notes that BOX operates in a highly competitive market in which market participants can readily direct order flow to competing venues that offer similar products. Ultimately, the Exchange believes that offering Bitcoin Fund options for trading on BOX will promote competition by providing investors with an additional, relatively low-cost means to hedge their portfolios and meet their investment needs in connection with Bitcoin prices and Bitcoin-related products and positions on a listed options exchange.

Finally, the proposed rule change to exclude Bitcoin Fund options from being eligible for trading as FLEX Equity Options does not impose an undue burden on competition as no BOX Participant will be able to transact a FLEX Equity Option on the Bitcoin Funds.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act⁴⁷ and Rule 19b-4(f)(6) thereunder.⁴⁸

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)⁴⁹ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested

that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission previously approved the listing of options on the shares of the Bitcoin Funds.⁵⁰ The Exchange has provided information regarding the underlying Bitcoin Funds, including, among other things, information regarding trading volume, the number of beneficial holders, and the market capitalization of the Bitcoin Funds. The proposal also establishes position and exercise limits for options on the Bitcoin Funds and provides information regarding the surveillance procedures that will apply to options on the Bitcoin Funds. The Commission believes that waiver of the operative delay could benefit investors by providing an additional venue for trading Bitcoin Fund options. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.⁵¹

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.

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-BOX-2024-28 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.

⁵⁰ See *supra* note 4.

⁵¹ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

All submissions should refer to file number SR-BOX-2024-28. 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-BOX-2024-28 and should be submitted on or before December 23, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵²

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-28109 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

⁴⁷ 15 U.S.C. 78s(b)(3)(A).

⁴⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission waives this requirement.

⁴⁹ 17 CFR 240.19b-4(f)(6)(iii).

⁵² 17 CFR 200.30-3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101732; File No. SR–BX–2024–051]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 9, Section 13, Position Limits, and Options 9, Section 15, Exercise Limits, Regarding Options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF iShares Bitcoin Trust ETF

November 25, 2024.

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 November 21, 2024, Nasdaq BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The 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 Options 9, Section 13, Position Limits, and Section 15, Exercise Limits.

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Options 9, Section 13, Position Limits, and Options 9, Section 15, Exercise Limits, to limit the position limits for options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF (collectively “Bitcoin Trusts”).

Recently, Cboe Exchange, Inc. (“Cboe”) received approvals to list options on the Fidelity Wise Origin Bitcoin Fund, and the ARK21Shares Bitcoin ETF.³ Also, recently, NYSE American LLC (“NYSE American”) received approvals to list options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF.⁴ Nasdaq ISE, LLC (“ISE”) filed a rule change to also list and trade options on the Bitcoin Trusts.⁵ BX’s Options 4 Rules were amended by the ISE rule change as those Rules are incorporated by reference to ISE’s Options 4 Rules, so BX has the ability to list the options on the Bitcoin Trusts. The Cboe Approval Order and the NYSE American Approval Order stated that the position and exercise limits for each of the Bitcoin Trusts shall be 25,000 contracts. At this time, the Exchange proposes to amend BX Option 9, Section 13 and Options 9, Section 15 to similarly note that options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF shall have position and exercise limits of 25,000 contracts to mirror the Cboe Approval Order and the NYSE American Approval Order, respectively.

³ See Securities Exchange Act Release No. 101387 (October 18, 2024), 89 FR 84948 (October 24, 2024) (SR–Cboe–2024–035) (Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds) (“Cboe Approval Order”).

⁴ See Securities Exchange Act Release No. 101386 (October 18, 2024), 89 FR 84960 (October 24, 2024) (SR–NYSEAMER–2024–49) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds) (“NYSE American Approval Order”).

⁵ See SR–ISE–2024–54.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁷ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange’s proposal to amend Options 9, Section 13, Position Limits, and Options 9, Section 15, Exercise Limits, to provide that the position and exercise limits for options on each of the Bitcoin Trusts shall be 25,000 contracts is consistent with the Act as it will conform BX’s options position and exercise limits for each of the Bitcoin Trusts with ISE’s options position and exercise limits on these same Bitcoin Trusts to align those limits.⁸

B. Self-Regulatory Organization’s Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Amending Options 9, Sections 13 and 15 to provide that the position and exercise limits for options on each of the Bitcoin Trusts shall be 25,000 contracts does not impose an undue burden on competition as the position and exercise limits will apply to all trading for options on the Bitcoin Trusts trading on the Exchange as well as those trading on other exchanges that file a similar proposal.⁹

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁰ and Rule

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

⁸ The Exchange believes that other exchanges will adopt position and exercise limits of 25,000 contracts for options on each of the Bitcoin Trusts. All Nasdaq affiliated markets have filed to adopt a 25,000 contract position and exercise limit for the Bitcoin Trusts.

⁹ All Nasdaq affiliated markets are filing to adopt a 25,000 contract position and exercise limit for options on the Bitcoin Trusts.

¹⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

19b-4(f)(6) thereunder.¹¹ 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 Act¹² and subparagraph (f)(6) of Rule 19b-4 thereunder.¹³

A proposed rule change filed under Rule 19b-4(f)(6)¹⁴ under the Act does not normally 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 requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission previously approved the listing of options on the Fidelity Wise Origin Bitcoin Fund, the ARK21Shares Bitcoin ETF, the Grayscale Bitcoin Trust (BTC), the Grayscale Bitcoin Mini Trust BTC, and the Bitwise Bitcoin ETF.¹⁶ As noted above, BX's Options 4 Rules were amended by an ISE rule change¹⁷ as those Rules are incorporated by reference to ISE's Options 4 Rules, so BX has the ability to list the options on the Bitcoin Trusts. This proposal also establishes position and exercise limits for options on the Bitcoin Trusts. The Commission believes that waiver of the operative delay could benefit investors by assuring that trading Bitcoin Trust

options are subject to the same position and exercise limits in place on other exchanges. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.¹⁸

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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-BX-2024-051 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-BX-2024-051. 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-BX-2024-051 and should be submitted on or before December 23, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-28103 Filed 11-29-24; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #20641 and #20642; IDAHO Disaster Number ID-20010]

Administrative Declaration of a Disaster for the State of Idaho

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Idaho dated November 22, 2024.

Incident: Gwen Fire.

DATES: Issued on November 22, 2024.

Incident Period: July 24, 2024 through August 9, 2024.

Physical Loan Application Deadline Date: January 21, 2025.

Economic Injury (EIDL) Loan Application Deadline Date: August 22, 2025.

ADDRESSES: Visit the MySBA Loan Portal at <https://lending.sba.gov> to apply for a disaster assistance loan.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205-6734.

¹¹ 17 CFR 240.19b-4(f)(6).

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)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission waives this requirement.

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ 17 CFR 240.19b-4(f)(6)(iii).

¹⁶ See Securities Exchange Act Release No. 101387 (October 18, 2024), 89 FR 84948 (October 24, 2024) (SR-Cboe-2024-035) (Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds). See also Securities Exchange Act Release No. 101386 (October 18, 2024), 89 FR 84960 (October 24, 2024) (SR-NYSEAMER-2024-49) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Permit the Listing and Trading of Options on Bitcoin Exchange-Traded Funds).

¹⁷ See SR-ISE-2024-54.

¹⁸ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁹ 17 CFR 200.30-3(a)(12), (59).

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be submitted online using the MySBA Loan Portal <https://lending.sba.gov> or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at disastercustomerservice@sba.gov or by phone at 1-800-659-2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

Primary County: Nez Perce.

Contiguous Counties:

Idaho: Clearwater, Idaho, Latah, Lewis.

Oregon: Wallowa.

Washington: Asotin, Whitman.

The Interest Rates are:

	Percent
<i>For Physical Damage:</i>	
Homeowners with Credit Available Elsewhere	5.375
Homeowners without Credit Available Elsewhere	2.688
Businesses with Credit Available Elsewhere	8.000
Businesses without Credit Available Elsewhere	4.000
Non-Profit Organizations with Credit Available Elsewhere ...	3.250
Non-Profit Organizations without Credit Available Elsewhere	3.250
<i>For Economic Injury:</i>	
Business and Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations without Credit Available Elsewhere	3.250

The number assigned to this disaster for physical damage is 206415 and for economic injury is 206420.

The States which received an EIDL Declaration are Idaho, Oregon, Washington.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,

Administrator.

[FR Doc. 2024-28199 Filed 11-29-24; 8:45 am]

BILLING CODE 8026-09-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA-2024-0076]

Agency Information Collection Activities: Request for Comments for a New Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for a new information collection, which is summarized below under **SUPPLEMENTARY INFORMATION**. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by January 31, 2025.

ADDRESSES: You may submit comments identified by DOT Docket ID Number 0076 by any of the following methods:

Website: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to <https://www.regulations.gov>.

Follow the online instructions for submitting comments.

Fax: 1-202-493-2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590-0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Alison Rogers, Discretionary Grants Training Liaison, FHWA Discretionary Grants Coordination Division, (304) 347-3574 or via email at alison.rogers@dot.gov or Tamiko Burnell, Chief, FHWA Discretionary Grants Coordination Division, (202) 366-1200 or via email at tamiko.burnell@dot.gov. Office hours are from 8 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Federal Highway Administration (FHWA) Performance Progress Report (PPR) Form.

Background: FHWA is administering over 40 discretionary grant and cooperative agreement programs, including those established under the

Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act, (November 15, 2021, Pub. L. 117-58) and the Inflation Reduction Act, 2022 (August 16, 2022, Pub. L. 117-169). The Uniform Administrative Requirements in 2 CFR part 200 require recipients of Federal financial assistance awards to monitor activities under Federal awards to ensure compliance with applicable Federal requirements and performance expectations are being achieved. In addition, the regulations require Federal awarding agencies, such as FHWA, to use OMB-approved common information collections. The FHWA PPR form will be used by recipients of FHWA grant awards and cooperative agreements to report performance and progress of a Federal financial assistance-funded construction or non-construction project.

Respondents: Recipients of a discretionary grant or cooperative agreement award administered by FHWA. Discretionary grant or cooperative agreement recipients include but are not limited to State DOTs as defined in 23 U.S.C. 101, U.S. Territories, Federally recognized tribes, and other entities identified as eligible for federal financial assistance from FHWA.

Frequency: The information will be collected quarterly, semiannually, or annually, as required by the Notice of Funding Opportunity (NOFO) for the grant program.

Estimated Average Burden per Response: 1 hour per respondent per form per grant award. This includes time to review the form instructions, research existing sources to gather necessary data, complete and review the form before submitting to FHWA.

Estimated Total Annual Burden Hours: It is expected that approximately 2,500 respondents will complete up to 4 PPR forms for a up to 10 grant awards per respondent for an estimated total of 100,000 annual burden hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.48.

Issued on November 25, 2024.

Jazmyne Lewis,

Information Collection Officer.

[FR Doc. 2024-28086 Filed 11-29-24; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Transportation Project in Washington State

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of limitation on claims for judicial review of actions by FHWA.

SUMMARY: This notice announces actions taken by the FHWA that are final. The action relates to the SR 3 Freight Corridor—New Alignment project, located in western Washington within the City of Bremerton, Kitsap County, and Mason County. The Project will construct the SR 3 Freight Corridor—New Alignment to the east of the existing SR3 with a design and posted speed of 50 miles per hour. The proposed alignment will begin at MP 22.81 on existing SR 3 and connect back to the existing SR 3 alignment at MP 29.49. The project includes stormwater treatment facilities, 12-foot lanes with 8-foot shoulders, and roundabouts at the north and south connections to existing SR 3. The FHWA's Finding of No Significant Impact (FONSI) provides details on the Selected Alternative for the proposed improvements.

DATES: A claim seeking judicial review of the Federal agency actions on the listed highway project will be barred unless the claim is filed on or before May 1, 2025. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Liana Liu, Area Engineer, Federal Highway Administration, 711 S Capitol Way, Suite 501, Olympia, WA, 98501-1284, (360) 753-9553, liana.liu@dot.gov or Washington.FHWA@dot.gov, or Victoria Book, Environmental & Hydraulics Manager, WSDOT Olympic Region, P.O. Box 47440, Olympia, WA 98504-7440, (360) 570-6707, victoria.book@wsdot.wa.gov.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA has taken final

agency actions within the meaning of 23 U.S.C. 139(l)(1) by issuing a NEPA Finding of No Significant Impact (FONSI) for the SR 3 Freight Corridor-New Alignment Project in Mason and Kitsap Counties, Washington. The action(s) by FHWA and the laws under which such actions were taken, are described in the FONSI and the associated agency records. That information is available by contacting FHWA at the addresses provided above.

The project proposed to provide a reliable, high-speed, regional route between Kitsap and Mason Counties. This new route will move freight and regional traffic between Shelton and Bremerton, thus bypassing the urban center of Belfair. This project will reduce congestion and improve safety through Belfair and provide an alternate route during highway closures resulting from vehicular crashes and other incidents. Construction of this project will provide safe and reliable regional access to jobs, goods, and services, and improve efficiencies for all public service providers, on SR 3 through Belfair. A FONSI for the project was signed on November 15, 2024.

Information about the NEPA FONSI and associated records are available from FHWA at the addresses provided above and can be found at: <https://wsdot.wa.gov/construction-planning/search-projects/sr-3-freight-corridor-new-alignment>. This notice applies to all Federal agency decisions related to the FONSI as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321-4347]; Federal-Aid Highway Act [23 U.S.C. 109].
2. *Air:* Clean Air Act, as amended [42 U.S.C. 7401-7671(q)].
3. *Land:* Section 6(f) of the Land and Water Conservation Fund Act of 1965 [16 U.S.C. 4601]; section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303].
4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531-1544 and 1536]. Fish and Wildlife Coordination Act [16 U.S.C. 661-667(d)]. Migratory Bird Treaty Act [16 U.S.C. 703-712]. Bald and Golden Eagle Protection Act [16 U.S.C. 668-668c]. Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended [16 U.S.C. 1801 *et seq.*].
5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archaeological and Historic Preservation Act [16 U.S.C. 469-469(c)];

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*]; Farmland Protection Policy Act [7 U.S.C. 4201-4209].

7. *Wetlands and Water Resources:* Clean Water Act (section 319, section 401, section 402, section 404) [33 U.S.C. 1251-1377]. Safe Drinking Water Act [42 U.S.C. 300(f) *et seq.*].

8. *Executive Orders:* Executive Order 11990 Protection of Wetlands; Executive Order 11988 Floodplain Management; Executive Order 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; Executive Order 11593 Protection and Enhancement of Cultural Resources; Executive Order 13007 Indian Sacred Sites; Executive Order 13287 Preserve America; Executive Order 13175 Consultation and Coordination with Indian Tribal Governments; Executive Order 11514 Protection and Enhancement of Environmental Quality; Executive Order 13112 Invasive Species; Executive Order 13166 Improving Access to Services for Persons with Limited English Proficiency; Executive Order 13045 Protection of Children From Environmental Health Risks and Safety Risks; Executive Order 14096 Revitalizing Our Nation's Commitment to Environmental Justice for All.

Authority: 23 U.S.C. 139(l)(1).

Ralph J. Rizzo,

FHWA Division Administrator, Olympia, WA.

[FR Doc. 2024-28219 Filed 11-29-24; 8:45 am]

BILLING CODE 4910-RY-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2022-0148]

Commercial Driver's License: National School Transportation Association Application for Renewal of Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of final disposition; granting of renewal of exemption.

SUMMARY: FMCSA announces its final decision to renew the exemption granted to the National School Transportation Association (NSTA) for a period of two years to permit all commercial driver's license (CDL) applicants seeking a school bus endorsement to forgo the engine compartment portion of the pre-trip vehicle inspection skills testing requirement, known informally as the

“under-the-hood” testing requirement. Drivers issued CDLs pursuant to the requested exemption are restricted to intrastate operation of school buses only.

DATES: The exemption is effective for the period of November 28, 2024, through November 28, 2026.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; 202–366–2722; MCPSPD@dot.gov. If you have questions on viewing or submitting material to the docket, contact Dockets Operations at (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation Viewing Comments and Documents

To view comments, go to www.regulations.gov, insert the docket number “FMCSA–2022–0148” in the keyword box, and click “Search.” Next, sort the results by “Posted (Newer-Older),” choose the first notice listed, and click “Browse Comments.”

To view documents mentioned in this notice as being available in the docket, go to www.regulations.gov, insert the docket number “FMCSA–2022–0148” in the keyword box, click “Search,” and chose the document to review.

If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, 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.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315(b) to grant exemptions from Federal Motor Carrier Safety Regulations. FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including the applicant’s safety analyses. The Agency must provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305(a)). The Agency must publish its decision in

the **Federal Register** (49 CFR 381.315(b)). If granted, the notice will identify the regulatory provision(s) from which the applicant will be exempt, the effective period, and all terms and conditions of the exemption (49 CFR 381.315(c)(1)). If the exemption is denied, the notice will explain the reasons for the denial (49 CFR 381.315(c)(2)). The exemption may be renewed (49 CFR 381.300(b)).

III. Background

Current Regulatory Requirements

Under 49 CFR 383.113(a), CDL applicants are required to possess basic pre-trip vehicle inspection skills for the vehicle class that the applicant operates or expects to operate. For all test vehicles, applicants must be able to identify each safety-related part on the vehicle and explain what needs to be inspected to ensure a safe operating condition of each part, including the engine compartment.

IV. Application for Renewal of Exemption

The renewal application for exemption from NSTA was described in detail in a **Federal Register** notice published on May 30, 2024 (89 FR 46986) and will not be repeated here as the facts have not changed.

V. Public Comments

The Agency received 75 comments; 64 supported the exemption, including 12 from individuals. Six commenters opposed the exemption, including three from individuals. Five others took no position either for or against the request.¹ Various school bus companies and contractors and industry associations including NSTA, American Bus Association (ABA), Chicago Public Schools, Pennsylvania School Bus Association, Wisconsin School Bus Association, First Student, and individuals supported the exemption renewal. Common themes of commenters in support of granting the exemption renewal included the ongoing school bus driver shortage, the frequent lack of a need for school bus drivers to make under-the-hood repairs, and the eventual obsolescence of under-the-hood testing as the industry transitions to electric school buses.

¹ FMCSA received verbal comments from two States during a CDL Bi-Monthly Roundtable Meeting held on October 1, 2024. These comments were made long after the comment period closed on July 1, 2024, were raised in an entirely different context, and did not raise new substantive issues. Accordingly, FMCSA did not consider them in its decision. A summary of the comments is nevertheless available in the docket to this notice.

B.R. Williams, Inc., a school bus contractor, commented, “As you know, a national school bus driver shortage has been a prevalent problem of the student transportation system, and the effects of the Covid–19 pandemic only served to increase this shortage in many areas. The pronounced shortage of school bus drivers, and more importantly school bus driver candidates, have had a great impact on the ability of our company to serve the community. We believe that one impediment to qualifying and licensing school bus driver candidates is the Under the Hood testing requirements for school bus driver candidates.”

The Washington State Student Transportation Coalition commented, “[o]ur bus drivers are not allowed to perform any on-road repairs or maintenance to their vehicle in the event of a break down. The bus driver must call dispatch with the problem, and typically a replacement bus is sent to their location to transport students from the original bus . . . Safety for students in this situation is the priority for our drivers. They must stay with the students and let those with training address the mechanical issues. To this end, the need for Under the Hood knowledge is extremely limited and only serves as a deterrent for potential school bus drivers. Removing this outdated requirement will allow us to focus our drivers on what is most important, keeping students safe.”

The Wisconsin School Bus Association added, “given the current transition to electric school buses, the Under the Hood testing will eventually become obsolete entirely . . . Bus manufacturers warn against untrained laypersons going under the hood to inspect or repair a vehicle. Requiring drivers to do so is fraught with danger, and ultimately becomes a liability concern for operators and testing facilities. Wisconsin was one of the first states to adopt this exemption and many members are using it when existing drivers renew their license. The exemption has allowed employers to maintain the driver pool and discontinuing it would be a large burden on employers, including potentially losing those drivers.”

James Lynch, an individual commenter who supported granting the exemption renewal, stated, “We should all consider potential options that can assist us with overcoming the bus driver shortage that has contributed to a substantial increase in lost instructional time across all schools. This waiver does not pose any concerns with safety standards and is a practical option that

each State would have the discretion to implement.”

The prevalent themes of comments opposed to the exemption included that the exemption may pose an increased risk to safety, it is costly for States to change the current testing process, and drivers who lack the strength to lift the hood may not be able to perform other essential functions, such as assisting passengers in an emergency evacuation.

AWM Associates, LLC commented, “FMCSA must recognize there are safety issues impacting the operation of school buses and the issues must be addressed to reduce the high turnover rate driving the renewal for the exception. NSTA’s request should be denied as the request places school children and drivers in [h]arm’s way.” AWM Associates, LLC further asked, “Has NSTA conducted any research to identify the root cause of high turnover rates and taken corrective actions to repair the issues that cause drivers to quit as soon as they start?” Jennifer Brunette stated: “In our company it would handicap our drivers from making extra money due to the restriction that is placed on their license. They are class B, CDL drivers and should be held to the same standards of every CDL driver.”

The National Association of State Directors of Pupil Transportation Services (NASDPTS) commented that it was “concerned by the cost states would incur to change the current testing process. Licensing and testing agencies would have to update their systems, all trainers and third-party testers would need to be trained on the waiver and law enforcement would need to be trained on the additional license. NASDPTS urges FMCSA to consider the burdensome costs, both financial and in work hours, to states before considering such a requirement.”

NASDPTS further commented: “NASDPTS continues to believe that the unintended consequences of this waiver have result[ed] in an increased risk to safety. Many public-school transportation fleets rely upon school bus drivers to perform pre-trip inspections. In addition, many rural school bus drivers take their buses home each night and therefore must perform the pre-trip inspections themselves.” NASDPTS also noted “there is also a shortage of school bus maintenance personnel facing the school transportation industry and to not ensure all school bus drivers are capable of performing the inspection themselves could leave a district shorthanded or in the position of compromising safety . . . NASDPTS believes that if a driver is capable of adequately ensuring safety in an emergency, then that same driver

is capable of inspecting under the hood of a vehicle.” NASDPTS added that it “has great unease with limiting drivers to intrastate only operations as state lines are not always easily avoided in school transportation. In the State of Vermont, for example, school bus drivers often cross state lines even in home-to-school transportation as in doing so can result in shorter route distances and times.”

The American Association of Motor Vehicle Administrators (AAMVA) did not oppose the exemption but had technical concerns and stated, “[t]esting experience tells us that of all the applicable testing requirements, being able to identify the under the hood components is not one of the more taxing requirements on applicants. AAMVA also notes that to date, not many jurisdictions have utilized the available exemption, and we remain unsure that this specific relief will amount to a dramatic increase in the number of eligible school bus driver applicants.” AAMVA also commented that the under-the-hood testing component “may prevent safety critical issues, like fire prevention or other hazard mitigation prior to the onboarding of children.” AAMVA also noted that “the school bus endorsement, in conjunction with a passenger endorsement, may be transferred to general passenger carrying duties or other commercial vehicle operations that have nothing to do with the school bus endorsement—but the exemption may provide individual testing relief.” Finally, AAMVA commented that “there is no way for licensing agencies to currently differentiate the record of someone who has been granted relief from this specific exemption from those that have not. Meaning, that if someone is initially granted the exemption and moves to another jurisdiction, the new jurisdiction of record may not know that the applicant was previously subject to an exemption that may not conform with their own testing requirements.”

The National Association of Pupil Transportation (NAPT) did not oppose the exemption but commented, “[i]t is our belief that such a long-term extension needs to be based in evidence that the exemption is working effectively and that the continued exemption would not compromise safety for the children who ride our yellow school buses.” The NAPT asked if FMCSA has “data that demonstrates that the ‘under the hood’ component has led to any of the following (1) candidates refusing to complete the test; (2) trainees deciding not to continue because of the test; or (3) CDL candidates failing the test because of the

component?” The NAPT also asked if FMCSA has data demonstrating that the exemption has increased the numbers of school bus drivers, about the experiences of States that have implemented the exemption, and why many States have not implemented the exemption. NAPT also suggested consideration of information on the extent to which potential drivers have abandoned their pursuit of a CDL because of other ELDT requirements that might be unrelated to the characteristics of school bus driving.

VI. FMCSA Safety Analysis and Agency Decision

FMCSA has evaluated NSTA’s application and the public comments and grants the exemption renewal request for a two-year period. Due to the limited scope, terms, conditions, and restrictions of the exemption and the existing regulatory requirements that remain in place, FMCSA has determined that the “under-the-hood” exemption will likely achieve a level of safety that is equivalent to the level of safety that would be obtained absent the exemption. The exemption does not apply to the remaining elements of the pre-trip vehicle inspection components of the skills test, as set forth in 49 CFR 383.113(a)(1)(ii–ix). Accordingly, drivers obtaining CDLs under this exemption will have demonstrated the ability to safely operate the special features of a school bus.

Further, because school buses are typically operated for relatively short distances, mechanics or other qualified personnel can readily provide roadside assistance in the event of an engine malfunction. The exemption does not change FMCSA’s vehicle maintenance requirements in 49 CFR part 396, including that every motor carrier must systematically inspect, repair, and maintain all vehicles (49 CFR 396.3) and that unsafe operations of a CMV are forbidden (49 CFR 396.7). All State or local school bus inspection maintenance standards continue to apply. In response to concerns about costs, FMCSA notes that use of the exemption is optional for States, as a State may elect to continue to require all CDL applicants to meet the requirements of 49 CFR 383.113(a)(1)(i). As it pertains to bus routes that require crossing state lines, the exemption is expressly limited to intrastate operations and drivers obtaining licenses under the exemption must adhere to that restriction. A driver who was granted a CDL under this exemption simply would not be eligible to drive a school bus on a route that crosses State lines; to drive on such a route would require a CDL without a K

restriction granted upon passing the full skills test.

FMCSA believes requiring States to include “school bus only” and K restrictions on CDLs issued under this exemption per 49 CFR 383.153(a)(10)(vii) and (ix) addresses concerns about drivers operating under the exemption moving to a jurisdiction that did not adopt the exemption. The new jurisdiction will become aware of these restrictions when driver applicants surrender their old CDLs, as required by 49 CFR 383.71(c)(4).

FMCSA agrees with comments from AAMVA and NAPT that additional data would be useful to examine the impact of a longer-term exemption. FMCSA therefore requires States report to FMCSA on a monthly basis the names and CDL numbers of drivers who are issued a CDL pursuant to the terms of this exemption.

VII. Exemption Decision

A. Grant of Renewal of Exemption

This exemption covers States for the period beginning at 12:00 a.m. (ET) on November 28, 2024, through 11:59 p.m. on November 28, 2026. Under this exemption, a State may, but is not required to, waive the engine compartment portion of the pre-trip vehicle inspection skills test, set forth in 49 CFR 383.113(a)(1)(i), only for CDL applicants seeking the S and P endorsements, subject to the K restriction limiting their operation to intrastate commerce. States issuing CDLs pursuant to this exemption are not subject to the requirement in 49 CFR 383.133(c)(1) that this portion of the pre-trip vehicle inspection test be administered in accordance with an FMCSA pre-approved examiner information manual.

FMCSA intends to continue to closely monitor the safety impacts of the relief granted under this exemption. As necessary, FMCSA may take action to modify the exemption, including scaling back the regulatory relief provided, or to terminate the exemption sooner, if conditions warrant.

B. Terms and Conditions

States issuing CDLs pursuant to this exemption must abide by the following terms and conditions:

1. The State driver's licensing agency must submit the names and CDL numbers of drivers who are issued a CDL pursuant to the terms of this exemption, as authorized by 49 CFR 383.73(h) and 384.225(e)(2), monthly to MCPSD@dot.gov.

2. The CDL credential must conform to the requirements of 49 CFR part 383, subpart J.

3. When issuing a K-restricted CDL with the S and P endorsements pursuant to this exemption, States must continue to comply with the applicable provisions set forth in 49 CFR 383.73.

4. When issuing a K-restricted CDL with the S and P endorsements pursuant to this exemption, States must place a school bus only restriction on the CDL in accordance with 49 CFR 383.153(a)(10)(ix).

5. States must conduct the remaining pre-trip vehicle inspection components of the skills test for drivers subject to this exemption, as set forth in 49 CFR 383.113(a)(1)(ii–ix).

6. This exemption applies only to the intrastate operation of school buses used to transport pre-primary, primary, or secondary school students from home to school, from school to home, or to and from school-sponsored events, as defined in 49 CFR 383.5.

C. Termination

FMCSA does not believe that drivers issued CDLs under the exemption will experience any deterioration of safety below the level that would be achieved without the exemption. The exemption will be rescinded if: (1) States fail 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).

Vincent G. White,

Deputy Administrator.

[FR Doc. 2024–28098 Filed 11–29–24; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2021–0080; Notice 2]

FCA US LLC; Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: FCA US LLC f/k/a Chrysler Group LLC (collectively referred to as “FCA US”) has determined that certain model year (MY) 2018–2022 Alfa Romeo Stelvio motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 111, *Rear Visibility*. FCA US filed a

noncompliance report dated September 21, 2021. FCA US subsequently petitioned NHTSA on October 14, 2021, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces receipt of FCA US’ petition and amended petition.

DATES: Send comments on or before January 2, 2025.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and submitted by any of the following methods:

- **Mail:** Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- **Hand Delivery:** Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal holidays.

- **Electronically:** Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at <https://www.regulations.gov/>. Follow the online instructions for submitting comments.

- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to <https://www.regulations.gov/>, including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register**

pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at <https://www.regulations.gov> by following the online instructions for accessing the docket. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

SUPPLEMENTARY INFORMATION:

I. Overview

FCA US has determined that certain MY 2018–2022 Alfa Romeo Stelvio motor vehicles do not fully comply with the requirements of paragraphs S2 and S5.5.1 of FMVSS No. 111, *Rear Visibility* (49 CFR 571.111). FCA US filed a noncompliance report dated September 21, 2021, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. FCA US subsequently petitioned NHTSA on October 14, 2021, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance*.

NHTSA previously published notice of receipt of FCA US' petition on June 17, 2022, in the **Federal Register** (87 FR 36573). FCA US submitted an amended petition to NHTSA on July 30, 2024, that broadened the scope of FCA US' petition. Therefore, NHTSA invites interested persons to comment on FCA US' petition and supplemental information. This notice of receipt of FCA US' petition and amended petition is published under 49 U.S.C. 30118 and 30120 and does not represent any Agency decision or other exercise of judgment concerning the merits of the petition.

II. Vehicles Involved

Approximately 43,701 MY 2018–2022 Alfa Romeo Stelvio motor vehicles manufactured between April 12, 2017, and August 27, 2021, are potentially involved.

III. Noncompliance

FCA US explains that the noncompliance is that the subject vehicles are equipped with rearview camera displays that when tested to

FMVSS No. 111, covers a required portion of a test object and therefore, do not fully meet the field of view requirements outlined in paragraphs S2 and S5.5.1 of FMVSS No. 111.

Specifically, the rearview camera display includes “dynamic gridlines” that project the vehicle to be wider than it is. As a result, the “dynamic gridlines” partially cover the lower inside edges of the front test object when the steering wheel is straight.

IV. Rule Requirements

Paragraphs S2 and S5.5.1 of FMVSS No. 111 include the requirements relevant to this petition. Paragraph S2 of FMVSS No. 111 specifies that the purpose of this standard is to reduce the number of deaths and injuries that occur when the driver of a motor vehicle does not have a clear and reasonably unobstructed view to the rear. Paragraph S5.5.1 of FMVSS No. 111 requires the rearview image to include: (a) A minimum of a 150-mm wide portion along the circumference of each test object located at positions F and G; and (b) the full width and height of each test object located at positions A through E, when tested in accordance with the procedures in S14.1 of FMVSS 111.

V. Summary of FCA US' Petition

The following views and arguments presented in this section, V. Summary of FCA US' Petition and Amended Petition, are the views and arguments provided by FCA US. They have not been evaluated by the Agency and do not reflect the views of the Agency.

A. Summary of FCA's Petition

In its petition, FCA US describes the subject noncompliance and explains that it is caused by an incorrect calibration in the subject vehicles. According to FCA US the subject noncompliance is inconsequential to motor vehicle safety because the subject noncompliance “does not create an unclear or unreasonably obstructed view to the rear.” FCA US specifies that although the subject noncompliance exists, the obstruction caused by the gridlines while performing the FMVSS No. 111 test is “transitory” and does not “significantly obstruct the view to the rear.”¹ Further, the gridlines will move rearward as the vehicle does, resulting in the test objects to be “displayed in full.”

FCA US quoted an excerpt from the notice of final rule for FMVSS No. 111 in which FCA US says that NHTSA

“acknowledged that over lays, such as gridlines, could provide safety-related benefits.”

B. Summary of FCA's Amended Petition

In its amended petition, FCA US adds that an analysis of the gridline's overlap with the lower inner portion of test object E, which exceeds that of test object D, shows that the overlap is smaller than the size of a seated Riley Low Birth Weight Infant, the smallest test dummy, as referenced by the University of Michigan Transport Research Institute and 49 CFR part 572.² While FCA US acknowledges that the gridline intersects a portion of the test object specified in FMVSS No. 111, FCA US believes that the obstruction is minimal and insufficient to cover the area where a small child would be seated or lying at the point of the gridline meets the test object.

FCA US concludes that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that FCA US no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after FCA US notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8)

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2024–28117 Filed 11–29–24; 8:45 am]

BILLING CODE 4910–59–P

¹ FCA US provided photos of the noncompliance in its petition which can be viewed in full at <https://www.regulations.gov/docket/NHTSA-2021-0080>.

² FCA US cites https://www.umtri.umich.edu/wp-content/uploads/sites/11/2021/12/CPPRP_brochure12_21.pdf, pg 2.

DEPARTMENT OF TRANSPORTATION**National Highway Traffic Safety Administration****[Docket No. NHTSA–2024–0018; Notice 1]****Daimler Truck North America, LLC; Receipt of Petition for Decision of Inconsequential Noncompliance****AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).**ACTION:** Receipt of petition.

SUMMARY: Daimler Truck North America, LLC (DTNA) has determined that a model year (MY) 2022 Western Star 4900 truck tractor does not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 136, *Electronic Stability Control Systems for Heavy Vehicles*. DTNA filed a noncompliance report dated February 28, 2024, and subsequently petitioned NHTSA (the “Agency”) on March 22, 2024, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces receipt of DTNA’s petition.

DATES: Send comments on or before January 2, 2025.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and may be submitted by any of the following methods:

- **Mail:** Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- **Hand Delivery:** Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.

- **Electronically:** Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at <https://www.regulations.gov/>. Follow the online instructions for submitting comments.

- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary

attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *regulations.gov*, including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT’s complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT:

Ahmad Barnes, General Engineer, NHTSA, Office of Vehicle Safety Compliance, (202) 366–7236.

SUPPLEMENTARY INFORMATION:**I. Overview**

DTNA determined that one MY 2022 Western Star 4900 truck tractor does not fully comply with section 5.2 of FMVSS No. 136, *Electronic Stability Control Systems for Heavy Vehicles*. (49 CFR 571.136).

DTNA filed a noncompliance report dated February 28, 2024, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. DTNA petitioned NHTSA on March 22, 2024, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance*.

This notice of receipt of DTNA’s petition is published under 49 U.S.C.

30118 and 30120 and does not represent any agency decision or another exercise of judgment concerning the merits of the petition.

II. Vehicles

Involved One MY 2022 Western Star 4900 truck tractor, manufactured on October 6, 2021, was reported by the manufacturer.

III. Rule Requirements

Paragraph S5.2 of FMVSS No. 136 includes the requirements relevant to this petition. FMVSS No. 136 establishes the standards for, and requires the installation of, electronic stability control (ESC) systems in certain heavy vehicles for the purpose of reducing loss of control and rollovers. The system’s operational requirements outlined in paragraph S5.2 are:

- (1) The ESC system must function when the vehicle is traveling at speeds greater than 20 km/h (12.4 mph), while reversing, and during system initialization.
- (2) The ESC system must remain capable of activation, even when the antilock brake system or the traction control system is engaged.

IV. Noncompliance

DTNA explains that the subject vehicle does not conform to FMVSS No. 136 paragraph S5.2 because it is equipped with a function that deactivates the required ESC system. Specifically, the subject vehicle is equipped with an “off-road mode” that the driver can activate which deactivates the vehicle’s ESC system, including at speeds above 20 km/h (12.4 mph).

V. Summary of DTNA Petition

The following views and arguments presented in this section, “V. Summary of DTNA’s Petition,” are the views and arguments provided by DTNA. They have not been evaluated by the Agency and do not reflect the views of the Agency. DTNA describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety.

DTNA reports that the subject vehicle was inadvertently equipped with a feature that disables the ESC functionality. DTNA states that this feature, which is commonly used in vocational trucks for off-road conditions, was also used in truck tractors prior to the implementation of FMVSS No. 136. DTNA asserts that this feature is necessary for vocational use in off-road conditions that antilock brake (ABS) and electronic stability control (ESC) systems are not designed to handle effectively. DTNA explains that

the feature enables wheel locking to reduce stopping distances on uneven terrain and surfaces with poor traction, such as dirt or gravel. DTNA notes that the subject noncompliance has been corrected in production, and the off-road system is no longer installed on DTNA's truck tractors subject to FMVSS No. 136.

DTNA explains that ABS and ESC systems are not optimized for off-road use and may impact vehicle safety in such settings. DTNA states that while ABS and ESC systems were designed and tested for driving on paved roads, they do not account for driving on surfaces with irregularities. DTNA cites brake supplier ZF, which asserts that vehicles tuned for off-road driving is safer without ABS/ESC functions in those conditions, not less. According to ZF, ESC systems require accurate vehicle speed data based on the reference speed. The reference speed is normally determined by a reading from a non-driven steer axle, as that axle is not influenced by drive slip; by definition, however, all-wheel-drive vehicles do not have a non-driven steer axle. This limitation is addressed in modern trucks not subject to FMVSS No. 136 by disabling ESC when the front axle is engaged by the transfer case. DTNA further highlights that ZF representatives indicate that off-road driving requires more aggressive maneuvers, which exceed the thresholds of ABS/ESC systems designed for highway use. Additionally, the inertial sensors and algorithms designed for highway conditions, may inadvertently activate inappropriately in off-road conditions.

According to DTNA, the optional off-road mode makes the vehicle safer in off-road conditions. DTNA's petition cites a graph from SAE International's report J2246 (2014) to illustrate that ABS systems are optimized for hard, paved surfaces, which typically involves a wheel slip ratio of around 20 percent before arresting longitudinal force. DTNA notes that off-road driving often occurs on looser, more deformable surfaces with higher wheel slip ratios. DTNA states that the ABS algorithm, which limits wheel slip, may result in sub-optimal performance in these conditions. Instead, DTNA suggests that an algorithm allowing for wheel lock-up in these conditions would provide superior stopping distance on loose, deformable surfaces, particularly for trained commercial drivers who select the off-road mode.

DTNA explains that prohibiting the optimization of vocational vehicles for off-road environments restricts their ability to complete their tasks. DTNA's

petition includes a table (Figure 3) showing that while vehicles in normal operation mode are compliant and optimal for paved road conditions, they may have difficulties when used on off-road terrain. DTNA contends that while vehicles in off-road mode are not compliant, they are unlikely to be operated on paved roads as all drivers of the subject vehicle should have a commercial driver's license and training as well as the presence of an off-road mode indicator on the instrument cluster. Vehicles in normal operation mode in off-road conditions are compliant but not optimal for the conditions and are difficult to operate. DTNA asserts that vehicles in off-road mode in off-road conditions are, while noncompliant, are the best suited for off-road conditions.

DTNA notes that while NHTSA might be concerned that this off-road function may be used on road conditions, this is unlikely because the system must be manually engaged before it can activate, and the instrument cluster indicates when off-road mode is engaged. Additionally, the system cannot be accidentally left on as it disengages automatically after the vehicle is shut off. DTNA also emphasizes that drivers of the subject vehicle must have commercial driver's licenses, ensuring that they are trained and familiar with commercial vehicles and would understand the off-road function and its activation.

DTNA notes that light-duty trucks are allowed to be equipped with a switch that disables the ESC system, in accordance with FMVSS No. 126. Citing NHTSA's rationale from the FMVSS No. 126 final rule on April 6, 2007 (72 FR 17236), DTNA states that NHTSA recognized the need to temporarily disable the ESC in certain conditions where the system could hinder vehicle performance. DTNA further notes that NHTSA permitted the option to temporarily disable ESC because ESC is not suited for certain conditions and may be an unnecessary impediment to the operation of a vehicle in those conditions and without the ability to temporarily disable the function, drivers may disable it entirely. DTNA points out that similar to in light-duty trucks, the heavy-duty vehicle in question defaults back to ESC enabled mode after the vehicle is turned off. DTNA also suggests that the conditions in which ESC might be temporarily disabled and reactivated are similar to those considered by NHTSA for light duty vehicles, which NHTSA concluded allowed for an appropriate level of safety.

Experienced commercial vehicle drivers highlight the necessity of ESC disablement in off-road environments. Drivers working in the construction, mining, logging, and forestry industries agree that standard ABS and ESC systems are disruptive and counterproductive in the off-road environments where they frequently work. Rugged off-road conditions present challenges that could and would not exist in highway conditions and would therefore necessitate a different approach to vehicle control.

Drawing from customer complaints, DTNA cites real world situations in which the mandatory ABS and ESC systems in question are frustrating and inadequate in off-road conditions. According to one customer, it has become such a commonplace issue that dealers in the Canadian logging industry "predominantly order logging trucks as trucks (rather than truck tractors) to avoid ESC."

(1) DTNA refers to NHTSA precedent to highlight the importance of prioritizing real-world safety benefits when necessary. DTNA compares its petition to the 1988 D.C. Circuit Court case *U.S. v. General Motors Corp.* also known as the "X-Cars Case" (6556 F. Supp. 15555, D.D.C. 1987). DTNA summarizes that in the "X-Cars Case," the D.C. Circuit Court recognized the propensity of those vehicles to lock up their wheels during certain braking events but concluded that the risk to motor vehicle safety was insignificant and did not rise to the level of a defect posing an unreasonable risk to motor vehicle safety. DTNA notes that the testing procedures outlined in FMVSS No. 136 were based on conditions like a "solid-paved surface" with a peak friction coefficient of 1.02 and a slope of 0 percent to 1 percent, while surfaces with irregularities like dips and large cracks, are unsuitable for testing under the standard. However, DTNA believes this does not reflect real-world scenarios where wheel lock up may be necessary under certain circumstances.

DTNA also mentions that NHTSA maintained its decision to deny ESC disablement functions in FMVSS No. 136 as part of the rulemaking process as neither Bendix nor Meritor WABCO provided justification for why disablement would be beneficial in off-road conditions. (80 FR 36085, June 23, 2015.) DTNA states that while NHTSA acknowledged Bendix's assertion that the current ESC systems were optimized for on-road and mild off-road conditions, more severe off-road conditions may require optimization better suited to those conditions. DTNA suggests that this acknowledgment

implies that certain ESC systems may not perform optimally in severe off-road conditions, which are relevant to operators of the subject vehicle.

DTNA concludes by stating its belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety and its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that DTNA no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after DTNA notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8)

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2024–28118 Filed 11–29–24; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons

are generally prohibited from engaging in transactions with them.

DATES: This action was issued on September 25, 2024. See **SUPPLEMENTARY INFORMATION** for relevant dates.

FOR FURTHER INFORMATION CONTACT:

OFAC: Associate Director for Global Targeting, 202–622–2420; or Assistant Director for Sanctions Compliance, 202–622–2490 or <https://ofac.treasury.gov/contact-ofac>.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website: <https://ofac.treasury.gov>.

Notice of OFAC Actions

On September 25, 2024, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Individuals

1. VICTOR, Prophane (a.k.a. PROFANE, Victor; a.k.a. PROPHANE, Victor), 64 Pelerin 5, Petion-Ville, West, HT6142, Haiti; 3, Rue Marcelin, Tabarre 61, Tabarre, Ouïest, HT6125, Haiti; DOB 08 Feb 1969; POB Port-au-Prince, Haiti; nationality Haiti; citizen Haiti; Gender Male; Passport R10097145 (Haiti) expires 09 May 2031; National ID No. 0033760991 (Haiti) (individual) [GLOMAG].

Designated pursuant to section (1)(a)(iii)(A)(3) of Executive Order 13818 of December 20, 2017, "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption," 82 FR 60839, 3 CFR, 2017 Comp., p. 399, (E.O. 13818) for being a person who has materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of an entity, including any government entity, that has engaged in, or whose members have engaged in serious human rights abuse, where the activity is conducted by a foreign person.

2. ELAN, Luckson (Latin: ÉLAN, Luckson) (a.k.a. ELAN, Lucson; a.k.a. "GENERAL LUCKSON"; a.k.a. "JENERAL LUCKSON"), Artibonite Department, Haiti; DOB 06 Jan 1988; nationality Haiti; Gender Male (individual) [GLOMAG].

Designated pursuant to section (1)(a)(ii)(A) and (1)(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse and is or has been

a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in serious human rights abuse relating to the leader's or official's tenure.

Lisa M. Palluconi,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2024–28084 Filed 11–29–24; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Action

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: This action was issued on November 26, 2024. See Supplementary Information for relevant dates.

FOR FURTHER INFORMATION CONTACT:

OFAC: Associate Director for Global Targeting, 202–622–2420; or Assistant Director for Sanctions Compliance, 202–622–2490 or <https://ofac.treasury.gov/contact-ofac>.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website: <https://ofac.treasury.gov>.

Notice of OFAC Action

On November 26, 2024, OFAC determined that the persons identified below meet one or more of the criteria for the imposition of sanctions set forth in section 1(a)–(c) of Executive Order 14059 of December 15, 2021, "Imposing Sanctions on Foreign Persons Involved in the Global Illicit Drug Trade," 86 FR 71549 (December 17, 2021) (E.O. 14059). OFAC has selected to impose blocking sanctions pursuant to section 2(a)(i) of E.O. 14059 on the persons identified below.

Individuals

1. CARRILLO SAPIEN, Ildelfonso (a.k.a. CARRILLO SAPIEN, Idelfonso; a.k.a. "El Chivo"), Mexico; DOB 21 Aug 1976; POB Veracruz, Mexico; nationality Mexico; Gender Male; C.U.R.P. CASI760821HVZRPL04 (Mexico) (individual) [ILLICIT-DRUGS-EO14059] (Linked To: GULF CARTEL).

Designated pursuant to section (1)(b)(iii) of E.O. 14059 for being owned, controlled, or directed by, or having acted or purported to act for or on behalf of, directly or indirectly, Gulf Cartel, a person sanctioned pursuant to E.O. 14059.

2. DECUIR GARCIA, Raul (a.k.a. "La Burra"), Mexico; DOB 14 Mar 1971; POB Tamaulipas, Mexico; nationality Mexico; Gender Male; C.U.R.P. DEGR710314HVZCRL01 (Mexico) (individual) [ILLICIT-DRUGS-EO14059] (Linked To: GULF CARTEL).

Designated pursuant to section (1)(b)(iii) of E.O. 14059 for being owned, controlled, or directed by, or having acted or purported to act for or on behalf of, directly or indirectly, Gulf Cartel, a person sanctioned pursuant to E.O. 14059.

3. GUERRA SALINAS, Ismael (a.k.a. "El Comandante"; a.k.a. "Mayelo"), Mexico; DOB 01 Jun 1990; POB Tamaulipas, Mexico; nationality Mexico; Gender Male; C.U.R.P. GUSI900601HTSRLS09 (Mexico) (individual) [ILLICIT-DRUGS-EO14059] (Linked To: GULF CARTEL).

Designated pursuant to section (1)(b)(iii) of E.O. 14059 for being owned, controlled, or directed by, or having acted or purported to act for or on behalf of, directly or indirectly, Gulf Cartel, a person sanctioned pursuant to E.O. 14059.

4. GUERRA SALINAS, Omar (a.k.a. "Samorano"), Mexico; DOB 11 Apr 1986; POB Tamaulipas, Mexico; nationality Mexico; Gender Male; C.U.R.P. GUSO860411HTSRLM03 (Mexico) (individual) [ILLICIT-DRUGS-EO14059] (Linked To: GULF CARTEL).

Designated pursuant to section (1)(b)(iii) of E.O. 14059 for being owned, controlled, or directed by, or having acted or purported to act for or on behalf of, directly or indirectly, Gulf Cartel, a person sanctioned pursuant to E.O. 14059.

5. SIERRA ANGULO, Francisco Javier (a.k.a. "El Borrado"), Mexico; DOB 24 Dec 1988; POB Tamaulipas, Mexico; nationality Mexico; Gender Male; C.U.R.P. SIAF881224HTSRNR05 (Mexico) (individual) [ILLICIT-DRUGS-EO14059] (Linked To: GULF CARTEL).

Designated pursuant to section (1)(b)(iii) of E.O. 14059 for being owned, controlled, or directed by, or having acted or purported to act for or on behalf of, directly or indirectly, Gulf Cartel, a person sanctioned pursuant to E.O. 14059.

Lisa M. Palluconi,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2024-28166 Filed 11-29-24; 8:45 am]

BILLING CODE 4810-AL-P

DEPARTMENT OF THE TREASURY**Office of Foreign Assets Control****Notice of OFAC Sanctions Actions**

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See Supplementary Information for relevant dates.

FOR FURTHER INFORMATION CONTACT:

OFAC: Lisa M. Palluconi, Acting Director, tel.: 202-622-2490; Associate Director for Global Targeting, tel.: 202-622-2420; Assistant Director for Licensing, tel.: 202-622-2480; Assistant Director for Regulatory Affairs, tel.: 202-622-4855; or Assistant Director for Sanctions Compliance & Evaluation, tel.: 202-622-2490.

SUPPLEMENTARY INFORMATION:**Electronic Availability**

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (<https://www.treasury.gov/ofac>).

Notice of OFAC Action(s)

On September 12, 2024, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Individual

1. LY, Yong Phat (a.k.a. "PAD SUPA"; a.k.a. "PAT SUPAPHA"; a.k.a. "PHAT SUPHAPHA"; a.k.a. "PHAT, Suphapha"; a.k.a. "PUT SUPAPA"), 9352 Moo 1 Wangkrajai Amphur Muang, Trat Trat 23000, Thailand; DOB 07 Jan 1958; POB Thmor Sor Village, Thmor Sor Commune, Botum Sakor District, Koh Kong Province, Cambodia; alt. POB Trat, Thailand; nationality Cambodia; alt. nationality Thailand; Gender Male; National ID No. 5230200031049 (Thailand) (individual) [GLOMAG].

Designated pursuant to section (1)(a)(ii)(A) of Executive Order 13818 of December 20, 2017, "Blocking the

Property of Persons Involved in Serious Human Rights Abuse or Corruption," 82 FR 60839, 3 CFR, 2017 Comp., p. 399, (E.O. 13818) for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

Entities

1. L.Y.P. GROUP CO., LTD (a.k.a. L.Y.P. GROUP), Neang Kok, Bak Khlang, Mondol Seima, Koh Kong 9351, Cambodia; N. 205-209, Mao Tse Tong Boulevard, Sangkat, Toul Svay Prey I, Khan Chamkamo, Phnom Penh, Cambodia; website www.lypgroup.com; Email Address fc@gardencityhotel.com.kh; Organization Established Date 28 Sep 2017;

Organization Type: Short term accommodation activities; Tax ID No. L001-360000010 (Cambodia) [GLOMAG] (Linked To: LY, Yong Phat).

Designated pursuant to section (1)(a)(ii)(A) of Executive Order 13818 of December 20, 2017, "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption," 82 FR 60839, 3 CFR, 2017 Comp., p. 399, (E.O. 13818) for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

2. O-SMACH RESORT (a.k.a. O SMACH RESORT; a.k.a. O'SMACH CASINO RESORT), National Highway 68, Krong Samraong, Cambodia; Organization Established Date 01 Jan 2000; Organization Type: Short term accommodation activities; alt. Organization Type: Gambling and betting activities [GLOMAG] (Linked To: LY, Yong Phat).

Designated pursuant to section (1)(a)(ii)(A) of Executive Order 13818 of December 20, 2017, "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption," 82 FR 60839, 3 CFR, 2017 Comp., p. 399, (E.O. 13818) for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

3. GARDEN CITY HOTEL, #205, Mao Tse Tong Boulevard (388), Sangkat Chamkarmon, Phnom Penh, Cambodia; Street Ly Yong Phat, Phum Prek Tarath, Khum Prek Tasek Khan, 12111, Cambodia-Japan Friendship Bridge, Phnom Penh, Cambodia; website www.gardencityhotel.com.kh; Email Address info@gardencityhotel.com.kh; Phone Number 855 66 678 716; Organization Type: Short term accommodation activities [GLOMAG] (Linked To: LY, Yong Phat).

Designated pursuant to section (1)(a)(iii)(B) of Executive Order 13818 of December 20, 2017, "Blocking the

Property of Persons Involved in Serious Human Rights Abuse or Corruption,” 82 FR 60839, 3 CFR, 2017 Comp., p. 399, (E.O. 13818) for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, LY, an individual concurrently designated pursuant to E.O. 13818.

4. KOH KONG RESORT (a.k.a. KOH KONG CASINO RESORT; a.k.a. KOH KONG RESORT AND CASINO; a.k.a. KOH RONG RESORT AND CASINO), Phum Cham Yeam, Khum Paklong, Srok Mondul Seyma, AH123, Khum Pak Khlang, Cambodia; Email Address *info@kohkongresort.com*; Phone Number 85 51 155 5706; Organization Established Date 1998; Organization Type: Short term accommodation activities [GLOMAG] (Linked To: LY, Yong Phat).

Designated pursuant to section (1)(a)(iii)(B) of Executive Order 13818 of December 20, 2017, “Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption,” 82 FR 60839, 3 CFR, 2017 Comp., p. 399, (E.O. 13818) for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, LY, an individual concurrently designated pursuant to E.O. 13818.

5. PHNOM PENH HOTEL, No. 53 Monivong Boulevard, Phnom Penh, Phnom Penh, Cambodia; No. 53 Monivong Boulevard, Sangkat Srah Chok, P.O. Box 1131, Phnom Penh 12201, Cambodia; website *www.phnompenhhotel.com*; Email Address *info@phnompenhhotel.com*; Phone Number 855 23 991 868; Organization Established Date 2003; Organization Type: Short term accommodation activities [GLOMAG] (Linked To: LY, Yong Phat).

Designated pursuant to section (1)(a)(iii)(B) of Executive Order 13818 of December 20, 2017, “Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption,” 82 FR 60839, 3 CFR, 2017 Comp., p. 399, (E.O. 13818) for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, LY, an individual concurrently designated pursuant to E.O. 13818.

Dated: September 12, 2024.

Lisa M. Palluconi,

Acting Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2024-28085 Filed 11-29-24; 8:45 am]

BILLING CODE 4810-AL-P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Purchases of Bank Checks and Drafts, Cashier's Checks, Money Orders, and Traveler's Checks

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice of information collection; request for comment.

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 2, 2025 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:

Financial Crimes Enforcement Network (FinCEN)

Title: Purchases of Bank Checks and Drafts, Cashier's Checks, Money Orders, and Traveler's Checks.

OMB Control Number: 1506-0057.

Type of Review: Extension without change of a currently approved collection.

Description: The Bank Secrecy Act (BSA) prohibits financial institutions from issuing any “bank check, cashier's check, traveler's check, or money order to any individual in connection with a transaction or group of such contemporaneous transactions which involves United States coins or currency (or such other monetary instruments as the Secretary may prescribe) in amounts or denominations of \$3,000 or more” unless (1) the financial institution verifies, through a signature card or

other account documentation or information, that the individual has a transaction account with the financial institution, and records the method of verification in accordance with regulations issued by the Secretary; or (2) the individual furnishes the financial institution with such forms of identification as the Secretary may require by regulation, and the financial institution verifies and records such information in accordance with regulations issued by the Secretary. To implement these requirements, FinCEN issued a regulation requiring financial institutions to maintain records related to the issuance or sale of bank checks and drafts, cashier's checks, money orders, and traveler's checks. The regulation applies to all financial institutions as defined in 31 CFR 1010.100(t). However, it is FinCEN's experience that banks and money services businesses (MSBs) are more likely than other categories of financial institution to issue or sell bank checks and drafts, cashier's checks, money orders, and traveler's checks.

Under 31 CFR 1010.415, financial institutions are required to maintain records of certain information related to the issuance or sale of bank checks and drafts, cashier's checks, money orders, and traveler's checks when the issuance or sale involves currency between \$3,000 and \$10,000, inclusive, to any individual purchaser of one or more of these instruments.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 23,207.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 23,207.

Estimated Time per Response: 7.5 hours.

Estimated Total Annual Burden Hours: 174,053.

Authority: 44 U.S.C. 3501 *et seq.*

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2024-28099 Filed 11-29-24; 8:45 am]

BILLING CODE 4810-02-P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Schedule of Excess Risks

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice of information collection; request for comment.

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 2, 2025 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)

Title: Schedule of Excess Risks.

OMB Control Number: 1530-0062.

Type of Review: Extension without change of a currently approved collection.

Description: The information contained in the Schedule of Excess Risks, FS 285-A (Schedule), is collected pursuant to 31 CFR 223.14 and Instruction VII of Treasury’s “Annual Letter to Executive Officers of Surety Companies” by the Surety Bond Branch (SBB). The Schedule provides a listing of risks, either written or assumed, that exceed a company’s underwriting limitation as established by the Treasury (for companies holding Certificates of Authority from Treasury) or in excess of 10 percent of that company’s Policyholders’ surplus (for companies applying for certification). Treasury has been mandated at 31 U.S.C. 9304 through 9308, to ensure that companies so certified by Treasury are solvent and able to carry out their contracts. The information contained in this Schedule assists in this analysis.

Form: FS Form 285-A.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 283.

Frequency of Response: One time, Quarterly.

Estimated Total Number of Annual Responses: 1,072.

Estimated Time per Response: 20 hours for new applications and 5 hours for quarterly renewals.

Estimated Total Annual Burden Hours: 5,660.

Authority: 44 U.S.C. 3501 *et seq.*

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2024-28119 Filed 11-29-24; 8:45 am]

BILLING CODE 4810-AS-P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Tax and Trade Bureau Information Collection Requests

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice of information collection; request for comment.

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 2, 2025 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:

Alcohol and Tobacco Tax and Trade Bureau (TTB)

1. Title: Volatile Fruit-Flavor Concentrate Plants—Applications and Related Records (TTB REC 5520/2).

OMB Control Number: 1513-0006.

Type of Request: Extension without change of a currently approved collection.

Description: Volatile fruit-flavor concentrates contain alcohol when made by an evaporative process from the mash or juice of a fruit. However, under the Internal Revenue Code (IRC) at 26 U.S.C. 5511, alcohol excise taxes and most other provisions of chapter 51 of the IRC do not apply to such concentrates if the manufacturers file applications, keep records, and meet certain statutory and regulatory requirements. Under that IRC authority, the Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations in 27 CFR part 18 require volatile fruit-flavor concentrate manufacturers to register using form TTB F 5520.3 and file amendments to their registrations using that form or a letterhead application (depending on circumstances). Additionally, the regulations require concentrate manufacturers to maintain a record file of all approved registrations and related supporting documents. TTB uses the collected information to identify concentrate manufacturers and their operations to ensure that the tax provisions of the IRC are appropriately applied.

Form: TTB F 5520.3.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 55.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 55.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 110.

2. Title: Volatile Fruit-Flavor Concentrate Manufacturers—Annual Report, and Usual and Customary Business Records (TTB REC 5520/1).

OMB Control Number: 1513-0022.

Type of Request: Extension without change of a currently approved collection.

Description: Volatile fruit-flavor concentrates contain alcohol when made by an evaporative process from the mash or juice of a fruit. However, under the Internal Revenue Code (IRC) at 26 U.S.C. 5511, alcohol excise taxes and most other provisions of chapter 51 of the IRC do not apply to such concentrates if the manufacturers meet certain statutory and regulatory requirements. Under that IRC authority, the TTB regulations in 27 CFR part 18 require manufacturers of volatile fruit-flavor concentrates to submit an annual summary report using form TTB F 5520.2 in order to account for all volatile fruit-flavor concentrates produced, removed, or made unfit for beverage use. Such manufacturers compile this report from usual and

customary business records, which, under the regulations, respondents must retain for 3 years. TTB uses the collected information to ensure that the tax provisions of the IRC are appropriately applied.

Form: TTB F 5520.2.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 55.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 55.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 18.

Authority: 44 U.S.C. 3501 *et seq.*

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2024-28101 Filed 11-29-24; 8:45 am]

BILLING CODE 4810-31-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0897]

Agency Information Collection Activity Under OMB Review: Statement of Assurance of Compliance With 85 Percent Enrollment Ratios; Statement of Assurance of Compliance With 85 Percent Enrollment Ratios Continuation Sheet

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden, and it includes the actual data collection instrument.

DATES: Comments and recommendations for the proposed information collection should be sent by January 2, 2025.

ADDRESSES: To submit comments and recommendations for the proposed information collection, please type the following link into your browser: www.reginfo.gov/public/do/PRAMain, select “Currently under Review—Open for Public Comments”, then search the

list for the information collection by Title or “OMB Control No. 2900-0897.”

FOR FURTHER INFORMATION CONTACT: VA PRA information: Maribel Aponte, 202-461-8900, vacopaperworkreduact@va.gov.

SUPPLEMENTARY INFORMATION:

Title: Statement of Assurance of Compliance with 85 Percent Enrollment Ratios; Statement of Assurance of Compliance with 85 Percent Enrollment Ratios Continuation Sheet, VA Form 22-10215; VA Form 22-10215a.

OMB Control Number: 2900-0897, <https://www.reginfo.gov/public/do/PRASearch>.

Type of Review: Revision of a currently approved collection.

Abstract: The VA uses data from the VA Form 22-10215 and VA Form 22-10215a for this information collection to ensure the compliance of IHLs and NCD training institutions that are approved by the VA to ensure that no more than 85% of students in any approved program are students in receipt of financial support from the educational institution or by VA under title 38, U.S.C., or under title 10, U.S.C. Without this information, VA might pay benefits in error. Except as otherwise provided by regulation, VA shall not approve an enrollment in any course for an eligible Veteran, not already enrolled, for any period during which more than 85 percent of the students enrolled in the course are having all or part of their tuition, fees or other charges paid for them by the educational institution or by VA under title 38, U.S.C., or under title 10, U.S.C. This is known as the 85/15 Rule and is applicable to Institutions of Higher Learning (IHLs) and Non-College Degree postsecondary schools (NCDs). The requirements apply to all courses, not otherwise exempt, or waived, offered by all educational institutions, regardless of whether the institution is degree-granting, proprietary profit, proprietary nonprofit, eleemosynary, public and/or tax-supported. These schools are required to submit information necessary to determine if their programs of training are approved for the payment of VA educational assistance. This specified information is submitted either to VA or to the State Approving Agency (SAA) having jurisdiction over that school.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 89 FR 77583, September 23, 2024.

Affected Public: Educational Institutions.

Estimated Annual Burden: 1,814 hours.

Estimated Average Burden Per Respondent: 60 minutes.

Frequency of Response: Quarterly.

Estimated Number of Respondents: 1,814.

Authority: 44 U.S.C. 3501 *et seq.*

Dorothy Glasgow,

VA PRA Clearance Officer, (Alt.) Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2024-28187 Filed 11-29-24; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0171]

Agency Information Collection Activity Under OMB Review: Application for Individualized Tutorial Assistance

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden, and it includes the actual data collection instrument.

DATES: Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by clicking on the following link www.reginfo.gov/public/do/PRAMain, select “Currently under Review—Open for Public Comments”, then search the list for the information collection by Title or “OMB Control No. 2900-0171.”

FOR FURTHER INFORMATION CONTACT: VA PRA information: 202-461-8900, vacopaperworkreduact@va.gov.

SUPPLEMENTARY INFORMATION:

Title: Application for Individualized Tutorial Assistance, VA Form 22-1990t.

OMB Control Number: 2900-0171, <https://www.reginfo.gov/public/do/PRASearch>.

Type of Review: Revision of a currently approved collection.

Abstract: The VA uses the information collected to determine

eligibility and payment for tutorial assistance. Without the information on this form, VA would be unable to determine the applicant's eligibility for tutorial assistance.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register**

Notice with a 60-day comment period soliciting comments on this collection of information was published at 89 FR 79366, September 27, 2024.

Affected Public: Educational Institutions.

Estimated Annual Burden: 51 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 102.

Authority: 44 U.S.C. 3501 *et seq.*

Dorothy Glasgow,
VA PRA Clearance Officer, (Alt.) Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.
[FR Doc. 2024-28192 Filed 11-29-24; 8:45 am]

BILLING CODE 8320-01-P



FEDERAL REGISTER

Vol. 89

Monday,

No. 231

December 2, 2024

Part II

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Previously Taxed Earnings and Profits and Related Basis Adjustments;
Proposed Rule

DEPARTMENT OF THE TREASURY**Internal Revenue Service****26 CFR Part 1****[REG–105479–18]****RIN 1545–BO61****Previously Taxed Earnings and Profits and Related Basis Adjustments****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations regarding previously taxed earnings and profits of foreign corporations and related basis adjustments. The proposed regulations affect foreign corporations with previously taxed earnings and profits and their shareholders.

DATES: Written or electronic comments and requests for a public hearing must be received by March 3, 2025.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG–105479–18) by following the online instructions for submitting comments. Requests for a public hearing must be submitted as prescribed in the “Comments and Requests for a Public Hearing” section. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically or on paper to its public docket. Send paper submissions to: CC:PA:01:PR (REG–105479–18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT:

Concerning the proposed regulations generally, Elena M. Madaj at (202) 317–3576; concerning the portions of the proposed regulations relating to section 1502, Jeremy Aron-Dine at (202) 317–6847; concerning the portions of the proposed regulations relating to partnerships, Jennifer N. Keeney at (202) 317–6850; and concerning submissions of comments and requests for a public hearing, contact the Publications and Regulations Section of the Office of Associate Chief Counsel (Procedure and Administration) by email at publichearings@irs.gov (preferred) or by telephone at (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:**Authority**

This document contains proposed additions and amendments to 26 CFR part 1 (proposed regulations) under sections 959 and 961 and certain other provisions of the Internal Revenue Code (Code) regarding previously taxed earnings and profits (PTEP). As discussed in the Explanation of Provisions, the primary provisions of the proposed regulations are issued pursuant to the express delegations of authority under sections 245A(g), 743(b), 904(d)(7), 951A(f)(1)(B), 960(f), 961(a) through (c), 965(o), 986(c)(2), 989(c), and 1502. The proposed regulations are also issued pursuant to the express delegation of authority under section 7805(a).

Background*I. Scope*

The Background describes PTEP, including provisions giving rise to PTEP and provisions regarding the treatment of PTEP, and related guidance and issues under existing law. Any term used but not defined in this preamble has the meaning given to it in the proposed regulations.

*II. PTEP**A. Overview*

Sections 959 and 961 are intended to operate in tandem to prevent double taxation of PTEP, which is earnings and profits (E&P) of a foreign corporation described in section 959(c)(1) or (c)(2). Section 959 designates amounts of E&P as PTEP based on amounts included, or treated as included, in gross income with respect to the foreign corporation under section 951(a).

The remainder of this part II of the Background summarizes provisions giving rise to PTEP, provisions regarding the treatment of PTEP, and existing regulations under sections 959 and 961.

*B. Provisions Giving Rise to PTEP**1. Section 951(a)*

Section 951(a)(1)(A) requires a United States shareholder (as defined in section 951(b) or, if applicable, section 953(c)(1)(A)) of a foreign corporation to include in gross income its pro rata share of the corporation's subpart F income (as defined in section 952) for a taxable year of the corporation (subpart F income inclusion), if the corporation is a controlled foreign corporation (CFC) (as defined in section 957(a) or, if applicable, section 957(b) or 953(c)(1)(B)) at any time during the taxable year and the shareholder owns

(within the meaning of section 958(a)) stock of the corporation on the last day of the taxable year on which the corporation is a CFC (last relevant day). Pursuant to section 951(a)(1)(B), the United States shareholder is generally required to also include in gross income its amount determined under section 956 (section 956 amount) for the taxable year of the foreign corporation (section 956 inclusion). This amount represents an effective repatriation of E&P and is computed based on certain United States property held by the corporation. Ownership of stock within the meaning of section 958(a) means stock owned directly and stock owned indirectly through foreign entities, including domestic partnerships to the extent treated as foreign partnerships under § 1.958–1(d)(1) (discussed in part III.B of the Background). For purposes of the remainder of this preamble, a reference to stock ownership means stock owned within the meaning of section 958(a).

Section 951(a)(2) determines a United States shareholder's pro rata share of a foreign corporation's subpart F income by first allocating a portion of such subpart F income to the United States shareholder, and then reducing such allocation in accordance with section 951(a)(2)(B) to take into account certain distributions where ownership of the stock of the foreign corporation is acquired by the United States shareholder during the corporation's taxable year. *See* § 1.951–1(b). Subpart F income allocated to a United States shareholder before the application of section 951(a)(2)(B) is computed by multiplying the subpart F income by a fraction, the numerator of which is the portion of the foreign corporation's hypothetical distribution described in § 1.951–1(e) that would be distributed with respect to the shareholder's stock of the corporation, and the denominator of which is the amount of such hypothetical distribution. *See* § 1.951–1(e). The amount of the hypothetical distribution is equal to the foreign corporation's allocable E&P, which is generally the corporation's E&P for the taxable year (not reduced by distributions during the year). *See* § 1.951–1(e)(1)(ii).

A special rule under section 245A(e) treats certain hybrid dividends received by a CFC as subpart F income of the receiving CFC for purposes of section 951(a)(1)(A). Similarly, section 964(e)(4) treats certain gain from a sale of stock of a foreign corporation by a CFC as subpart F income of the selling CFC for purposes of section 951(a)(1)(A). Consequently, a United States shareholder of such a receiving CFC or selling CFC includes in gross income

under section 951(a)(1)(A) its pro rata share of such subpart F income.

2. Section 951A(a)

Pursuant to section 951A(a), a United States shareholder of a CFC is required to include in gross income its global intangible low-taxed income (GILTI inclusion). *See* § 1.951A-1(b). A United States shareholder's GILTI inclusion is determined by taking into account the shareholder's pro rata share of tested items (as defined in § 1.951A-1(f)(5)) of CFCs in which the shareholder owns stock, such as tested income, tested loss, and qualified business asset investment. *See* § 1.951A-1(c). A United States shareholder's pro rata share of a CFC's tested items is determined in the same manner as a pro rata share of subpart F income under section 951(a)(2), subject to certain modifications. *See* § 1.951A-1(d).

Section 951A(f)(1)(A) provides that a GILTI inclusion is treated in the same manner as a subpart F income inclusion for purposes of applying certain provisions of the Code, including sections 959 and 961. Section 951A(f)(1)(B) grants the Secretary authority to provide rules for applying section 951A(f)(1)(A) to other provisions of the Code in any case in which the determination of subpart F income is required to be made at the level of the CFC.

3. Section 1248(a) or (f)

Section 1248(a) requires a United States person that satisfies certain ownership requirements with respect to stock in a foreign corporation to include gain recognized on a sale or exchange of stock in such foreign corporation in gross income as a dividend, to the extent of the E&P of the foreign corporation attributable to the stock (including E&P of certain lower-tier foreign corporations pursuant to section 1248(c)(2), but not including PTEP pursuant to section 1248(d)(1)). Section 1248(f) provides similar rules for certain distributions in nonrecognition transactions.

Section 959(e) treats an amount included in gross income of any person as a dividend under section 1248(a) or (f) as an amount included in gross income under section 951(a)(1)(A), for purposes of section 959.

4. Section 965

The transition tax imposed under section 965 as part of the Tax Cuts and Jobs Act, Public Law 115-97, 131 Stat. 2054 (2017) (the Act) increased the subpart F income of certain foreign corporations and treated such foreign corporations as CFCs for purposes of

section 951 (if not already the case). Section 965(a) and (e). Consequently, a United States shareholder of such a foreign corporation generally included in gross income under section 951(a)(1)(A) its pro rata share of such additional subpart F income, subject to reduction under section 965(b) for certain E&P deficits attributable to stock of other foreign corporations owned by the shareholder.

For purposes of section 959, the transition tax also treated the amount of a reduction to a United States shareholder's inclusion with respect to a foreign corporation under section 965(b) as an amount included in the shareholder's gross income with respect to the foreign corporation under section 951(a). Section 965(b)(4)(A).

C. Provisions Regarding the Treatment of PTEP

1. Gross Income Exclusions Under Section 959

Section 959 prevents double taxation by excluding PTEP from gross income of United States persons and CFCs. *See* H.R. Rep. No. 87-1447, at A101-102 (1962).

Section 959(a) provides that, when PTEP of a foreign corporation is distributed to, or would otherwise be included under section 951(a)(1)(B) in gross income of, a United States shareholder whose inclusion under section 951(a) gave rise to the PTEP, the PTEP is excluded from the United States shareholder's gross income. Under successor rules within section 959(a), the exclusion extends to any other United States person who acquires from any person any portion of the United States shareholder's interest in the foreign corporation (subject to any proof of identity rules that may be prescribed by the Secretary).

Section 959(b) applies for purposes of section 951(a) and provides that, when PTEP of a CFC is distributed through a chain of ownership described under section 958(a), the PTEP is excluded from the gross income of another CFC in the chain for purposes of applying section 951(a) to such CFC with respect to the United States shareholder whose inclusion under section 951(a) gave rise to the PTEP. Under successor rules within section 959(b), the exclusion extends to any CFC of any other United States shareholder who acquires from any person any portion of the United States shareholder's interest in the CFC (subject to any proof of identity rules that may be prescribed by the Secretary).

Section 959(c) treats PTEP as distributed before E&P that is not PTEP.

It does so by allocating distributions first to PTEP described in section 959(c)(1) (PTEP resulting from a section 956 inclusion or PTEP that have been excluded under section 959(a)(2)), then to PTEP described in section 959(c)(2) (all other PTEP), and finally to non-PTEP (section 959(c)(3) E&P).

For purposes of section 959, section 951A(f)(1) treats the portion of a United States shareholder's GILTI inclusion that is allocated to a CFC in the same manner as a subpart F income inclusion.

Section 959(f) allocates a section 956 amount first to PTEP described in section 959(c)(2) and then to section 959(c)(3) E&P, taking into account distributions made by the foreign corporation. A section 956 amount is not allocated to PTEP described in section 959(c)(1) because, under section 956(a) and (b)(1), that PTEP is taken into account in determining the section 956 amount.

Thus, under section 959, a CFC's E&P for a taxable year of the CFC is first classified as PTEP to reflect any subpart F income inclusions or GILTI inclusions with respect to the CFC. Next, any distributions made by the CFC during the taxable year are allocated to PTEP (and such PTEP is reduced). Then, any section 956 amount with respect to the CFC is determined for the taxable year, which is allocated to remaining section 959(c)(2) PTEP (and such PTEP is reclassified as section 959(c)(1) PTEP). Finally, the CFC's E&P for the taxable year is classified as PTEP to reflect any inclusion under section 951(a)(1)(B).

2. Basis Adjustments Under Section 961

Section 961 describes rules that provide for basis increases to reflect amounts included in gross income under section 951(a) and basis reductions and gain recognition to reflect distributions of PTEP. Basis increases prevent undistributed PTEP of a foreign corporation from giving rise to gain or a subpart F income inclusion of a covered shareholder, and thus additional tax, in a sale or exchange of stock of the foreign corporation or property through which such stock is owned. *See* H.R. Rep. No. 87-1447, at A106 (1962); H.R. Rep. No. 105-148, at 529-30 (1997). Basis reductions and gain recognition prevent double benefits that would otherwise arise (for example, by ensuring a distribution of PTEP does not create a loss in the stock or other property on which the distribution is made because of basis provided under section 961 for the inclusion that gave rise to the PTEP).

Section 961(a) provides that, under regulations prescribed by the Secretary, a United States shareholder's basis in its

stock in a CFC, and basis in property through which it owns such stock, is increased by the amount included in the shareholder's gross income under section 951(a) with respect to such stock or property.

Section 961(b)(1) provides that, under regulations prescribed by the Secretary, when a United States shareholder or a United States person receives an amount that is excluded from gross income under section 959(a), the basis of the stock or other property with respect to which the amount is received is reduced by the amount so excluded. To the extent that an amount excluded from gross income under section 959(a) exceeds the basis of the stock or other property with respect to which it is received, section 961(b)(2) treats the amount as gain from the sale or exchange of property.

Section 961(c) provides that, under regulations prescribed by the Secretary, if a United States shareholder owns stock in a CFC that is owned by another CFC, then adjustments similar to the adjustments provided by section 961(a) and (b) are made to the basis of such stock, and the basis of stock in any other CFC through which the United States shareholder owns the stock of the first mentioned CFC, but only for the purposes of determining the amount included under section 951 in the gross income of such United States shareholder. Under successor rules within section 961(c), basis adjustments carry over to any other United States shareholder who acquires from any person any portion of the interest of the United States shareholder by reason of which the shareholder was treated as owning the relevant CFC stock (subject to any proof of identity rules that may be prescribed by the Secretary). Section 961(c) further provides that the adjustments described in section 961(c) do not apply to any stock owned by the United States shareholder to which a basis adjustment applies under section 961(a) or (b).

For purposes of section 961, section 951A(f)(1) treats the portion of a United States shareholder's GILTI inclusion that is allocated to a CFC in the same manner as a subpart F income inclusion.

Section 1.965–2(f)(1) generally provides that basis is not increased under section 961 to reflect PTEP resulting from section 965(b), but § 1.965–2(f)(2) permits taxpayers to elect to make certain basis adjustments.

3. Foreign Currency Gain or Loss Under Section 986(c)

Section 986(c)(1) requires the recognition of foreign currency gain or loss with respect to distributions of

PTEP attributable to movements in exchange rates between the date of the income inclusion that gave rise to the PTEP and the distribution of the PTEP. Section 986(c)(1) further provides that such foreign currency gain or loss is treated as ordinary income or loss from the same source as the associated income inclusion. Section 986(c)(2) provides that the Secretary shall prescribe regulations with respect to distributions of PTEP through tiers of foreign corporations. Section 989(c) provides that the Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of the subpart that includes section 986 (subpart J of part III, subchapter N, chapter 1, subtitle A of the Code).

Notice 88–71, 1988–2 C.B. 374 (1988 notice), provides guidance regarding foreign currency gain or loss with respect to PTEP and announced an intent to issue regulations consistent with the guidance. Under the 1988 notice, such foreign currency gain or loss is determined with respect to each separate category of income listed in section 904(d)(1) pursuant to a formula and is recognized immediately before certain sales or exchanges of stock of a foreign corporation with respect to undistributed PTEP of the foreign corporation. *See also* § 1.985–5(e)(2) (requiring a United States shareholder to recognize foreign currency gain or loss when a CFC changes its functional currency to the U.S. dollar); § 1.367(b)–2(j)(2)(i) (application of section 986(c) to certain nonrecognition).

Section 1.986(c)–1 addresses foreign currency gain or loss with respect to distributions of PTEP resulting from section 965. The rules provide that foreign currency gain or loss with respect to PTEP resulting from section 965(a) is determined based on movements in the exchange rate between December 31, 2017, and the time such PTEP is distributed, and that any such gain or loss recognized is reduced in the same proportion as the reduction by a section 965(c) deduction amount (as defined in § 1.965–1(f)(42)) of the section 965(a) inclusion amount (as defined in § 1.965–1(f)(38)) that gave rise to the PTEP. The rules also provide that section 986(c) does not apply with respect to distributions of PTEP resulting from section 965(b).

4. Foreign Income Taxes Under Sections 164(a), 901(a), and 960(b)

Section 164(a) generally provides that a taxpayer is allowed a deduction for certain foreign income taxes paid or accrued by the taxpayer.

Section 901(a) generally provides that a taxpayer choosing to credit foreign income taxes is allowed a credit for certain foreign income taxes paid or accrued by the taxpayer plus, in the case of a domestic corporation, the taxes deemed to have been paid by the domestic corporation under section 960.

Section 960(b) applies for purposes of sections 901 through 909 (relating to the foreign tax credit). Section 960(b)(1) provides that, if PTEP distributed by a CFC to a corporate United States shareholder of the CFC is excluded from gross income under section 959(a), the United States shareholder is deemed to have paid the foreign income taxes that are properly attributable to the PTEP and that have not already been deemed paid by a domestic corporation. Similarly, section 960(b)(2) provides that, if PTEP distributed by a CFC to another CFC is excluded from gross income under section 959(b), the recipient CFC is deemed to have paid the foreign income taxes that are properly attributable to the PTEP and that have not already been deemed paid by a domestic corporation. Section 960(f) provides that the Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the provisions of section 960. Section 904(d)(1) provides that certain provisions including section 960 apply separately with respect to certain categories of income, and section 904(d)(7) provides that the Secretary shall prescribe such regulations as may be necessary or appropriate for the purposes of section 904(d).

For purposes of determining the amount of foreign income taxes deemed paid, § 1.960–3 requires the establishment and maintenance of foreign corporation-level accounts that track a foreign corporation's PTEP and foreign income taxes associated with the PTEP. Those regulations adopt a system of accounting for PTEP in annual accounts for each separate section 904 category (as defined in § 1.960–1(b)(23)) and further segregate each annual account among ten PTEP groups.

Section 965(g) and § 1.965–5 disallow a percentage (referred to as the applicable percentage, as defined in § 1.965–5(d)) of any credit or deduction for foreign income taxes associated with PTEP resulting from section 965(a) or (b). Section 245A(d) and § 1.245A(d)–1 disallow the entirety of any credit or deduction for foreign income taxes associated with PTEP resulting from income inclusions by reason of section 245A(e)(2) (regarding hybrid dividends) or certain income inclusions by reason of section 964(e)(4) (regarding sales of

stock of a foreign corporation by a CFC). Sections 245A(g) and 965(o) provide that the Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the provisions of sections 245A and 965, respectively.

5. Election Under Section 962

Section 962(a) provides that, under regulations prescribed by the Secretary, an individual United States shareholder may elect to be taxed at domestic corporate rates on amounts included in the individual's gross income under section 951(a) and that those amounts are treated as taken into account by a domestic corporation for purposes of applying the relevant provisions of section 960. The election also applies to amounts included in the individual's gross income under section 951A(a) because, for purposes of section 962, such amounts are treated in the same manner as a subpart F income inclusion. *See* section 951A(f)(1). The purpose of section 962 generally is to equate an individual's tax burden with respect to certain earnings of a CFC with the tax burden the individual would have had if the individual were to own the CFC through a domestic corporation. *See* S. Rep. No. 87–1881, at 92–93 (1962).

To carry out this purpose, section 962(d) generally subjects PTEP to an additional level of taxation when distributed. It does so by, notwithstanding section 959(a)(1), requiring that the distributed PTEP be included in gross income to the extent it exceeds the amount of tax paid on the amounts to which the election under section 962 applied.

Section 961(a) also carries out this purpose by, in the case of an election under section 962, limiting a basis increase for an income inclusion to which the election applied to the amount of tax paid by the individual with respect to the income inclusion. Additionally, in a distribution of PTEP, section 961(b)(1) limits a basis decrease to the amount that is excluded from gross income under section 959(a) after the application of section 962(d).

6. Section 1411

Section 1411 generally imposes a 3.8 percent tax on the net investment income of certain individuals, trusts, and estates. Under section 1411(c)(1) and § 1.1411–4(a), net investment income includes certain income from dividends and net gain from the disposition of property. Section 1.1411–10 provides, in relevant part, rules regarding the application of section 1411 to individuals, trusts, and estates that own stock of a CFC, and § 1.1411–10(g)

allows an election with respect to a CFC to treat amounts included in income under section 951(a) with respect to the CFC as net investment income for purposes of § 1.1411–4(a)(1)(i). *See also* § 1.951A–5(b)(1) (treating a GILTI inclusion in the same manner as a subpart F income inclusion for purposes of applying section 1411). If the election provided under § 1.1411–10(g) is made, a distribution of E&P that is not treated as a dividend pursuant to section 959(d) is generally not treated as a dividend for purposes of section 1411(c)(1)(A)(i) and § 1.1411–4(a)(1)(i). *See* § 1.1411–10(c)(1)(i)(B). If the election provided under § 1.1411–10(g) is not made, however, net investment income could reflect value attributable to PTEP, either when the PTEP is distributed or when a United States shareholder directly or indirectly disposes of stock of the CFC. Thus, if no election is made, a distribution of E&P that is not treated as a dividend pursuant to section 959(d) is nevertheless a dividend for purposes of determining net investment income under section 1411(c)(1)(A)(i) and § 1.1411–4(a)(1)(i), provided the distribution is attributable to amounts that are or have been included in gross income under section 951(a) in a taxable year beginning after December 31, 2012. *See* § 1.1411–10(c)(1)(i)(A)(1). For purposes of calculating gain on the disposition of stock of a CFC, basis adjustments under section 961(a) and (b) are similarly not taken into account for section 1411 purposes in the absence of the election. *See* § 1.1411–10(d)(1).

D. Regulations Under Sections 959 and 961

The current regulations under sections 959 and 961 were issued in 1965 and have not been updated to reflect certain statutory changes (for example, the enactment of section 961(c)). The regulations also do not address a number of issues relating to the operation of sections 959 and 961.

In 2006, the Treasury Department and the IRS issued a notice of proposed rulemaking (71 FR 51155) (2006 proposed regulations) to provide more complete rules and address various open issues under sections 959 and 961 and related provisions.

In 2018, the Treasury Department and the IRS issued Notice 2019–01, 2019–02 I.R.B. 275 (2019 notice), which announced an intent to withdraw the 2006 proposed regulations and issue a new notice of proposed rulemaking under sections 959 and 961 to address certain issues arising from the Act. The 2019 notice described rules for the maintenance of PTEP accounts and other aspects relating to the operation of

section 959 and requested comments on certain topics. The Treasury Department and the IRS received several written comments in response to the 2019 notice. In 2022, the Treasury Department and the IRS formally withdrew the 2006 proposed regulations (87 FR 63981).

As indicated in the 2019 notice, changes made by the Act had a significant impact on the role of PTEP and how it functions within the U.S. tax system and, in certain cases, exacerbated the need to address longstanding issues. Thus, in addition to the need for updated and more complete rules as contemplated in the 2006 proposed regulations, the issuance of new regulations requires consideration of multiple issues raised by the Act. Certain significant considerations about the role of PTEP in the current U.S. tax system are summarized below.

First, the Act significantly increased the types of income that give rise to PTEP, several of which involve specific rules and limitations to determine foreign currency gain or loss and the availability of foreign tax credits. Giving effect to the various rules and limitations introduced by the Act requires a detailed accounting system to track PTEP in new groups, and to ensure those rules and limitations are appropriately applied by taxpayers and can be administered by the IRS.

The Act also substantially increased the amount of PTEP in the U.S. tax system. In many cases, a considerable portion of a CFC's income has been (or will be) subject to tax under section 951(a)(1)(A) or 951A(a), including by reason of the transition tax imposed under section 965, and thus only the residual amount of the CFC's income constitutes section 959(c)(3) E&P.

At the same time, the Act introduced section 245A, which in certain cases allows a domestic corporation to claim a dividends received deduction for section 959(c)(3) E&P. As a result, unlike before the Act where section 959(c)(3) E&P generally was subject to U.S. tax (with a possible foreign tax credit in some cases) when repatriated to the domestic corporation, such E&P may now generally be repatriated without U.S. tax to a recipient domestic corporation. Nonetheless, there are important distinctions between section 959(c)(3) E&P and PTEP—in particular, the section 245A deduction generally allows E&P to be distributed without a corresponding basis reduction (but see sections 961(d) and 1059), whereas a distribution of PTEP reduces basis (or gives rise to gain) in accordance with section 961(b). Therefore, PTEP may not

be preferable to section 959(c)(3) E&P and taxpayers might take inappropriate positions to maximize the existence of section 959(c)(3) E&P. For example, a taxpayer may wish to claim a section 961 basis increase for an amount included in gross income but apply the section 245A deduction on a distribution of the corresponding E&P so that such E&P is repatriated tax-free without any basis reduction under section 961(b). To prevent this type of planning, it is critical for the system to properly maintain the PTEP character of that E&P so that section 961(b) applies when the E&P is distributed.

Existing rules governing PTEP also do not adequately address structures where a United States shareholder owns only a portion of the stock in an upper-tier CFC that owns stock in a lower-tier CFC. In particular, there are no rules prescribing the manner in which basis under section 961(c) functions in these non-wholly owned structures. Further, after the enactment of section 951A in the Act, it is much more likely for United States shareholders to have disparate amounts of PTEP with respect to the same CFC because a United States shareholder's GILTI inclusion is determined based on items attributable to all the stock of CFCs owned by the United States shareholder, and this can raise issues about how section 959(b) applies in distributions of the PTEP (such as the issues discussed in part II.D.1.ii of the Explanation of Provisions). Thus, changes in the Act have compounded already existing complexities with respect to the treatment of PTEP and basis in stock in non-wholly owned structures.

Finally, existing rules do not sufficiently address the operation of the PTEP provisions with respect to domestic partnerships (or certain S corporations) in light of the enactment of section 951A and the extension of aggregate treatment to such entities in determining inclusions under both sections 951(a) and 951A(a) (as discussed in part III.A of the Background). Moreover, certain unresolved issues, such as whether a partnership obtains basis in stock of a CFC to account for PTEP, which had previously been limited to foreign partnerships, now apply equally to domestic partnerships (and certain S corporations).

III. Other Guidance and Issues

A. Regulations Under Section 958

Before the Act, domestic partnerships (and S corporations by operation of section 1373(a)) were treated as owning stock of a foreign corporation for

purposes of determining inclusions in gross income under section 951(a), and, thus, PTEP accounts under section 959 were maintained, and related basis adjustments under section 961 were made, at the partnership level.

Following the enactment of section 951A in the Act, in 2019 the Treasury Department and the IRS published final regulations treating a domestic partnership (and certain S corporations) as an aggregate of its partners for purposes of applying section 951A and related provisions. TD 9866, 84 FR 29288. That is, partners do not take into account a distributive share of a section 951A inclusion with respect to the domestic partnership and its CFCs, but instead are treated as proportionately owning the stock of those CFCs, with the result that (as with foreign partnerships) income inclusions under section 951A are determined directly (and solely) by partners that are United States shareholders with respect to a CFC. Subsequently, in 2022, the Treasury Department and the IRS published § 1.958–1(d) which, consistent with the approach adopted under section 951A, extends the aggregate treatment of domestic partnerships to section 951. TD 9960, 87 FR 3648.

Under § 1.958–1(d), for purposes of sections 951, 951A, and 956(a), as well as any provision that specifically applies by reference to those sections (or regulations issued under those sections), a domestic partnership is generally not treated as owning stock of a foreign corporation under section 958(a), and stock of a foreign corporation owned by the domestic partnership is instead treated in the same manner as stock of a foreign corporation owned by a foreign partnership under section 958(a)(2) and § 1.958–1(b). Accordingly, because sections 959 and 961 specifically apply by reference to sections 951 and 951A (in the latter case, as a result of section 951A(f)(1)(A)), aggregate treatment of domestic partnerships applies for purposes of sections 959 and 961 pursuant to § 1.958–1(d). Regulations do not, however, specifically address the application of sections 959 and 961 with respect to domestic partnerships or their partners under § 1.958–1(d).

B. Regulations Under Section 1502

Section 1502 authorizes the Secretary to prescribe regulations for an affiliated group of corporations that join in filing (or that are required to join in filing) a consolidated return (consolidated group, as defined in § 1.1502–1(h)) to clearly reflect the U.S. tax liability of the consolidated group and to prevent avoidance of such tax liability. For

purposes of carrying out those objectives, section 1502 also permits the Secretary to prescribe rules that may be different from the provisions of chapter 1 of subtitle A of the Code that would apply if the corporations composing the consolidated group filed separate returns. Pursuant to these rules, members of a consolidated group are treated as separate entities for some purposes but as divisions of a single corporation for other purposes. *See, for example*, § 1.1502–13(a)(2).

Regulations issued under section 1502 address the application of certain provisions of subpart F in the context of consolidated groups. *See, for example*, § 1.1502–51 (application of section 951A to consolidated groups); § 1.1502–80(j) (addressing determination of section 951(a)(2)(B) reduction for distributions under section 959(b) for purposes of sections 951(a)(1)(A) and 951A(a)). However, regulations do not address the application of sections 959 and 961 with respect to a consolidated group or its members.

Explanation of Provisions

I. Scope

The proposed regulations provide rules addressing core aspects of the PTEP system, including rules that address longstanding issues under sections 959 and 961, account for new provisions and amendments under the Act, and implement the 1988 notice and 2019 notice. Future guidance will address certain issues not addressed in the proposed regulations, for example, issues involving nonrecognition transactions, redemptions, transactions to which section 964(e) applies, and structures where CFCs are partners in a partnership. *See also* Notice 2024–16, 2024–5 I.R.B. 622 (announcing intent to issue proposed regulations addressing the treatment of section 961(c) basis in certain transactions in which a domestic corporation acquires stock of a CFC in a liquidation described in section 332 or an asset reorganization described in section 368(a)(1)). Future guidance may also address any issues regarding the interaction of the proposed regulations with existing rules under other provisions.

II. Section 959 Regulations

A. Overview

The proposed regulations under section 959 provide rules for PTEP accounting (both at the shareholder-level and foreign corporation-level), exclusions from gross income, and related determinations and adjustments.

B. PTEP Accounting (Proposed § 1.959–2)

1. Shareholder-Level Accounts

i. In General

Integral to the proposed regulations are annual PTEP accounts, dollar basis pools, and PTEP tax pools, which are established and maintained by a covered shareholder with respect to a foreign corporation in which the shareholder owns stock. *See* proposed § 1.959–2(b)(1). These are integral aspects of the PTEP system because they ensure proper tracking of amounts described under provisions of the Code such as sections 959(a), 986(c), and 960(b). These rules are issued pursuant to the express delegations of authority under sections 245A(g), 904(d)(7), 960(f), 965(o), and 989(c).

A covered shareholder means any United States person, other than a domestic partnership. *See* proposed § 1.959–1(b); *see also* part VIII.A of the Explanation of Provisions (providing that an S corporation is generally treated in the same manner as a domestic partnership). Domestic partnerships are excluded from this definition because they are treated as aggregates of their partners in determining stock ownership for purposes of section 959 (discussed in part III.A of the Background). A covered shareholder is not limited to a United States shareholder because the exclusion under section 959(a) is not limited to United States shareholders. For example, section 959(a) applies to any United States person who acquires from any person an interest in a foreign corporation with PTEP.

ii. Annual PTEP Accounts

Annual PTEP accounts track a foreign corporation's PTEP with respect to a covered shareholder. *See* proposed § 1.959–2(b)(1). These accounts represent PTEP distributable exclusively to the covered shareholder (or a successor), directly or indirectly through tiers, on any stock of the foreign corporation.

Each annual PTEP account relates to a single taxable year of the foreign corporation and a single section 904 category, and PTEP within an annual PTEP account is maintained in the foreign corporation's functional currency and assigned among ten PTEP groups and two subgroups. *See* proposed § 1.959–2(b)(2). Tracking PTEP on an annual basis is necessary to apply the “last-in, first-out” rule for distributions of PTEP in section 959(c), and PTEP is maintained in the foreign corporation's functional currency pursuant to section 986(b). Tracking

PTEP by section 904 category and by PTEP groups is necessary to implement rules determining foreign currency gain or loss and foreign tax credits with respect to PTEP.

The ten PTEP groups fall within two categories—section 959(c)(2) PTEP groups and section 959(c)(1) PTEP groups. *See* proposed § 1.959–2(b)(2)(i). The section 959(c)(2) groups separately track PTEP resulting from subpart F income inclusions, GILTI inclusions, application of section 965(a) or 965(b), or income inclusions to which section 245A(d) applies (PTEP resulting from section 245A(e)(2) or certain PTEP resulting from section 959(e) (concerning section 1248) or section 964(e)(4) (concerning certain dispositions of foreign stock)). The section 959(c)(1) PTEP groups correspond to the section 959(c)(2) PTEP groups and account for the reclassification of PTEP pursuant to section 959(a)(2). PTEP arising from section 956 inclusions is combined with reclassified PTEP arising from subpart F income inclusions.

The two subgroups track PTEP arising from income inclusions of certain covered shareholders. *See* proposed § 1.959–2(b)(2)(ii). One subgroup tracks PTEP arising from an income inclusion of an individual and includible in gross income under section 962(d) when distributed in a distribution to which section 959(a) would otherwise apply (taxable section 962 PTEP). The second subgroup tracks PTEP arising from an income inclusion of an individual, estate, or trust that would be includible in net investment income under section 1411(c) when distributed (that is, the election under § 1.1411–10(g) is not made and, thus, the income inclusion giving rise to the PTEP was not taken into account in determining net investment income).

Additionally, for PTEP resulting from the application of section 965(a) or (b), an adjusted applicable percentage must be maintained, which tracks the percentage of a credit or deduction for foreign income taxes associated with PTEP that is disallowed under § 1.965–5. *See* proposed § 1.959–2(b)(2)(iii)(A). Similarly, for PTEP resulting from the application of section 965(a), a section 965(c) deduction percentage must be maintained, which tracks the percentage of foreign currency gain or loss with respect to PTEP that is not recognized under § 1.986(c)–1. *See* proposed § 1.959–2(b)(2)(iii)(B). The adjusted applicable percentage and the section 965(c) deduction percentage are tracked by section 904 category. Each is determined using a single weighted average across that section 904 category,

which is intended to reduce the compliance burden and facilitate administrability in cases in which the applicable percentage or section 965(c) deduction amount differs with respect to PTEP in the section 904 category by not requiring the separate tracking of those percentages or amounts. *See also* part IX.B.3. of the Explanation of Provisions (describing transition rules for the initial determination of the adjusted applicable percentage and section 965(c) deduction percentage).

iii. Dollar Basis Pools and PTEP Tax Pools

Dollar basis pools track the basis in U.S. dollars of a foreign corporation's PTEP with respect to a covered shareholder, and such dollar basis is used to determine foreign currency gain or loss under section 986(c). *See* proposed § 1.959–2(b)(1). PTEP tax pools track the U.S. dollar amount of foreign income taxes associated with a foreign corporation's PTEP with respect to a covered shareholder, and such taxes are assigned to a creditable PTEP tax group to the extent eligible to be deemed paid under section 960(b). *See* proposed § 1.959–2(b)(1) and (4)(ii). The creditable PTEP tax group tracks foreign income taxes that are eligible to be deemed paid under section 960(b).

Furthermore, together, dollar basis and the U.S. dollar amount of associated foreign income taxes determine basis reductions under section 961 for distributions of PTEP. *See also* part III.C.2 of the Explanation of Provisions.

Tracking foreign income taxes associated with PTEP in a shareholder-specific manner (consistent with how PTEP is tracked) differs from the approach under existing § 1.960–3 (and the 1988 notice), which tracks such taxes only at the CFC-level (without regard to the shareholder whose PTEP account was reduced by the taxes). This new approach ensures that, in structures involving multiple covered shareholders, foreign income taxes are associated with PTEP with respect to a particular covered shareholder and do not include foreign income taxes that were imposed on PTEP with respect to another covered shareholder. Thus, in a distribution of PTEP to a covered shareholder, the covered shareholder's basis is reduced under section 961(b) by the foreign income taxes that are (i) associated with (and consequently reduced) PTEP with respect to the covered shareholder, and (ii) deemed paid by the covered shareholder. This method is intended to prevent each covered shareholder from incurring double taxation on a single item of income, by ensuring that a covered

shareholder is able to take into account the foreign income taxes associated with the PTEP with respect to the covered shareholder.

Generally, dollar basis pools and PTEP tax pools are maintained on a year-by-year basis, with one pool for each PTEP group within each annual PTEP account. *See* proposed § 1.959–2(b)(3) and (4). Maintenance of separate dollar basis pools for each PTEP group prevents the commingling of dollar basis of PTEP that is subject to different rules with respect to the recognition of foreign currency gain or loss under section 986(c). Maintenance of separate PTEP tax pools for each PTEP group prevents the commingling of foreign income taxes for which the related PTEP is subject to different rules regarding the applicability of section 960(b).

Under an exception intended to simplify PTEP accounting, a covered shareholder may elect to combine dollar basis pools and PTEP tax pools across years. *See* proposed § 1.959–2(c). In such a case, each dollar basis pool and PTEP tax pool relates to PTEP assigned to a single PTEP group and a single section 904 category (without regard to the taxable years to which the PTEP relates). *See* proposed § 1.959–2(b)(3) and (4). This election is consistent with a comment in response to the 2019 notice that recommended allowing taxpayers to pool dollar basis across years within section 904 categories.

If a covered shareholder elects to combine dollar basis pools and PTEP tax pools across years, the election applies to the covered shareholder's dollar basis pools and PTEP tax pools with respect to each foreign corporation in which the covered shareholder owns stock. *See* proposed § 1.959–2(c)(1). This ensures consistent treatment by not permitting a covered shareholder to maintain combined pools with respect to some foreign corporations but not others. A combined pool election may be revoked only with the consent of the Commissioner. *See* proposed § 1.959–2(c)(2).

2. Foreign Corporation-Level Accounts

Foreign corporation-level accounts track a foreign corporation's PTEP and associated foreign income taxes (corporate PTEP accounts and corporate PTEP tax pools, respectively). *See* proposed § 1.959–2(d)(1) and (d)(2). A corporate PTEP account and corporate PTEP tax pool each relate to a single covered shareholder, and PTEP or foreign income taxes within such an account are assigned to section 904 categories and PTEP groups (as is the case in shareholder-level accounts). These accounts reflect that PTEP and

associated foreign income taxes are foreign corporation-level attributes (which, as discussed in part II.B.1 of the Explanation of Provisions, are tracked in a shareholder-specific manner). These accounts also are necessary to allocate and apportion current year taxes paid or accrued by a foreign corporation among the relevant statutory and residual groupings of the foreign corporation, as discussed in part II.F of the Explanation of Provisions, as well as for computations under section 956, which take into account E&P described in section 959(c)(1). Finally, as with shareholder-level accounts, these rules are issued pursuant to the express delegations of authority under sections 245A(g), 904(d)(7), 960(f), 965(o), and 989(c).

A corporate PTEP account relating to a covered shareholder represents all PTEP within the covered shareholder's annual PTEP accounts with respect to the foreign corporation (therefore, unlike shareholder-level accounts, a corporate PTEP account does not relate to a single taxable year of the foreign corporation). Similarly, a corporate PTEP tax pool for a covered shareholder represents all foreign income taxes within the covered shareholder's PTEP tax pools with respect to the foreign corporation. Thus, as a covered shareholder's annual PTEP accounts and PTEP tax pools with respect to a foreign corporation are adjusted, the foreign corporation-level accounts (including the PTEP groups within the accounts) are also adjusted.

The proposed regulations do not provide rules for maintaining a foreign corporation-level account for section 959(c)(3) E&P because the Treasury Department and the IRS are studying whether such E&P should be separately computed with respect to each covered shareholder in certain instances and related issues (for example, coordination with section 1248). For example, assume a case in which US1 and US2, each a covered shareholder, own 60% and 40%, respectively, of the stock of CFC1, a foreign corporation. CFC1 has \$75x and \$0 of PTEP with respect to US1 and US2, respectively, but only \$50x of total E&P as a result of incurring a deficit in E&P after generating the PTEP. Under a shareholder-specific approach to computing CFC1's section 959(c)(3) E&P, such E&P would be negative \$45x with respect to US1 ($\$50x \times 60\% - \$75x$) and \$20x with respect to US2 ($\$50x \times 40\% - \$0$). Under a non-shareholder-specific approach to computing section 959(c)(3) E&P, CFC1's section 959(c)(3) E&P would be negative \$25x ($\$50x - \$75x$).

The proposed regulations clarify that a foreign corporation's E&P is determined independently of the foreign corporation's PTEP. *See* proposed § 1.959–2(d)(3). For example, in a distribution by a foreign corporation with respect to its stock, section 316 determines the extent to which the distribution is made out of the foreign corporation's E&P, and section 959 determines the extent to which the portion that is made out of E&P is a distribution of PTEP. *See also* proposed § 1.959–10(c)(2)(iii) (*Example 2, alternative facts*, regarding a distribution of built-in loss property). Additionally, as in the example in the preceding paragraph, the proposed regulations clarify that a foreign corporation's E&P may be less than the foreign corporation's PTEP because a loss does not reduce PTEP.

C. Shareholder-Level Account Adjustments (Proposed § 1.959–3)

1. In General

The proposed regulations describe the adjustments made to a covered shareholder's annual PTEP accounts (including PTEP groups within those accounts and, if applicable, relevant percentages for section 965 PTEP and PTEP subgroups), dollar basis pools, and PTEP tax pools with respect to a foreign corporation. *See* proposed § 1.959–3. The rules for making these adjustments are issued pursuant to the express delegations of authority under sections 245A(g), 904(d)(7), 986(c)(2), 960(f), 965(o), and 989(c).

These adjustments reflect income inclusions and transactions related to a taxable year of the foreign corporation, and the adjustments preserve the character of the foreign corporation's PTEP with respect to the covered shareholder (for example, the taxable year, section 904 category, and PTEP group to which PTEP relates). In applying these rules to tiers of foreign corporations, the adjustments are applied successively from the lowest-tier foreign corporation to the highest-tier foreign corporation. *See* proposed § 1.959–3(g).

An adjustment to annual PTEP accounts is treated as made at one of three points in time (each of which is discussed below in this part II.C of the Explanation of Provisions), which determines when PTEP becomes (or ceases to be) available for distribution to the covered shareholder: (i) at the beginning of the first day of the foreign corporation's taxable year, (ii) concurrently with the transaction giving rise to the adjustment, or (iii) at the end of the last day of the foreign

corporation's taxable year. *See* proposed § 1.959–3(f). An adjustment to dollar basis pools and PTEP tax pools is treated as made concurrently with the related adjustment to annual PTEP accounts.

2. Beginning of Year Adjustments

Three types of PTEP are added to annual PTEP accounts at the beginning of the foreign corporation's taxable year (even if, for example, the determination of the amount giving rise to the PTEP occurs at the end of such taxable year). This timing ensures that PTEP generated or received during the taxable year is available for distribution as of the start of the taxable year, consistent with sections 316(a)(2) and 959(c) (which determine dividend treatment and the application of section 959(a) or (b) based on E&P for the taxable year).

The first type is PTEP arising from the covered shareholder's subpart F income inclusion or GILTI inclusion with respect to the foreign corporation for the taxable year. *See* proposed § 1.959–3(c)(1)(i) and (ii). To reflect the addition of this PTEP, basis equal to the U.S. dollar amount of the income inclusion giving rise to the PTEP is added to related dollar basis pools. *See* proposed § 1.959–3(d)(1)(i).

The second type is PTEP with respect to the covered shareholder that is distributed to the foreign corporation during the taxable year (discussed in part II.D of the Explanation of Provisions). *See* proposed § 1.959–3(c)(1)(iii). To reflect the addition of this PTEP, the dollar basis and associated foreign income taxes of the PTEP are added to related dollar basis pools and PTEP tax pools, and such taxes are assigned to the creditable PTEP tax group to the extent the foreign corporation is deemed to pay the taxes under section 960(b)(2) and proposed § 1.960–3(c). *See* proposed § 1.959–3(d)(1)(ii), (e)(1)(i). Further, the PTEP is reduced by current year taxes allocated and apportioned to the PTEP (that is, by foreign income taxes imposed on the PTEP and paid or accrued by the foreign corporation in the taxable year, as distinguished from foreign income taxes described in the preceding sentence, which were paid or accrued by another foreign corporation in a prior distribution of the PTEP). *See* proposed § 1.959–3(c)(1)(v); *see also* part II.F of the Explanation of Provisions (rules for allocating and apportioning current year taxes to PTEP). Such current year taxes reduce related dollar basis pools and are added to related PTEP tax pools, where the taxes are assigned to the creditable PTEP tax group to the extent the foreign corporation is a CFC and a credit for the

taxes is not disallowed or suspended at the level of the CFC. *See* proposed § 1.959–3(d)(1)(iii), (e)(1)(ii).

The third type is PTEP with respect to the covered shareholder that results from the application of the foreign corporation's section 961(c) basis to gain recognized by the foreign corporation during the taxable year (discussed in part III.E of the Explanation of Provisions). *See* proposed § 1.959–3(c)(1)(iv). To reflect the addition of this PTEP, the dollar basis of the PTEP is added to related dollar basis pools. *See* proposed § 1.959–3(d)(1)(ii). Further, current year taxes allocated and apportioned to the PTEP reduce the PTEP, reduce related dollar basis pools, and are added to related PTEP tax pools, where (like in a distribution) the taxes are assigned to the creditable PTEP tax group to the extent the foreign corporation is a CFC and a credit for the taxes is not disallowed or suspended at the level of the CFC. *See* proposed § 1.959–3(d)(1)(iii), (e)(1)(ii).

3. Time of Transaction Adjustments

Three types of PTEP are added to, or removed from, annual PTEP accounts concurrently with the relevant transaction occurring during the foreign corporation's taxable year.

The first type is PTEP distributed by the foreign corporation during the taxable year. *See* proposed § 1.959–3(c)(1)(vi). To reflect the removal of this PTEP, the dollar basis and associated foreign income taxes of the PTEP are removed from related dollar basis pools and PTEP tax pools. *See* proposed § 1.959–3(d)(1)(iv), (e)(1)(iii).

The second type is PTEP arising from gain recognized by the covered shareholder on the sale or exchange of stock during the taxable year that is recharacterized and included in gross income as a dividend under section 1248 by reason of E&P attributed to stock of the foreign corporation under section 1248. *See* proposed § 1.959–3(c)(1)(vii); *see also* section 959(e). This timing prevents iterative computations that could result if the PTEP were available for distribution earlier in the taxable year. To reflect the addition of this PTEP, basis equal to the U.S. dollar amount of the income inclusion giving rise to the PTEP is added to related dollar basis pools. *See* proposed § 1.959–3(d)(1)(i). The Treasury Department and the IRS are studying whether a foreign corporation's PTEP should similarly be increased to reflect gain treated as a dividend under section 964(e)(1) by reason of E&P of the foreign corporation, which amount generally increases the selling CFC's PTEP, and welcome comments on whether

increasing the foreign corporation's PTEP would be appropriate notwithstanding the duplicative result (that is, PTEP would be in the selling CFC and the foreign corporation whose E&P gave rise to the dividend).

The third type is PTEP that transfers from (or to) the covered shareholder under section 959's successor rules (discussed in part II.G of the Explanation of Provisions). *See* proposed § 1.959–3(c)(1)(viii), (ix). To reflect the removal (or addition) of this PTEP, the dollar basis and associated foreign income taxes of the PTEP are removed from (or added to) related dollar basis pools and PTEP tax pools. *See* proposed § 1.959–3(d)(1)(iv) and (v), (e)(1)(iii) and (iv).

4. End of Year Adjustments

Two types of adjustments are made at the end of the foreign corporation's taxable year. These adjustments relate to the covered shareholder's section 956 amount with respect to the foreign corporation for the taxable year.

First, PTEP to which the section 956 amount is allocated (which, as discussed in part II.E of the Explanation of Provisions, is excluded from the covered shareholder's gross income under section 959(a)(2)) is reassigned within annual PTEP accounts from section 959(c)(2) PTEP groups to section 959(c)(1) PTEP groups. *See* proposed § 1.959–3(c)(1)(x). To reflect the reclassification, the dollar basis and associated foreign income taxes of the PTEP are moved from dollar basis pools and PTEP tax pools relating to section 959(c)(2) PTEP groups to dollar basis pools and PTEP tax pools relating to section 959(c)(1) PTEP groups. *See* proposed § 1.959–3(d)(1)(vi), (e)(1)(v).

Next, PTEP arising from the portion of the section 956 amount included in the covered shareholder's gross income under section 951(a)(1)(B) is added to annual PTEP accounts. *See* proposed § 1.959–3(c)(1)(xi). In addition, an amount of basis equal to the U.S. dollar amount of the section 956 inclusion giving rise to the PTEP is added to related dollar basis pools. *See* proposed § 1.959–3(d)(1)(i).

Further, additional rules address cases where the covered shareholder acquires ownership of stock of the foreign corporation on or after the last relevant day of the foreign corporation's taxable year (that is, the last day of such taxable year on which the foreign corporation is a CFC) and a portion of a section 956 amount of a United States shareholder is attributable to such stock. *See* proposed § 1.959–3(c)(4). Under these rules, PTEP of the foreign corporation that has transferred to the

covered shareholder but to which such portion of the section 956 amount is ultimately allocated (discussed in part II.E of the Explanation of Provisions) is reclassified from section 959(c)(2) PTEP groups to section 959(c)(1) PTEP groups. Moreover, the foreign corporation's PTEP with respect to the covered shareholder is increased to reflect the inclusion in income by the United States shareholder of such portion of the section 956 amount.

D. Distributions of PTEP (Proposed § 1.959-4)

1. Application of Exclusions

i. In General

The proposed regulations provide rules regarding the exclusions from gross income under section 959(a)(1) and (b) for PTEP that is distributed to a covered shareholder or a CFC. *See* proposed § 1.959-4; *see also* part II.D.2 of the Explanation of Provisions (determining distributed PTEP).

Under the section 959(a)(1) exclusion, PTEP distributed to a covered shareholder, other than taxable section 962 PTEP, is excluded from the covered shareholder's gross income. *See* proposed § 1.959-4(b)(1); *see also* section 962(d) and proposed § 1.312-8(c) (domestic corporation's receipt of PTEP does not increase E&P, discussed in part VIII.I of the Explanation of Provisions).

Under the section 959(b) exclusion, PTEP distributed by a CFC to another CFC is excluded from the recipient CFC's gross income for purposes of determining the recipient CFC's subpart F income and tested income or tested loss, provided that the PTEP relates to a covered shareholder that is a United States shareholder in both CFCs. *See* proposed § 1.959-4(b)(2); *see also* § 1.312-6(b) (the distribution generally increases the recipient CFC's E&P) and proposed § 1.952-1(c)(4) (the distribution does not increase the recipient CFC's current year E&P for purposes of the limitation in section 952(c)(1)(A), discussed in part VIII.I of the Explanation of Provisions).

Applying the section 959(b) exclusion for purposes of determining the recipient CFC's tested income or tested loss prevents double taxation (and thus is consistent with the policy of section 959) in cases where the distribution is not a related party dividend described in section 951A(c)(2)(A)(i)(IV) and therefore could otherwise result in tested income. The Treasury Department and the IRS are of the view that this approach, which is issued under the express delegation of authority in section 951A(f)(1)(B), is

consistent with section 951A(f)(1)(A) (treating an inclusion under section 951A(a) in the same manner as an inclusion under section 951(a)(1)(A) for purposes of section 959), which should be interpreted as allowing references to section 951(a) in section 959 to be treated as including a reference to section 951A(a).

Applying the section 959(b) exclusion only to PTEP distributed by a CFC to another CFC is consistent with the statute. However, under the express delegation of authority in section 965(o), the proposed regulations provide a special rule pursuant to which a specified foreign corporation (as defined in § 1.965-1(f)(45)(i)(B)) that is not a CFC is treated as a CFC for purposes of applying the section 959(b) exclusion to section 965 PTEP distributed by the specified foreign corporation, which ensures that the section 959(b) exclusion applies to such PTEP when received by a CFC. *See* proposed § 1.959-4(b)(2)(ii). The Treasury Department and the IRS are studying the application of section 959(b) to other PTEP distributed by a foreign corporation that is not a CFC (for example, in a case where the foreign corporation was a CFC when the PTEP was generated but is no longer a CFC when the PTEP is distributed). Irrespective of whether the section 959(b) exclusion applies to PTEP distributed to a foreign corporation, the PTEP remains PTEP and, in a subsequent distribution, may be excluded from gross income under section 959(a)(1) or (b). *See* proposed §§ 1.959-2 and 1.959-3 (describing shareholder-level annual PTEP accounts and related adjustments with respect to a foreign corporation without regard to CFC status). This treatment is required to give effect to section 959(a), which does not depend on the CFC status of any intermediary entities through which a covered shareholder ultimately receives PTEP.

ii. Split-Ownership Structures

Under the proposed regulations, the section 959(b) exclusion applies at the CFC-level by excluding a distribution of PTEP from the recipient CFC's gross income for certain purposes. In structures where stock of a CFC is not all owned by a single United States shareholder, the application of the section 959(b) exclusion at the CFC-level could, absent special rules, result in all United States shareholders of the CFC sharing any benefits of the exclusion (rather than just the United States shareholder to which the excluded PTEP relates) and partial double taxation to the United States

shareholder to which the excluded PTEP relates (to the extent the exclusion benefits other United States shareholders).

Guidance issued before the Act generally used a "gross-up" mechanism to address this issue. Rev. Rul. 82-16, 1982-1 C.B. 106, considered a scenario where a United States shareholder owned 70% of the stock of an upper-tier CFC, with the remaining 30% owned by non-United States shareholders, and the upper-tier CFC owned all the stock of a lower-tier CFC. The lower-tier CFC earned \$100x of subpart F income, which gave rise to a \$70x subpart F income inclusion and, thus, \$70x of PTEP with respect to the United States shareholder. In a later year, the lower-tier CFC distributed \$200x to the upper-tier CFC. The ruling concluded that section 959(b) looks to the total amount of E&P of the lower-tier CFC that caused the United States shareholder's subpart F income inclusion, with the result that section 959(b) excluded \$100x (rather than \$70x) from the upper-tier CFC's subpart F income in applying section 951(a) to the United States shareholder. Conversely, a \$70x exclusion under section 959(b) would have caused the upper-tier CFC to have an additional \$30x of subpart F income from the distribution, which would have led to a \$21x (\$30x × 70%) subpart F income inclusion for the United States shareholder even though its share of the distribution was all attributable to PTEP.

However, a gross-up mechanism raises certain issues. For example, computing a gross-up may be complex or burdensome in light of the increased prevalence of PTEP that is not pro rata with respect to United States shareholders following the Act (for instance, PTEP resulting from a GILTI inclusion, which is not determined solely by reference to a particular CFC). Additionally, a gross-up mechanism could result in the need for different determinations of a CFC's subpart F income (and tested income or tested loss) for different United States shareholders of the CFC, which is inconsistent with the way that these types of income are treated under existing regulations for other purposes of the Code such as the expense allocation rules or foreign tax credit rules.

Accordingly, instead of a gross-up mechanism, the proposed regulations coordinate the section 959(b) exclusion with revisions to the pro rata share rules of section 951(a) (discussed in part IV.C of the Explanation of Provisions). Under this approach, a CFC's subpart F income is determined with respect to all

shareholders by excluding the same amount of PTEP received by the CFC, and United States shareholders' pro rata shares of the CFC's subpart F income are computed in a manner so that any benefits of the application of the section 959(b) exclusion to PTEP with respect to a United States shareholder generally inure only to that United States shareholder. For instance, if two United States shareholders own equal interests in a CFC, and the CFC receives a distribution half of which is PTEP with respect to one United States shareholder (because there is PTEP with respect to the United States shareholder at least equal to its share of distribution) and the other half of which gives rise to subpart F income (because there is no PTEP with respect to the other United States shareholder and no exception from subpart F income applies), then only the United States shareholder with respect to which there is no PTEP has a pro rata share of the subpart F income resulting from the distribution.

The Treasury Department and the IRS are of the view that the approach in the proposed regulations appropriately carries out the shareholder-specific nature of section 959(b) (that is, excluding PTEP with respect to a United States shareholder from a CFC's gross income for purposes of the application of section 951(a) to the CFC with respect to the United States shareholder). Additionally, this approach conforms with the approach for applying section 961(c) which, under the proposed regulations (as discussed in part III.E of the Explanation of Provisions), also provides for a gross income exclusion at the CFC-level that is coordinated with the section 951(a) pro rata share rules to ensure its benefits generally inure only to the appropriate United States shareholder.

iii. Issues Involving Allocation Rules Under Section 861

The approach in the proposed regulations discussed in part II.D.1.ii of the Explanation of Provisions (applying the section 959(b) exclusion, as well as section 961(c), at the CFC-level) can lead to issues involving the rules of section 861 for allocating and apportioning deductions because a CFC's deductions that are not current year taxes are not allocated and apportioned under section 861 to PTEP. See § 1.960–1(c)(1)(ii) and proposed § 1.959–6(d)(1).

For example, in a case where some, but not all, of a distribution received by a CFC is PTEP, an amount of the CFC's deductible interest expense could reduce the non-PTEP portion of the distribution. See also proposed § 1.951–

1(h)(2)(ii)(C) (*Example 1, alternative facts*). This may result in a benefit if the non-PTEP portion would give rise to subpart F income or tested income, but otherwise may not be beneficial if the interest deductions reduce section 959(c)(3) E&P and thus the potential for a dividends received deduction under section 245A. Comments are requested on how to appropriately allocate and apportion deductions of a CFC when some, but not all, of a distribution (or gain recognized) is PTEP.

For example, comments are requested on whether deductions that are not current year taxes, such as deductible interest expense, should be allocated and apportioned to, and therefore reduce, the CFC's PTEP. Under this approach, to the extent PTEP with respect to a United States shareholder is reduced by deductions that are not current year taxes, the shareholder could be allowed to retain an equivalent amount of adjusted basis in property directly owned by the shareholder and on which the remaining PTEP is ultimately distributed, with the result that the shareholder would receive a benefit equivalent to a deduction (similar to the result discussed in Part III.C.2.ii of the Explanation of Provisions in the case of foreign income taxes that are associated with PTEP but not credited under section 901).

Comments are also requested on whether, as an alternative to the approach in the proposed regulations, sections 959(b) and 961(c) should apply at the shareholder-level. Under this type of approach, instead of section 959(b) preventing a distribution to a CFC from giving rise to subpart F income (as it has historically been interpreted, but with respect to a particular shareholder), section 959(b) would generally reduce a United States shareholder's pro rata share of the CFC's subpart F income, to the extent attributable to distributed PTEP. Furthermore, section 961(c) would apply in a similar manner in the case of a CFC's gain from a sale or other disposition of stock of a foreign corporation. Comments should address whether a CFC's deductions that are not current year taxes, such as deductible interest expense, should be allocated and apportioned to gross income of the CFC that does not give rise to an inclusion at the shareholder-level under section 959(b) or 961(c) or whether CFC-level provisions (such as section 954(c)(3) or (c)(6) or 964(e)(1)) apply to such income and, if so applied, whether the E&P from the income should be treated as section 959(c)(3) E&P or PTEP to ensure that the CFC-level and shareholder-level provisions interact appropriately.

2. Determining Distributed PTEP

i. Covered Distributions

For a distribution to be considered a distribution of PTEP under section 959, the proposed regulations first require that the distribution be a covered distribution, which is generally defined as any distribution made by a foreign corporation with respect to its stock to the extent that the distribution is a dividend (as defined in section 316), determined without regard to section 959(d). See proposed § 1.959–4(c)(1). While a covered distribution may include deemed distributions treated as dividends (for example, distributions under section 304), a covered distribution does not include an amount treated as a dividend by reason of section 78, 367(b), 964(e)(1), or 1248. A deemed dividend under section 78 is determined without regard to E&P (and does not represent a distribution of E&P to any shareholder), and deemed dividends under the other provisions, regardless of whether they constitute deemed distributions of E&P, are determined by excluding PTEP (apart from § 1.367(b)–2(j)(2)(ii), which separately provides for a deemed distribution of PTEP in certain nonrecognition transactions, and § 1.367(b)–3(g)(1), which separately provides for a deemed distribution of E&P, including PTEP, in certain inbound nonrecognition transactions described in § 1.367(b)–3). The proposed regulations do not address the treatment of dividends arising under section 356(a)(2) as covered distributions, which will be addressed in future guidance regarding reorganizations (although no inference is intended as to the treatment of such dividends under current law). See proposed § 1.959–4(c)(2).

Comments on the 2019 notice asserted that a distribution of PTEP should not depend on the existence of E&P that would result in a dividend under section 316, stating that section 959(c) requires applying section 316 separately to sections 959(c)(1), (c)(2), and (c)(3) in determining whether there is sufficient E&P under section 316 to support a distribution of E&P under that paragraph. Comments noted that the approach described in the 2019 notice was contrary to section 959(a) and inconsistent with the policy of section 959 to facilitate the repatriation of PTEP. The Treasury Department and the IRS remain of the view described in the 2019 notice under which the reference to section 316(a) in section 959(c) indicates that, under the statute, a distribution of PTEP cannot occur unless there is sufficient current or

accumulated E&P to support what would otherwise be a dividend under section 316. This reading of the statute is consistent with the principle underlying section 959 that PTEP represents a type of E&P. Thus, the proposed regulations do not adopt the comments.

ii. Analyzing Covered Distributions

The proposed regulations provide rules for determining the extent to which PTEP is distributed in a covered distribution. *See* proposed § 1.959–4(d). Under these rules, each covered shareholder first determines its share of the covered distribution, which is the portion of the covered distribution that is made to the covered shareholder or any portion of the covered distribution that is made to an upper-tier foreign corporation and assigned to the covered shareholder under proposed § 1.951–2 (discussed in part IV.B of the Explanation of Provisions). *See* proposed § 1.959–4(d)(1). For this purpose, the portion of a covered distribution that is made to a partnership, or that is treated as made to the partnership in the case of tiered partnerships, is treated as made to the partnership's partners in accordance with their respective distributive shares of such portion. *See* proposed § 1.959–4(c)(3). Thus, if a covered shareholder is a partner in an upper-tier partnership, the covered shareholder's share of a covered distribution would include a portion of the covered distribution that is made to a lower-tier partnership because an amount of the covered distribution made to the lower-tier partnership would be treated as made to the upper-tier partnership by reason of the upper-tier partnership being a partner in the lower-tier partnership and, in turn, an amount of the covered distribution treated as made to the upper-tier partnership would be treated as made to the covered shareholder by reason of the covered shareholder being a partner in the upper-tier partnership.

Next, each covered shareholder allocates its share of the covered distribution to the distributing foreign corporation's PTEP with respect to the covered shareholder, to the extent thereof and in accordance with the composition rules described in part II.D.2.iii of the Explanation of Provisions, and then allocates any remaining portion of such share to the distributing foreign corporation's section 959(c)(3) E&P. *See* proposed § 1.959–4(d)(2) and (e)(1). For this purpose, the distributing foreign corporation's PTEP is determined immediately before the covered distribution (and thus includes PTEP

resulting from a subpart F income inclusion or GILTI inclusion for the distributing foreign corporation's taxable year in which the covered distribution is made because such PTEP is added to the covered shareholder's annual PTEP accounts at the beginning of the taxable year).

Further, because the amount of a covered shareholder's share of a covered distribution is determined on an aggregate basis rather than on a share-specific basis, the proposed regulations treat a pro rata portion of all PTEP distributed in each covered shareholder's share of the covered distribution as distributed with respect to each share of stock of the distributing foreign corporation on which the covered shareholder's share of the covered distribution is made. *See* proposed § 1.959–4(d)(4); *see also* proposed § 1.959–10(c)(1) (*Example 1*). In this way, basis adjustments resulting from distributed PTEP can be made on each share of stock of the foreign corporation in accordance with section 961 and, if applicable, PTEP of a recipient foreign corporation can be increased.

iii. Composition Rules

As discussed in part II.C of the Background, different types of PTEP can have different tax effects, including with respect to foreign currency gain or loss under section 986(c) or deemed paid taxes under section 960(b). Thus, once a covered shareholder has identified the portion of its share of a covered distribution that is allocated to PTEP, it is necessary to determine the specific PTEP that is distributed. The proposed regulations include composition rules for this purpose. *See* proposed § 1.959–4(d)(3) and (e)(2) through (5); *see also* proposed § 1.959–10(c)(2) (*Example 2*).

Under these composition rules, PTEP is sourced from section 959(c)(1) PTEP groups before section 959(c)(2) PTEP groups and then from each group within the section 959(c)(1) PTEP groups or section 959(c)(2) PTEP groups, respectively, on a "last-in, first-out" basis, subject to a priority rule for PTEP resulting from section 965 (section 965 priority rule). *See* proposed § 1.959–4(e)(2), (3). Additionally, PTEP that otherwise has the same priority is sourced first from PTEP that is not taxable section 962 PTEP and then from taxable section 962 PTEP, consistent with the rules currently in § 1.962–3. *See* proposed § 1.959–4(e)(4). Lastly, PTEP that has the same priority is sourced on a pro rata basis. *See* proposed § 1.959–4(e)(5).

The section 965 priority rule sources PTEP in section 959(c)(1) PTEP groups

first from the reclassified section 965(a) PTEP group, then from the reclassified section 965(b) PTEP group, and finally from the remaining section 959(c)(1) PTEP groups. *See* proposed § 1.959–4(e)(2)(ii). Similarly, for PTEP in section 959(c)(2) PTEP groups, the section 965 priority rule sources such PTEP first from the section 965(a) PTEP group, then from the section 965(b) PTEP group, and finally from the remaining section 959(c)(2) PTEP groups. *See* proposed § 1.959–4(e)(2)(iii). The section 965 priority rule, which is issued under the express delegation of authority in section 965(o), is consistent with the 2019 notice and is intended to simplify PTEP recordkeeping and IRS administration.

Comments on the 2019 notice stated that the section 965 priority rule (as described in the notice) would be a departure from the last-in, first-out approach for sourcing distributions from E&P, and also argued that there is no suggestion in section 965 or its legislative history that such a departure was intended or is necessary or appropriate. Other comments asserted that the policy for the section 965 priority rule was unclear, stating that a pure last-in, first-out approach does not impose additional burdens on taxpayers because once a taxpayer has determined its section 965 PTEP the additional burden of maintaining that information is minimal. Further, even if the section 965 priority rule simplifies PTEP recordkeeping, comments noted that this may be outweighed by the reduction in foreign tax credits under section 960(b) that accompanies distributions of section 965 PTEP. Another comment noted that the section 965 priority rule would adversely affect certain individuals who made section 962 elections and are economically compelled to distribute their PTEP every year to pay taxes arising under section 951(a) because it would accelerate the distribution of PTEP that is not excluded from gross income under section 962(d). Given these concerns, and because the section 965 priority rule departs from the longstanding approach in existing § 1.959–3(b), comments requested that taxpayers be able to elect to apply a last-in, first-out approach with no prioritization of section 965 PTEP.

The Treasury Department and the IRS continue to be of the view that the section 965 priority rule will simplify PTEP recordkeeping and IRS administration in the future by eventually eliminating section 965 PTEP (which, as noted in part II.C of the Background requires specific and detailed rules to apply sections 960(b)

and 986(c)) and reducing the overall number of PTEP groups that need to be tracked. The Treasury Department and the IRS are of the view that, on balance, this benefit outweighs the concerns raised in comments. Additionally, the section 965 priority rule is within the scope of the authority delegated to the Treasury Department and the IRS to administer section 965, including through sections 965(o) and 7805(a). Further, the proposed regulations do not adopt comments suggesting that taxpayers be allowed to not apply the section 965 priority rule because this would undermine the simplification and burden reduction policy of the rule.

iv. Dollar Basis and Associated Foreign Income Taxes Rules

The proposed regulations provide a pro rata approach for determining the dollar basis and associated foreign income taxes of PTEP distributed in a covered shareholder's share of a covered distribution. *See* proposed § 1.959–4(e)(3), (f) and (g). Under this approach, the portion of a dollar basis pool or PTEP tax pool, as applicable, attributed to distributed PTEP is determined based on the percentage that such PTEP represents of all PTEP relating to the dollar basis pool or PTEP tax pool. As discussed in part II.B.1.iii of the Explanation of Provisions, dollar basis pools and PTEP tax pools are maintained separately within each annual PTEP account for each PTEP group unless a combined pool election is in effect, in which case each dollar basis pool and PTEP tax pool relates to PTEP assigned to a single PTEP group and a single section 904 category (without regard to the taxable years to which the PTEP relates).

E. PTEP to Which a Section 956 Amount Is Allocated (Proposed § 1.959–5)

The proposed regulations provide rules regarding the exclusion from gross income under section 959(a)(2) for PTEP that would otherwise be included under section 951(a)(1)(B). *See* proposed § 1.959–5; *see also* proposed § 1.959–10(c)(4) (*Example 4*). Under these rules, a covered shareholder allocates its section 956 amount (that is, the amount determined under section 956 and § 1.956–1 with respect to the covered shareholder and a CFC) first to the CFC's PTEP that is with respect to the covered shareholder and assigned to section 959(c)(2) PTEP groups, to the extent thereof and in accordance with the principles of the composition rules for distributions of PTEP, and then allocates any remaining portion of such section 956 amount to the CFC's section

959(c)(3) E&P. *See* proposed § 1.959–5(c)(1) and (d)(1).

For purposes of these rules, the CFC's PTEP is determined on the last relevant day of the CFC's taxable year to which the section 956 amount relates (that is, the last day of such taxable year on which the foreign corporation is a CFC). *See* proposed § 1.959–5(d)(2). However, the CFC's PTEP is reduced to the extent it is distributed on or after the last relevant day to ensure that the section 956 amount is allocated only to section 959(c)(2) PTEP that remains after accounting for all covered distributions during the CFC's taxable year, in accordance with section 959(f)(2). Moreover, the PTEP is determined without regard to any transfer of PTEP from the covered shareholder to a successor covered shareholder on (or after) the last relevant day, thereby ensuring that section 959(c)(2) PTEP that exists with respect to the covered shareholder when the covered shareholder's ownership of stock of the CFC is determined for purposes of sections 951(a)(1)(B) and 956 may be taken into account for purposes of section 959(a)(2).

As with distributions of PTEP, the proposed regulations use a pro rata approach to determine the dollar basis and associated foreign income taxes of PTEP to which a section 956 amount is allocated. *See* proposed § 1.959–5(e) and (f).

F. Allocating and Apportioning Current Year Taxes to PTEP (Proposed § 1.959–6)

The proposed regulations provide rules for the application of § 1.861–20 to allocate and apportion current year taxes to the statutory groupings (as generally described in § 1.861–8(a)(4)) of PTEP of a foreign corporation. *See* proposed § 1.959–6(b) (describing the statutory groupings for purposes of proposed § 1.959–6 as the corporate PTEP accounts of the foreign corporation described in proposed § 1.959–2(d)(1)). These rules are issued pursuant to the express delegations of authority under sections 245A(g), 904(d)(7), 960(f), and 965(o).

Under the proposed regulations, current year taxes are generally associated with PTEP to the extent the foreign corporation pays or accrues such taxes with respect to PTEP arising by reason of a PTEP realization event that occurs in the same taxable year. *See* proposed § 1.959–6(b); *see also* proposed § 1.959–10(c)(3) (*Example 3*). A PTEP realization event occurs if there is a distribution of PTEP or gain recognized on a sale, exchange, or other disposition of foreign stock that is

treated as PTEP as a result of the application of section 961(c) basis. Current year taxes that are paid or accrued with respect to a PTEP realization event that occurs in a different taxable year may not be associated with PTEP of a foreign corporation (consistent with the rule in current § 1.960–1(d)(3)(ii)(B)). *See* proposed § 1.959–6(b) and 1.960–1(d)(3)(ii)(B).

Proposed § 1.959–6(c) provides rules relating to the application of the allocation and apportionment rules in § 1.861–20. Current year taxes (in the foreign corporation's functional currency) are allocated and apportioned to each corporate PTEP account of the foreign corporation that is increased during the taxable year as the result of a PTEP realization event by applying the rules in § 1.861–20 and treating PTEP with respect to each covered shareholder arising by reason of a PTEP realization event as an amount of dividend income (in the case of a distribution of PTEP) or gain from the sale, exchange, or other disposition of foreign stock (in the case of PTEP resulting from the application of section 961(c) basis). *See* proposed § 1.959–6(c) for purposes of identifying the corresponding U.S. item under § 1.861–20(b) through (c). While certain United States shareholders (taking into account the application of § 1.958–1(d)) must take into account a pro rata share of a CFC's subpart F income and tested income (or loss), the CFC's deductions are not divided into pro rata shares allocable to particular shareholders, and instead, must be allocated and apportioned to gross income of the CFC before the determination of each United States shareholder's pro rata share of subpart F income and tested income (or loss). As a result, because deductions must be allocated and apportioned to a CFC's income (rather than being allocated directly to United States shareholders), it is necessary to allocate and apportion current year taxes with respect to the statutory groupings of PTEP of the foreign corporation, which the proposed regulations provide are the corporate PTEP accounts described in proposed § 1.959–2(d)(1).

The proposed regulations also clarify other aspects of allocations of deductions involving PTEP. In particular, the proposed regulations provide that no deductions, other than current year taxes, may be allocated and apportioned to the statutory groupings of PTEP of a foreign corporation (consistent with the rule in current § 1.960–1(c)(1)(ii)). *See* proposed § 1.959–6(d)(1). *See also* the request for comments in Part II.D.1.iii of the

Explanation of Provisions on an approach that would also allocate and apportion deductions, other than current year taxes, to PTEP.

Finally, the proposed regulations provide that current year taxes paid or accrued by a foreign corporation that are denominated in a currency other than the functional currency of the foreign corporation are translated into the functional currency of the foreign corporation at the spot rate on the day on which the current year taxes are paid or accrued. *See* proposed § 1.959–6(d)(2). This currency translation rule applies for purposes of (i) making certain adjustments to accounts maintained under section 959 and the proposed regulations in the foreign corporation's functional currency and (ii) allocating and apportioning functional currency amounts at the level of the foreign corporation.

G. General Successor Transactions (Proposed § 1.959–7)

1. In General

If there is an acquisition of stock of a foreign corporation that results in a change of ownership of stock of the foreign corporation, successor rules in section 959 generally transfer the foreign corporation's PTEP with respect to the covered shareholder that relinquishes ownership of stock of the foreign corporation to the covered shareholder that acquires ownership of the stock. *See* section 959(a) (applying the rules of section 959(a) to any other United States person who acquires any portion of a United States shareholder's interest in a foreign corporation from any person); section 959(b) (similarly applying to any other United States shareholder who acquires any portion of a United States shareholder's interest in a CFC from any person). These successor rules generally ensure that PTEP is not subject to U.S. tax again in the hands of the acquiring covered shareholder when received in a distribution, even though that shareholder did not own the stock of the foreign corporation when the PTEP was generated and therefore did not have the inclusion that gave rise to the PTEP. Additionally, the rules ensure that E&P retains its PTEP status and thus remains subject to the rules under sections 959 and 961, rather than reverting to section 959(c)(3) E&P and potentially becoming eligible for a deduction under section 245A without a reduction in basis.

The proposed regulations address certain transactions subject to the successor rules in section 959, which the proposed regulations refer to as general successor transactions. *See*

proposed § 1.959–7(b)(1); *see also* part III.C.4 of the Explanation of Provisions (discussing rules for section 961(c) basis in general successor transactions). A general successor transaction occurs when a covered shareholder (successor covered shareholder) acquires ownership of stock of one or more foreign corporations (each, an acquired foreign corporation) that, immediately before the transaction, is owned by another covered shareholder (transferor covered shareholder). The acquisition may be direct or indirect. For example, a sale of stock of a foreign corporation by a covered shareholder (or by an upper-tier foreign corporation owned by the covered shareholder) to another covered shareholder (or to an upper-tier foreign corporation owned by such other covered shareholder) is a general successor transaction.

However, a general successor transaction is determined without regard to any portion of an acquisition of ownership of stock of a foreign corporation that results from any of the following: (i) an issuance of stock or a partnership interest, (ii) a redemption of stock (within the meaning of section 317(b)) or a liquidating distribution in redemption of a partnership interest, or (iii) a transfer of stock of a foreign corporation, or any property through which stock of a foreign corporation is owned, if such stock or property is substituted basis property. *See* proposed § 1.959–7(b)(2). For example, an exchange of stock of a foreign corporation solely for stock of another foreign corporation in an exchange under section 351(a) or 354(a), or as part of an exchange described in section 361, is not a general successor transaction because such stock is substituted basis property, even if covered shareholders' ownership of stock of the foreign corporation changes in the exchange. Alternatively, to the extent stock of a foreign corporation is not substituted basis property in such transactions (for example, if basis in the stock is determined under section 301(d) or 358(a)(2)), then the acquisition of ownership of stock of the foreign corporation is a general successor transaction. The Treasury Department and the IRS intend to issue additional rules regarding the transfer of PTEP in acquisitions that are not general successor transactions and proposed §§ 1.959–8 and 1.959–9 are reserved for this purpose. In these acquisitions, the Treasury Department and the IRS are considering adding a rule as part of finalization of the proposed regulations providing that, for any period before those additional rules apply and after

existing § 1.959–1(d) (successor in interest rules) is removed upon finalization of the proposed regulations, PTEP will transfer automatically (that is, without any requirement to submit proof of identity to the IRS) in accordance with the statute and consistent with the manner in which PTEP transfers in general successor transactions (as discussed in part II.G.2 of the Explanation of Provisions). The Treasury Department and the IRS request comments on this potential rule.

2. Categories of Transferred PTEP

The proposed regulations provide that two categories of an acquired foreign corporation's PTEP transfer from the transferor covered shareholder to the successor covered shareholder (and thus become PTEP with respect to the successor covered shareholder) in a general successor transaction. *See* proposed § 1.959–7(c); *see also* § 1.959–10(c)(5) (*Example 5*). For both categories of PTEP, the transfer is not subject to any requirement to submit proof of identity to the IRS (in contrast to current § 1.959–1(d)) and, thus, the transfer occurs automatically, although taxpayers should maintain sufficient records to substantiate the transfer on examination. *See also* § 1.245A–5(c)(4) (automatically transferring certain shareholder-level accounts in certain acquisitions of stock); § 1.245A(e)–1(d)(4)(iii) (similar). The automatic transfer ensures that E&P retains PTEP status and, therefore, will be excluded from income under section 959 and give rise to basis reductions under section 961 in subsequent distributions.

The first category of PTEP that transfers is PTEP of the acquired foreign corporation with respect to the transferor covered shareholder, as determined immediately before the general successor transaction. However, if the general successor transaction occurs before the last relevant day of the acquired foreign corporation's taxable year, certain current year PTEP does not transfer because such current year PTEP relates to shares of stock either retained by the transferor covered shareholder or acquired by the transferor covered shareholder concurrently with or after the general successor transaction. *See* proposed § 1.959–7(c)(1). Only a pro rata portion of this PTEP (called general successor PTEP) transfers, and the amount is determined based on the percentage of a hypothetical distribution by the acquired foreign corporation that would be made with respect to the stock of the corporation acquired by the successor covered shareholder. *See* proposed § 1.959–7(d). In this way, distributions made by the acquired

foreign corporation after the general successor transaction will generally be allocated to PTEP to the same extent the distributions would be so allocated if the general successor transaction did not occur.

The second category of PTEP that transfers is PTEP resulting from the application of section 1248 to gain recognized by the transferor covered shareholder in the general successor transaction. *See* proposed § 1.959–7(c)(2). Because section 1248 only applies to the extent of E&P of the acquired foreign corporation that is attributable to the stock being sold or exchanged in the general successor transaction, the Treasury Department and the IRS determined that it is appropriate for PTEP described in this category (called section 959(e) successor PTEP) to transfer in the general successor transaction. The transfer of all PTEP arising under section 1248 in a sale or exchange of a foreign corporation is consistent with existing guidance. *See* Rev. Rul. 90–31, 1990–1 C.B. 147.

Like for distributions, the proposed regulations use a pro rata approach to determine the dollar basis and associated foreign income taxes of general successor PTEP. *See* proposed § 1.959–7(e)(1) and (f)(1). The dollar basis of section 959(e) successor PTEP is the U.S. dollar amount of the income inclusion giving rise to the PTEP. *See* proposed § 1.959–7(e)(2). There are no associated foreign income taxes with respect to section 959(e) successor PTEP because the PTEP is newly created PTEP to which foreign income taxes will not yet have been allocated and apportioned. *See* proposed § 1.959–7(f)(2).

3. Deemed Covered Shareholder

Section 959(a) applies to any other United States person “who acquires from any person” any portion of a United States shareholder’s interest in a foreign corporation. *See also* section 959(b) (similarly applying to an acquisition from “any person”). Accordingly, if there is an acquisition of stock of a foreign corporation, section 959 does not condition a transfer of the foreign corporation’s PTEP on whether the transfer is by or from a covered shareholder (or United States shareholder).

For example, if a nonresident alien individual acquires ownership of all the stock of a foreign corporation that has PTEP from a covered shareholder and another covered shareholder subsequently acquires ownership of all the stock from the individual, then, absent an election under section 338(g), the foreign corporation’s PTEP transfers

to the second covered shareholder. This prevents double taxation of the PTEP and ensures that PTEP does not become section 959(c)(3) E&P (potentially eligible for a dividends received deduction under section 245A(a)). However, existing guidance does not clearly address whether the amount of PTEP that transfers is reduced for transactions during the individual’s ownership period (for example, for E&P distributed by the foreign corporation to the individual).

To address the transfer of a foreign corporation’s PTEP among covered shareholders where there is intervening foreign ownership, the proposed regulations treat any stock of a foreign corporation not owned by a covered shareholder as owned by a single hypothetical person that is deemed to be a covered shareholder (the deemed covered shareholder). *See* proposed § 1.959–7(g). Under these rules, the deemed covered shareholder is treated in the same manner as a covered shareholder for purposes of transferring PTEP under section 959, and a reference to a covered shareholder includes the deemed covered shareholder. *See* proposed § 1.959–7(g)(1). Thus, in the example described in the preceding paragraph, the foreign corporation’s PTEP transfers in the first acquisition from the first covered shareholder to the deemed covered shareholder (who is a hypothetical person treated as owning all the stock of the foreign corporation owned by the nonresident alien individual). Then, in the second acquisition, the foreign corporation’s PTEP, adjusted using a reasonable method to reflect transactions during the deemed covered shareholder’s ownership period (for example, reductions for distributions), transfers from the deemed covered shareholder to the second covered shareholder. *See* § 1.959–7(g)(2). In cases where there are no previous covered shareholders or PTEP, the deemed covered shareholder rules have no effect.

The Treasury Department and the IRS are of the view that alternative approaches such as “freezing” a foreign corporation’s PTEP during periods in which its stock is not owned by a covered shareholder could inappropriately separate a foreign corporation’s PTEP from its E&P and give rise to double taxation or other distortions. For example, under such an alternative, a covered shareholder could transfer the stock of an upper-tier foreign corporation that owns stock of a lower-tier foreign corporation with PTEP to a nonresident alien individual, the lower-tier foreign corporation could distribute all its E&P to the upper-tier

foreign corporation without affecting its PTEP, and then the stock of the upper-tier foreign corporation could be transferred to another individual covered shareholder that would succeed to the PTEP that remains with the lower-tier foreign corporation even though it has no E&P. If the form of the transaction were respected for Federal income tax purposes, the result would be that a distribution by the upper-tier foreign corporation would not be sourced from PTEP and the transferred PTEP of the lower-tier foreign corporation could be distributed only to the extent that the lower-tier foreign corporation earns section 959(c)(3) E&P.

The Treasury Department and the IRS recognize that shareholders of a foreign corporation may not track PTEP of the foreign corporation that transfers to the deemed covered shareholder. In these cases, a covered shareholder that eventually succeeds to the PTEP must determine the amount and character of the PTEP, including by reconstructing transactions that affected the PTEP while the foreign corporation was under foreign ownership. This reconstruction is similar to other determinations that shareholders must make in certain acquisitions of stock of a foreign corporation for which an election under section 338(g) is not made, for example determinations regarding the foreign corporation’s basis in assets or its E&P. The use of a single deemed covered shareholder to represent all foreign ownership of a foreign corporation is intended to ease the burden of this reconstruction by focusing only on whether and how PTEP moves under foreign ownership rather than, for example, by attributing portions of PTEP to each shareholder that is a nonresident alien individual and separately analyzing such portions. The Treasury Department and the IRS welcome comments about how to decrease the compliance burden and improve the administrability of this regime while still ensuring that the correct amount and character of PTEP is transferred from one covered shareholder to another even when there is intervening foreign ownership. For instance, the Treasury Department and the IRS welcome comments on whether a majority United States shareholder of a CFC should be permitted or required to track PTEP that transfers from a minority United States shareholder of that CFC to the deemed covered shareholder.

III. Section 961 Regulations

A. Overview

As discussed in part II.C.2 of the Background, section 961 authorizes regulations that provide for basis increases to reflect income inclusions under section 951 and basis reductions and gain recognition to reflect distributions of PTEP. Generally, the purpose of basis increases is to prevent PTEP of a foreign corporation from giving rise to additional U.S. tax in a sale or exchange of stock of the foreign corporation or property through which such stock is owned (for example, an interest in a partnership) when the stock or other property is sold before the PTEP is distributed. The purpose of basis reductions and gain recognition is to prevent double benefits from the basis increases provided under section 961.

Thus, the proposed regulations under section 961 adjust the basis in shares of stock of a foreign corporation owned by a covered shareholder, and the basis in any items of property through which the covered shareholder owns stock of the foreign corporation, to reflect the foreign corporation's PTEP with respect to the covered shareholder (for example, to reflect income inclusions giving rise to the PTEP or distributions of the PTEP). Unlike annual PTEP accounts, basis adjustments under the proposed regulations are specific to a share of stock or other item of property, consistent with each item of property having separate basis under the Code. Timing of basis adjustments generally matches the timing of related adjustments to annual PTEP accounts. Further, the proposed regulations under section 961 provide rules for different types of basis under section 961, including the tax consequences of the basis, and are issued pursuant to the express delegations of authority in section 961(a), (b), and (c).

As discussed in part III.A of the Background, a covered shareholder does not include a domestic partnership because a domestic partnership is treated as an aggregate of its partners in determining stock ownership for purposes of section 961. *See* proposed § 1.961–1(b); *see also* part VIII.A of the Explanation of Provisions (providing that an S corporation is generally treated in the same manner as a domestic partnership). As also discussed in part III.A of the Background, under section 958(a) stock ownership means stock owned directly and stock owned indirectly through foreign entities, including domestic partnerships to the extent treated as foreign partnerships under § 1.958–1(d)(1). Thus, the

adjustments provided for by the proposed section 961 regulations also apply at the partner level to covered shareholders that own stock of a foreign corporation through one or more domestic (or foreign) partnerships. *See* part III.B.3 of this Explanation of Provisions for a discussion of basis provided in stock of a foreign corporation directly owned by a partnership.

B. Types of Property Units and Basis (Proposed § 1.961–2)

1. In General

Under the proposed regulations, the type of basis provided in an item of property depends on whether the direct owner of the item is a covered shareholder, partnership, or CFC. This is because when the direct owner of an item of property is a partnership or CFC, covered shareholder-specific basis is necessary so that the benefits of basis provided in the item to reflect income inclusions of a covered shareholder inure only to that shareholder. Additionally, section 961(c) provides that the basis in the case of an item of property directly owned by a CFC only applies for the purposes of determining the amount included under section 951 in the gross income of a United States shareholder. Specific rules are therefore needed with respect to basis adjustments for property owned by a CFC to reflect the limited purposes of basis under section 961(c).

Thus, the proposed regulations set forth rules for three types of property (each referred to as a property unit) and basis: (i) section 961(a) ownership units and adjusted basis, which is provided to a covered shareholder, (ii) derivative ownership units and derived basis, which is provided to a partnership and is covered shareholder-specific, and (iii) section 961(c) ownership units and section 961(c) basis, which is provided to a CFC and is covered shareholder-specific. *See* proposed § 1.961–2; *see also* proposed § 1.961–12(c) (*Example 1*). Each type of basis is maintained in U.S. dollars to ensure that basis reductions for a distribution of PTEP are commensurate with prior basis increases reflecting the income inclusion giving rise to the PTEP, regardless of movements in exchange rates (with any such movements taken into account under the rules for recognizing foreign currency gain or loss pursuant to section 986(c)).

2. Section 961(a) Ownership Units and Adjusted Basis

A section 961(a) ownership unit is a share of stock of a foreign corporation

directly owned by a covered shareholder, or a partnership interest directly owned by a covered shareholder and through which the covered shareholder owns stock of a foreign corporation. *See* proposed § 1.961–2(c). For example, if a covered shareholder directly owns an interest in a partnership and the partnership owns (directly or indirectly) stock of a foreign corporation, the partnership interest is a section 961(a) ownership unit. A covered shareholder is provided adjusted basis in a section 961(a) ownership unit.

3. Derivative Ownership Units and Derived Basis

A derivative ownership unit is a share of stock of a foreign corporation directly owned by a partnership and owned (indirectly) by one or more covered shareholders through only one or more partnerships (for example, not through a foreign corporation), or a partnership interest directly owned by another partnership and through which one or more covered shareholders own stock of a foreign corporation through only partnerships. *See* proposed § 1.961–2(d)(1). For example, if a covered shareholder directly owns an interest in a partnership and the partnership directly owns shares of stock of a foreign corporation, each share of stock of the foreign corporation is a derivative ownership unit (and the interest in the partnership is a section 961(a) ownership unit). If, instead, the partnership is a lower-tier partnership an interest in which is directly owned by an upper-tier partnership and the covered shareholder directly owns an interest in the upper-tier partnership, the upper-tier partnership's interest in the lower-tier partnership is also a derivative ownership unit along with each share of stock of the foreign corporation directly owned by the lower-tier partnership (and the interest in the upper-tier partnership directly owned by the covered shareholder is a section 961(a) ownership unit).

A partnership is provided derived basis in a derivative ownership unit, which is maintained separately with respect to each covered shareholder that owns the derivative ownership unit through only one or more partnerships. *See* proposed § 1.961–2(d)(2). Derived basis may be positive or negative and is treated as an attribute of the partnership but has no effect on the partnership's common basis in the derivative ownership unit (that is, the partnership's basis that is shared among all partners) or any other asset of the partnership. *See* part III.C of the Explanation of Provisions for a

discussion of adjustments to derived basis, including the allowance of negative derived basis. Derived basis is intended to operate in a manner similar to a basis adjustment under section 743(b). *See* parts III.D and F of the Explanation of Provisions for the tax consequences of derived basis.

4. Section 961(c) Ownership Units and Section 961(c) Basis

A section 961(c) ownership unit is a share of stock of a foreign corporation directly owned by a CFC and owned (indirectly) by one or more covered shareholders. *See* proposed § 1.961–2(e)(1). For example, if a covered shareholder directly owns stock of an upper-tier CFC and the upper-tier CFC directly owns shares of stock of a lower-tier foreign corporation, each share of stock of the lower-tier foreign corporation owned by the upper-tier CFC is a section 961(c) ownership unit.

A CFC is provided section 961(c) basis in a section 961(c) ownership unit, which is maintained separately with respect to each covered shareholder that owns the section 961(c) ownership unit. *See* proposed § 1.961–2(e)(2). Section 961(c) basis may be positive or negative and is treated as an attribute of the CFC that generally is taken into account on the sale, exchange, or other disposition of the section 961(c) ownership unit, but has no effect on the CFC's adjusted basis in the section 961(c) ownership unit or any other asset of the CFC. *See* part III.C of the Explanation of Provisions for a discussion of adjustments to section 961(c) basis, including the allowance of negative section 961(c) basis. Section 961(c) basis applies only for the purposes prescribed in the section 961 regulations and, therefore, does not affect the amount of the CFC's gross income or E&P. *See* parts III.E through G of the Explanation of Provisions for the tax consequences of section 961(c) basis.

5. Certain Basis Not Addressed

i. Section 961(c) Basis and Non-CFCs

Consistent with the statutory language of section 961(c), the proposed regulations provide for basis under section 961(c) only with respect to stock of a CFC that is directly owned by another CFC. Although a section 961(c) ownership unit is defined as a share of stock of a foreign corporation directly owned by a CFC, section 961(c) basis adjustments are generally made only with respect to section 961(c) ownership units that are shares of stock in a CFC, as discussed in part III.C of the Explanation of Provisions. *See* proposed § 1.961–3 (basis increases for income

inclusions); proposed § 1.961–4(d) (basis reductions for distributions); proposed § 1.961–5(b) (adjustments for foreign currency gain or loss). The Treasury Department and the IRS are studying whether, and to what extent, basis adjustments may or should also be made under section 961(c) in cases where stock of a CFC is owned by a covered shareholder through a foreign corporation that is not a CFC or where a CFC owns stock of a foreign corporation that used to be a CFC.

A CFC's section 961(c) basis with respect to a covered shareholder in stock of a lower-tier foreign corporation that is provided under the proposed regulations when that lower-tier foreign corporation was a CFC continues to exist, however, if that lower-tier foreign corporation ceases to be a CFC (a share of stock of the lower-tier foreign corporation is a section 961(c) ownership unit regardless of CFC status). Thus, for example, section 961(c) basis in stock of a foreign corporation that was a CFC but ceases to be a CFC may transfer to another covered shareholder in a general successor transaction and become section 961(c) basis with respect to that covered shareholder. *See* proposed § 1.961–5(c) (discussed in part III.C.4 of the Explanation of Provisions). Similarly, a CFC's positive section 961(c) basis in stock of a foreign corporation that was a CFC but ceases to be a CFC may be applied to certain gain recognized by the CFC with respect to stock of that foreign corporation. *See* proposed § 1.961–9 (discussed in part III.E of the Explanation of Provisions).

ii. Partnership Interests Owned by Foreign Corporations

Under the proposed regulations, a property unit does not include a share of stock of a foreign corporation or a partnership interest to the extent the share of stock or partnership interest is directly owned by a partnership and the interests of such partnership are owned by foreign corporations (including CFCs). Nor does a property unit include a partnership interest directly owned by a foreign corporation. For example, assume a covered shareholder directly owns all the stock of two upper-tier CFCs, the upper-tier CFCs are the only direct partners in a partnership, and the partnership directly owns all the stock of a lower-tier CFC. In such a case, neither the shares of stock of the lower-tier CFC directly owned by the partnership, nor the upper-tier CFCs' interests in the partnership, are property units. The Treasury Department and the IRS are studying whether the basis that should be provided in these items of

property should be similar to derived basis or section 961(c) basis or have characteristics of both. Thus, the proposed regulations do not address the extent to which section 961 provides basis in such items.

C. Basis Adjustments (Proposed §§ 1.961–3, 1.961–4, and 1.961–5)

1. Basis Increases for Certain Income Inclusions

i. In General

To reflect a covered shareholder's income inclusions under sections 951(a) and 951A(a) for a taxable year of a CFC, the proposed regulations provide rules to increase the basis of property units that are shares of stock of the CFC owned by the covered shareholder and the basis of any property units through which the covered shareholder owns such stock. *See* proposed § 1.961–3(b); *see also* proposed § 1.961–12(c) (*Example 2*). For this purpose, a reference to basis means adjusted basis of the covered shareholder in the case of a section 961(a) ownership unit, derived basis with respect to the covered shareholder in the case of a derivative ownership unit, and section 961(c) basis with respect to the covered shareholder in the case of a section 961(c) ownership unit.

Generally, the basis of each property unit is increased by the amount that would be distributed with respect to the property unit in a hypothetical distribution by the CFC equal to the U.S. dollar amount of the covered shareholder's income inclusions (hypothetical distribution rule). *See* proposed § 1.961–3(c)(1) and (4); *see also* part III.C.1.ii of the Explanation of Provisions (discussing additional rules that apply in the case of a midyear transaction). The hypothetical distribution is treated as made through all tiers to the covered shareholder on the last relevant day of the CFC's taxable year (taking into account only stock or other property owned by the covered shareholder). *See* proposed § 1.961–3(e). In this way, under the grant of regulatory authority in section 961, a property unit is generally provided an amount of basis matching the amount by which basis of the property unit is reasonably expected to be reduced under section 961 when PTEP resulting from the income inclusions is subsequently distributed to the covered shareholder. The amount of basis provided to a particular property unit will generally equal the covered shareholder's income inclusion attributable to that property unit, but the amount may differ in certain cases.

For example, consider a case where the covered shareholder owns all the stock of the CFC, with such stock consisting of a single preferred share with a \$10x preference and common stock. The CFC has \$100x of E&P for its taxable year, consisting of \$90x of subpart F income, \$0 of tested income or tested loss, and \$10x of other income. The covered shareholder includes \$90x in gross income under section 951(a)(1)(A) (under § 1.951–1, \$9x of the inclusion is attributable to the preferred share and the remaining \$81x is attributable to the common stock), and, consequently, the CFC's PTEP with respect to the covered shareholder increases by \$90x. While only \$9x of the covered shareholder's \$90x income inclusion is attributable to the preferred share, the proposed regulations increase the basis of the preferred share by \$10x and the basis of the common stock by the remaining \$80x. This approach takes into account that, of the first \$10x of PTEP distributed by the CFC to the covered shareholder, that amount is likely to be distributed on the preferred share. And, if the basis adjustments to the preferred share were to instead match the income inclusion attributable to that share (\$9x), the covered shareholder would receive a \$10x distribution on the preferred share, thus potentially giving rise to gain under section 961(b)(2) in an amount equal to that difference. The proposed regulations prevent that result by adjusting the basis in the preferred share by \$10x. The Treasury Department and the IRS request comments on this approach, including whether there are ways to improve the accuracy of allocating basis to a property unit without undue complexity and additional compliance and administrative burden, and without creating the possibility of inappropriate results.

However, if the CFC distributes PTEP with respect to the covered shareholder before the last relevant day of the CFC's taxable year, the policies underlying the hypothetical distribution rule (matching basis with distributed PTEP) are better carried out by using such actual distributions (rather than a hypothetical distribution on the last relevant day) to allocate basis increases among property units, particularly when there are midyear transactions (though where there is no midyear transaction the two approaches generally produce the same results). Thus, an actual distribution rule applies in these cases and consequently reduces the amount that can give rise to a basis increase pursuant

to the hypothetical distribution rule. *See* proposed § 1.961–3(c)(3).

The actual distribution rule applies in chronological order to distributions of the CFC's PTEP with respect to the covered shareholder, and in each case generally increases basis of a share of stock of the CFC on which the distribution is made by the amount of the reduction required under section 961 to such basis by reason of the distribution. *See* proposed § 1.961–3(d)(2). However, basis increases to stock of the CFC under the actual distribution rule cannot exceed the U.S. dollar amount of the covered shareholder's income inclusions, excluding for this purpose an income inclusion under section 951(a)(1)(B) because such inclusion does not give rise to PTEP that could be distributed before the last relevant day of the CFC's taxable year. Additionally, the actual distribution rule applies only to distributions on stock of the CFC that the covered shareholder owns on the last relevant day because the covered shareholder's income inclusions with respect to the CFC are attributable only to that stock.

Basis increases to stock of the CFC under the actual distribution rule “tier up” through property units through which the covered shareholder owns such stock, based on how the PTEP that is actually distributed would be further distributed in a hypothetical distribution made at the time of the actual distribution. *See* proposed § 1.961–3(d)(3). The Treasury Department and the IRS considered alternative approaches to tiering such as analyzing the extent to which PTEP is further distributed before the last relevant day, but those approaches could give rise to additional complexity and burden. For instance, the approaches could require rules tracing distributed PTEP through tiers of foreign corporation and coordinating applications of the actual distribution rule at each tier. The Treasury Department and the IRS welcome comments on the actual distribution rule, including whether there are ways to improve the accuracy of tiering without undue complexity and additional compliance and administrative burden.

Generally, each basis increase under the hypothetical distribution rule or actual distribution rule is treated as made at the beginning of the first day of the CFC's taxable year or, if later, at the beginning of the first day in the taxable year on which the covered shareholder owns the property unit. *See* proposed § 1.961–3(d)(1), (e)(1). In this way, the timing of a basis increase generally

matches when PTEP to which the basis is attributable could first be distributed on the property unit. Additionally, the portion of a basis increase for a section 951(a)(1)(B) inclusion is treated as made at the end of the last day of the taxable year, subject to a special rule. *See* proposed § 1.961–3(e)(1). The special rule applies where a property unit that will receive a basis increase for the section 951(a)(1)(B) inclusion is transferred before the end of the taxable year (but on or after the last relevant day of the taxable year), and in such a case accelerates the basis increase to the property unit so that it is treated as made immediately before the transfer, thereby ensuring that the basis is available in determining the tax consequences of the transfer. *See* proposed § 1.961–3(e)(4).

ii. Midyear Transactions

Additional rules address unique timing considerations for basis increases when a midyear transaction occurs during the taxable year of a CFC. *See* proposed § 1.961–3(c)(2). A midyear transaction represents any transaction occurring before the last relevant day of the taxable year that changes the covered shareholder's ownership structure of the CFC (for example, an exchange of the covered shareholder's stock of the CFC or an issuance of stock of the CFC to the covered shareholder).

In the case of a midyear transaction, a basis increase under the hypothetical distribution rule or actual distribution rule is treated as made at the earliest time during the CFC's taxable year at which the same ownership structure is in place as the ownership structure when the relevant hypothetical or actual distribution is made. *See* proposed § 1.961–3(d)(1), (e)(1). Thus, for a basis increase under the actual distribution rule, if the distribution is made before all midyear transactions, the basis increase is treated as made at the beginning of the first day of the CFC's taxable year; on the other hand, if the distribution is made after a midyear transaction, the basis increase is treated as made immediately after the most recent midyear transaction preceding the distribution. This approach is intended to prevent distortions, including possible duplication of basis in certain cases.

For example, assume a covered shareholder (US1) directly owns all the stock of two CFCs (CFC1 and CFC2) on January 1 of year 1. On June 30 of year 1, US1 exchanges all the stock of CFC1 solely for stock of CFC2 in an exchange described in section 351(a) (which is a midyear transaction with respect to CFC1 and CFC2). CFC1 makes no

distributions during its taxable year ending on December 31 of year 1, and US1 has a \$100x subpart F income inclusion with respect to CFC1 for that taxable year. Thus, under the hypothetical distribution rule, US1 increases its adjusted basis in its stock of CFC2 by \$100x and CFC2 increases its section 961(c) basis with respect to US1 in its stock of CFC1 by \$100x. However, basis could be inappropriately duplicated if the \$100x basis increase in the stock of CFC1 were treated as made on January 1 of year 1, which would be the case absent the section 351 exchange. This could occur if US1's basis in its stock of CFC2 were to both be increased under the hypothetical distribution rule and take a basis under section 358(a) reflecting the basis increase in the stock of CFC1 under the hypothetical distribution rule. To address this, special timing rules treat the \$100x basis increase in each of the stock of CFC1 and stock of CFC2 as made immediately after the section 351 exchange, which is the first time during CFC1's taxable year at which the same ownership structure is in place as the ownership structure on the last relevant day of the taxable year (when the hypothetical distribution determining the basis increase is made).

2. Basis Reductions and Gain Recognition for Distributions

i. In General

As discussed in part II.C.2 of the Background, section 961(b)(1) provides for reductions to the basis of stock or other property with respect to which a covered shareholder receives PTEP excluded from its gross income under section 959(a), with amounts in excess of such basis resulting in gain under section 961(b)(2). Section 961(c) indicates that the Secretary should issue regulations providing for adjustments similar to those in section 961(b) with respect to PTEP received by a CFC and amounts in excess of section 961(c) basis.

In order to implement the statutory language of section 961, the proposed regulations provide rules for reducing basis and recognizing gain with respect to property units to reflect distributions of PTEP. *See* proposed § 1.961–4; *see also* proposed § 1.961–12(c)(3) (*Example 3*). These rules describe the amounts of adjustments, limitations on basis reductions, and treatment of gain under section 961, which can differ depending on the type of property unit for which the basis is being adjusted. The adjustments are treated as made concurrently with the distribution if the property unit is stock of a foreign

corporation or, if the property unit is an interest in a partnership, concurrently with an adjustment to the partnership interest under section 705 resulting from the distribution. *See* proposed § 1.961–4(e) and (f)(1).

ii. Adjustments to Section 961(a) Ownership Units

If a covered shareholder receives a distribution of PTEP that is excluded from its gross income under section 959(a) (that is, PTEP other than taxable section 962 PTEP), then the covered shareholder's adjusted basis of each section 961(a) ownership unit is generally reduced by the dollar basis and associated foreign income taxes of the PTEP received with respect to the section 961(a) ownership unit. *See* proposed § 1.961–4(b)(2)(i) and (ii). Associated foreign income taxes are taken into account for this purpose because when foreign income taxes are allocated and apportioned to PTEP, the foreign income taxes reduce the PTEP and the dollar basis of the PTEP, as discussed in part II.C.2 of the Explanation of Provisions. As a result, the sum of the dollar basis and associated foreign income taxes of PTEP represent the amount by which basis was increased under section 961 when the PTEP was generated.

However, the associated foreign income taxes (which represent PTEP that was eliminated by foreign income taxes) reduce adjusted basis only to the extent the covered shareholder is allowed a credit under section 901 for those taxes. *See* proposed § 1.961–4(b)(2)(i). Consequently, associated foreign income taxes ultimately give rise to either a credit or an amount equivalent to a deduction (in the form of retained adjusted basis, which, in turn, will produce a lesser amount of gain or an additional amount of loss on a subsequent sale of the section 961(a) ownership unit relative to the gain or loss that would result if adjusted basis were reduced by associated foreign income taxes). The Treasury Department and the IRS are of the view that this prevents double taxation of PTEP but are studying whether the policies of section 245A(d) or 965(g) (denying a credit or deduction for foreign income taxes) should require reducing adjusted basis for associated foreign income taxes of PTEP resulting from section 245A(e) or 965.

Further, to the extent the required reduction to adjusted basis of a section 961(a) ownership unit exceeds such adjusted basis, the covered shareholder is treated as recognizing gain from a sale or exchange of the section 961(a) ownership unit, in accordance with

section 961(b)(2). *See* proposed § 1.961–4(b)(2)(iii) and (f)(1). Basis of another section 961(a) ownership unit (for example, another share of stock of the foreign corporation) cannot be used to reduce gain under section 961(b)(2), which is consistent with the approach in section 301(c)(3), pursuant to which basis is not shared among shares of stock on distributions. *See also Johnson v. United States*, 435 F.2d 1257 (4th Cir. 1971).

Moreover, unlike the approach described in the 2006 proposed regulations, basis attributable to section 961 does not shift from one share to another share when PTEP is distributed with respect to the other share. The Treasury Department and the IRS are of the view that a shifting approach could give rise to inappropriate results, is not required by section 961 (which increases basis for income inclusions without any indication that such basis must or should remain tied to the PTEP resulting from the income inclusion), and would depart from analogous provisions like section 358 (which, for example, increases basis for contributions to capital without subsequently shifting such basis to follow distributions of capital). Further, the approach in the proposed regulations is consistent with the share-by-share approach in the current regulations under section 961. *See* § 1.961–2(b) and (c).

As an example of inappropriate results that could arise from basis shifting, assume a covered shareholder owns all the stock of a foreign corporation with PTEP and contributes money to the corporation in exchange for a newly-issued share of stock, and the corporation subsequently distributes the PTEP, including on the newly-issued share. If a portion of the basis that had been provided under section 961(a) for the PTEP were to shift from the original shares to the newly-issued share as a result of the distribution, then that basis would be added on top of the existing fair market value basis in the newly-issued share (by an amount equal to the amount of PTEP distributed on that share), which could produce a noneconomic loss in the newly-issued share. Additionally, as indicated in the document withdrawing the 2006 proposed regulations (87 FR 63981), the Treasury Department and the IRS are aware of transactions in which taxpayers have taken positions that basis shifting produces large uneconomic losses, and the IRS may challenge such positions and other positions giving rise to abuse or inappropriate results.

iii. Adjustments to Derivative Ownership Units

If, through a partnership or tiered partnerships, one or more covered shareholder partners are treated as receiving PTEP that is excluded from gross income under section 959(a) and the proposed section 959 regulations, then each such partnership's derived basis with respect to such covered shareholders of derivative ownership units is reduced to reflect the PTEP received with respect to the derivative ownership units. *See* proposed § 1.961–4(c)(1); *see also* part II.D.2.ii of the Explanation of Provisions (portion of a covered distribution that is made to a partnership, or that is treated as made to the partnership in the case of tiered partnerships, is treated as made to the partnership's partners in accordance with their respective distributive shares of such portion). Specifically, starting with the partnership at the lowest tier, the partnership's derived basis with respect to each covered shareholder partner of each derivative ownership unit is generally reduced by the dollar basis and associated foreign income taxes of the PTEP with respect to the covered shareholder that is treated as received by the covered shareholder through the partnership with respect to the derivative ownership unit. *See* proposed § 1.961–4(c)(2)(i) and (ii). A basis increase under section 705 for the distribution occurs at the same time as the reduction to derived basis, with the result that, in tiered partnership structures, derived basis of an upper-tier partnership in a lower-tier partnership interest is reduced and common basis in the lower-tier partnership interest is increased (the common basis, in turn, may be decreased in a distribution to the upper-tier partnership by the lower-tier partnership of the amounts that constituted the PTEP, for example).

However, to the extent the required reduction to derived basis with respect to a covered shareholder of a derivative ownership unit exceeds the derived basis (for example, because a partnership purchased stock of a CFC and thus has no derived basis with respect to the derivative ownership unit), the excess first reduces the covered shareholder's positive section 743(b) basis adjustment of the derivative ownership unit (if any), but not below zero. *See* proposed § 1.961–4(c)(2)(iii). Thus, this rule, by treating the positive section 743(b) basis adjustment in the same manner as adjusted basis specific to the covered shareholder, is consistent with § 1.743–1(j) (regarding the effect of a basis adjustment under section 743(b)). Then, any remaining portion of

the excess reduces the derived basis below zero, subject to a limitation. *See id.* As discussed in part III.C.2.v of the Explanation of Provisions, this limitation is intended to prevent reductions to derived basis of the derivative ownership unit from having the effect of reducing the partnership's total basis (measured for this purpose by netting common basis and all negative derived basis) of the derivative ownership unit below zero.

Finally, to the extent the required reduction to derived basis with respect to a covered shareholder of a derivative ownership unit exceeds the amount of positive derived basis, positive section 743(b) basis, and negative derived basis created, the partnership is treated as recognizing gain from a sale or exchange of the derivative ownership unit. *See* proposed § 1.961–4(c)(2)(iv). The gain is allocated by the partnership solely to the covered shareholder and is taken into account in adjusting basis under section 705, but it has no effect on any partnership's computations or allocations of any other items under section 703 or 704 or on the covered shareholder's capital account. *See* proposed § 1.961–4(f)(2).

iv. Adjustments to Section 961(c) Ownership Units

If a CFC receives a distribution of PTEP, then the CFC's section 961(c) basis with respect to each covered shareholder of each section 961(c) ownership unit is generally reduced by the dollar basis and associated foreign income taxes of the PTEP with respect to the covered shareholder that is received with respect to the section 961(c) ownership unit. *See* proposed § 1.961–4(d)(2)(i) and (ii).

To the extent the required reduction to section 961(c) basis with respect to a covered shareholder of a section 961(c) ownership unit exceeds such section 961(c) basis (for example, because a CFC purchased stock of another CFC and thus has no section 961(c) basis with respect to the section 961(c) ownership unit or a portion of the distributed PTEP is section 965(b) PTEP), the excess reduces the section 961(c) basis below zero, subject to a limitation. *See* proposed § 1.961–4(d)(2)(ii). As discussed in part III.C.2.v of the Explanation of Provisions, this limitation is intended to prevent reductions to section 961(c) basis of the section 961(c) ownership unit from having the effect of reducing the CFC's total basis (measured for this purpose by netting adjusted basis and all negative section 961(c) basis) of the section 961(c) ownership unit below zero. Then, any remaining portion of the excess is

treated as gain recognized by the CFC from a sale or exchange of the section 961(c) ownership unit, and such gain is assigned from the CFC solely to the covered shareholder. *See* proposed § 1.961–4(d)(2)(iii). Gain recognized by a CFC under this rule applies only for purposes of determining amounts included in gross income of United States shareholders under proposed § 1.961–11 (discussed in part III.G. of the Explanation of Provisions) because section 961(c) applies only for limited purposes. *See* proposed § 1.961–4(f)(3). Therefore, the gain does not affect the CFC's items of gross income for purposes of section 952 or 951A or its E&P.

The Treasury Department and the IRS are of the view that the gain recognition rules described in this part III.C.2 of the Explanation of Provisions appropriately prevent use of the same basis more than once, provide similar outcomes for similar transactions at different tiers, and ensure the tax consequences of the gain are covered shareholder-specific. Any alternative approach that did not require gain recognition under section 961(b)(2) and (c) for amounts in excess of basis would necessarily have to narrow the application of section 961(c) basis (discussed in part III.E of the Explanation of Provisions), with the result that section 961(c) basis would not be available for use in a section 301(c)(3) transaction and, in a sale, might be available for use only to the extent of undistributed PTEP.

Consider the following examples illustrating that the proposed regulations provide a consistent approach ensuring that distributions appropriately reduce basis or result in the recognition of gain. First, assume US1, a covered shareholder, directly owns the single share of outstanding stock of CFC1, a newly formed foreign corporation. For simplicity, assume US1 has \$0 basis in its stock in CFC1. In year 1, CFC1 generates \$100x of PTEP with respect to US1, which increases US1's adjusted basis of the share of stock of CFC1 from \$0 to \$100x. In year 2, CFC1 makes a \$100x distribution out of E&P and, in year 3, CFC1 makes a \$100x distribution that is not out of E&P. In this case, the year 2 distribution is tax-free (that is, the distribution is excluded from US1's gross income under section 959(a) but reduces US1's adjusted basis in its stock of CFC1 under section 961(b)(1)), and the year 3 distribution requires US1 to recognize \$100x of gain under section 301(c)(3). Alternatively, assume CFC1 generates a deficit in E&P in year 2 and generates E&P in year 3, with the result that the year 3 distribution, but not the year 2

distribution, is out of E&P. In such a case, the year 2 \$100x distribution is tax-free under section 301(c)(2) by reason of US1's adjusted basis pursuant to section 961(a), and the year 3 \$100x distribution requires US1 to recognize \$100x of gain under section 961(b)(2), which appropriately prevents a double use of basis.

Now assume instead that CFC2, a foreign corporation directly owned by US1, directly owns the single share of stock of CFC1 (rather than US1), CFC2's adjusted basis of the share of stock of CFC1 is \$0, and CFC2's section 961(c) basis with respect to US1 of the share of stock of CFC1 is increased from \$0 to \$100x to reflect the \$100x of PTEP generated by CFC1 with respect to US1. In that case, if CFC1's year 2 distribution is out of E&P, the year 2 distribution is tax-free under sections 959 and 961 and the year 3 distribution requires CFC2 to recognize \$100x of gain under section 301(c)(3), which US1 will generally include in gross income under section 951(a). Alternatively, if the year 3 distribution is out of E&P instead of the year 2 distribution, the year 2 distribution is tax-free by reason of CFC2's section 961(c) basis and the year 3 distribution requires CFC2 to recognize \$100x of gain pursuant to section 961(c), which US1 will generally include in gross income under the rules described in part III.G of the Explanation of Provisions.

v. Limitations on Negative Derived Basis and Negative Section 961(c) Basis

As discussed in parts III.C.2.iii and iv of the Explanation of Provisions, a partnership's derived basis or a CFC's section 961(c) basis with respect to a covered shareholder of a property unit can be reduced below zero (and therefore result in negative basis instead of triggering immediate gain recognition) as a result of a distribution of PTEP with respect to the property unit, subject to a limitation. The concept of negative section 961(c) basis stems from the language of section 961(c) (providing "adjustments similar to the adjustments" of section 961(a) and (b), "but only for the purposes of determining the amount included under section 951"), which contemplates section 961(c) basis replicating the outcomes that would occur for section 951 purposes if the CFC's adjusted basis could be increased or reduced under section 961(a) or (b). In this way, negative section 961(c) basis can be conceptualized as a reduction to adjusted basis that has no tax effect until a transaction relevant for purposes of section 951 occurs with respect to the

property unit. Negative derived basis follows the same concept.

Under the limitation, a distribution can reduce (or further reduce) derived basis or section 961(c) basis below zero only to the extent of the amount of the partnership's common basis or the CFC's adjusted basis of the property unit that is available with respect to the covered shareholder (determined as described in the next paragraph). *See* proposed § 1.961–4(c)(3)(i) and (d)(3)(i). In the case of a partnership, the amount of common basis available with respect to the covered shareholder is reduced by the covered shareholder's negative section 743(b) basis adjustment of the derivative ownership unit (if applicable). *See* proposed § 1.961–4(c)(3)(i).

The common basis or adjusted basis available with respect to the covered shareholder is determined by first computing the partnership's common basis or the CFC's adjusted basis of the property unit, reduced, as applicable, by all negative derived basis or all negative section 961(c) basis of the property unit (regardless of the covered shareholders to which the negative basis relates). *See* proposed § 1.961–4(c)(3)(ii) and (d)(3)(ii). This amount represents the partnership's common basis or the CFC's adjusted basis that is potentially available to reduce derived basis or section 961(c) basis of the property unit below zero. To address concurrent adjustments with respect to multiple covered shareholders, the partnership's available common basis or the CFC's available adjusted basis is then multiplied by a fraction. The fraction determines the basis available with respect to a covered shareholder based on relative amounts by which derived basis or section 961(c) basis with respect to the covered shareholders would be reduced below zero without limitation.

The Treasury Department and the IRS are of the view that allowing, but limiting the amount of, negative basis in this way has the effect of permitting the partnership's common basis or CFC's adjusted basis of the property unit to be reduced to, but not below, zero. These rules do not affect the treatment or availability of a partnership's common basis or a CFC's adjusted basis under any other provision of the Code (and, thus, for example, do not impact the application of section 704(c)).

The Treasury Department and the IRS considered other approaches to the limitation such as looking to a covered shareholder's share of common basis or adjusted basis, based on the percentage of the interests in the partnership (using § 1.743–1(d) principles, for example) or the stock of the CFC that is owned by

the covered shareholder. However, those approaches would give rise to additional complexity and burden because, for example, they could require rules adjusting negative basis with respect to a covered shareholder to the extent that an issuance reduces the covered shareholder's share of common basis or adjusted basis. Further, as discussed in part III.F of the Explanation of Provisions, rules requiring gain recognition in transactions involving negative basis adequately prevent a covered shareholder from disproportionality benefiting from common basis or adjusted basis because gain recognized by a partnership or a CFC under those rules is allocated or assigned to covered shareholders based on relative amounts of negative basis with respect to the covered shareholders. Thus, although a partnership's common basis or a CFC's adjusted basis is available with respect to all covered shareholders in determining the amount by which derived basis or section 961(c) basis can be negative, a covered shareholder will generally be required to include in gross income any gain attributable to negative basis with respect to the covered shareholder.

The Treasury Department and the IRS request comments on the approach to limiting negative basis in the proposed regulations, including alternative methods for determining the amount of a partnership's common basis or a CFC's adjusted basis available with respect to a covered shareholder for this purpose.

3. Basis Adjustments for Foreign Currency Gain or Loss

To reflect foreign currency gain or loss recognized under section 986(c) by a covered shareholder with respect to a foreign corporation's PTEP in a general successor transaction or other transaction not including a distribution of PTEP (*see* proposed § 1.986(c)–1, discussed in part V of the Explanation of Provisions), the proposed regulations provide rules to adjust the basis of property units that are shares of stock of the foreign corporation owned by the covered shareholder. These adjustments "tier up" through any property units through which the covered shareholder owns such stock, with the result that the basis of such property units is also adjusted. *See* proposed § 1.961–5(b)(1). For purposes of these rules, a reference to basis means adjusted basis of the covered shareholder in the case of a section 961(a) ownership unit, derived basis with respect to the covered shareholder in the case of a derivative ownership unit, and section 961(c) basis with respect to the covered shareholder

in the case of a section 961(c) ownership unit. These rules are issued pursuant to the express delegations of authority under sections 965(o) and 989(c) (as well as those under sections 961(a), (b), and (c), as described in part III.A. of the Explanation of Provisions).

The amount of the basis adjustments is equal to the amount of net foreign currency gain or loss. *See* proposed § 1.961–5(b)(2). This is determined by comparing the sum of all foreign currency gain and the sum of all foreign currency loss that the covered shareholder recognizes with respect to the foreign corporation's PTEP in the transaction under section 986(c), without regard to limitations on the recognition of such foreign currency gain or loss for PTEP resulting from section 965.

Generally, the basis of each property unit is increased by the property unit's share of net foreign currency gain or is reduced by the property unit's share of net foreign currency loss, as applicable, determined in each case based on a hypothetical distribution by the foreign corporation equal to all PTEP of the foreign corporation with respect to which the covered shareholder recognizes (or, but for limitations for PTEP resulting from section 965, would recognize) foreign currency gain or loss in the transaction. *See* proposed § 1.961–5(b)(3) and (4). The basis adjustments are treated as made immediately before the transaction (and therefore are taken into account in the transaction). *See* proposed § 1.959–5(b)(4). Additionally, like in the case of distributions of PTEP, a reduction to basis can reduce derived basis or section 961(c) basis below zero and can result in gain recognition with respect to a property unit. *See id.*

These basis adjustments are consistent with the 1988 notice and prevent foreign currency gain or loss with respect to PTEP, which is recognized at the covered shareholder-level under section 986(c), from also being taken into account with respect to property units sold or exchanged in the transaction (which might otherwise occur if basis of the property units were not adjusted to reflect movements in exchange rates between the time of the income inclusion that gave rise to the PTEP (and basis) and the time of the transaction). The adjustments to basis are determined without regard to the limitations on the recognition of foreign currency gain or loss with respect to PTEP resulting from section 965, which ensures that such unrecognized foreign currency gain or loss does not result in a commensurate amount of gain or loss with respect to property units sold or

exchanged in the transaction. *See also* part V.B of the Explanation of Provisions (discussing rules under which foreign currency gain or loss with respect to PTEP resulting from section 965(a) is reduced based on the section 965(c) deduction percentage, and no foreign currency gain or loss is recognized for PTEP arising under section 965(b)).

4. Successor Basis

i. In General

If there is an acquisition of stock of a foreign corporation that results in a change of ownership of stock of the foreign corporation, successor rules in section 961(c) generally transfer the foreign corporation's section 961(c) basis with respect to the covered shareholder that relinquishes ownership of stock of the foreign corporation to the covered shareholder who acquires ownership of the stock. *See* section 961(c) (prescribed adjustments to basis in CFC stock also apply to any United States shareholder that acquires from any person any portion of the interest of a United States shareholder by reason of which such shareholder was treated as owning CFC stock). These rules generally ensure that undistributed PTEP of a lower-tier foreign corporation does not give rise to additional U.S. tax in the hands of the acquiring covered shareholder when stock of the corporation is later sold by an upper-tier CFC, even though the covered shareholder did not own such stock when the PTEP was generated and section 961(c) basis was increased. These successor basis rules are issued pursuant to the express delegation of authority under section 743(b) (as well as the express delegation of authority under section 961(c), as described in part III.A. of the Explanation of Provisions).

The proposed regulations set forth rules for transferring section 961(c) basis in a general successor transaction, as well as for transferring a partnership's derived basis if the general successor transaction involves an acquisition of an interest in a partnership (acquired partnership). *See* proposed § 1.961–5(c). These rules generally provide parity between derived basis and section 961(c) basis in a general successor transaction and, in the case of an acquired partnership, ensure that the successor covered shareholder succeeds to derived basis (as compared to an approach that attempted to replace all or a portion of derived basis with a section 743(b) basis adjustment, which would require an election under section 754 to be in effect or a substantial built-in

loss). The Treasury Department and the IRS intend to issue additional rules regarding the transfer of section 961(c) basis and derived basis (as well as the transfer of PTEP) in acquisitions that are not general successor transactions. In these acquisitions, the Treasury Department and the IRS are considering adding a rule as part of finalization of the proposed regulations that, similar to the potential rule discussed in part II.G.1 of the Explanation of Provisions, provides that section 961(c) basis and derived basis transfer automatically in periods before those additional rules apply.

In a general successor transaction, a portion of an acquired partnership's derived basis or acquired foreign corporation's section 961(c) basis with respect to the transferor covered shareholder of a property unit transfers to the successor covered shareholder and therefore becomes with respect to the successor covered shareholder. Thus, to reflect the general successor transaction, derived basis or section 961(c) basis is increased (or reduced) by the basis that transfers to (or from) the covered shareholder, and those adjustments are treated as made concurrently with the general successor transaction. *See* proposed § 1.961–5(c)(1) and (2)(iii). The amount of basis that transfers may be a positive or negative amount and is equal to a pro rata portion of the derived basis or section 961(c) basis of the property unit immediately before the general successor transaction, plus any increase, or minus any decrease, to the basis for foreign currency gain or loss recognized under section 986(c) in the general successor transaction (discussed in part V of the Explanation of Provisions). *See* proposed § 1.961–5(c)(2)(i) and (ii).

The pro rata portion is determined based on the percentage, by value, of the transferor covered shareholder's interests in the acquired partnership or acquired foreign corporation that the successor covered shareholder acquires in the general successor transaction. *See* proposed § 1.961–5(c)(2)(i). This approach is intended to transfer derived basis or section 961(c) basis commensurate with the percentage change of the transferor covered shareholder's indirect interests in the partnership's common basis or foreign corporation's adjusted basis by reason of the general successor transaction. The Treasury Department and the IRS are of the view that alternative approaches—such as transferring an amount of derived basis or section 961(c) basis equal to the amount of PTEP that transfers in the general successor transaction—could give rise to

inappropriate outcomes or undue complexity where derived basis or section 961(c) basis is not equal to the PTEP that transfers in the general successor transaction.

ii. Deemed Covered Shareholder

Consistent with the deemed covered shareholder rules discussed in part II.G.3 of the Explanation of Provisions, the proposed regulations provide that the deemed covered shareholder is treated in the same manner as a covered shareholder in determining the transfer of derived basis or section 961(c) basis. See proposed § 1.961–5(c)(3)(i). Thus, for example, if a covered shareholder owns all the stock of an upper-tier CFC, the upper-tier CFC directly owns all the stock of a lower-tier CFC, and the covered shareholder sells a portion of its stock of the upper-tier CFC to a nonresident alien individual, then a portion of the upper-tier CFC's section 961(c) basis in the stock of the lower-tier CFC transfers from the seller covered shareholder to the deemed covered shareholder. The proposed regulations further provide that, to the extent the deemed covered shareholder is treated as owning stock of any foreign corporation that is not otherwise a CFC, the foreign corporation is treated as a CFC for purposes of determining section 961(c) basis that transfers to or from the deemed covered shareholder. See proposed § 1.961–5(c)(3)(ii). This is intended to allow for section 961(c) basis to transfer from the deemed covered shareholder to a subsequent covered shareholder (as properly adjusted under the proposed section 961 regulations) even if both an upper-tier foreign corporation and the lower-tier foreign corporation in which the upper-tier foreign corporation directly owns stock cease to be CFCs during the period in which the stock of the foreign corporations is considered owned by the deemed covered shareholder.

In cases where basis of a derivative ownership unit or section 961(c) ownership unit transfers from the deemed covered shareholder to a covered shareholder, the covered shareholder must use a reasonable method to determine the amount of transferred basis. See proposed § 1.961–5(c)(3)(iii). The proposed regulations provide that such method must take into account adjustments to basis with respect to the deemed covered shareholder that would have been made under the proposed regulations if the basis were with respect to a covered shareholder during the time that it was with respect to the deemed covered shareholder.

Like in the context of the deemed covered shareholder rules for purposes of transferring PTEP, the Treasury Department and the IRS welcome comments on this regime.

iii. Coordination With Section 743(b)

In certain general successor transactions in which an acquired partnership has a section 754 election in effect or a substantial built-in loss as defined under section 743(d), property of the acquired partnership will receive a section 743(b) basis adjustment with respect to the successor covered shareholder. Accordingly, the proposed regulations take into account derived basis that transfers to the successor covered shareholder in calculating the overall section 743(b) basis adjustment and its allocation among the acquired partnership's assets with respect to the successor covered shareholder. See proposed § 1.961–5(d). In transactions involving multiple tiers of acquired partnerships, this coordination rule applies to each acquired partnership.

5. Basis Adjustments for Deemed Dividends Under Section 1248(c)(2) or 964(e)(1)

The Treasury Department and the IRS are studying whether basis under section 961 should be increased to reflect gain treated as a dividend under section 1248(c)(2) or 964(e)(1). For example, to the extent gain recognized by a covered shareholder on a sale of stock of a first-tier CFC is treated as a dividend under section 1248(c)(2) by reason of E&P of a third-tier CFC (and therefore gives rise to PTEP under section 959(e)), the Treasury Department and the IRS are considering whether (and to what extent) the first-tier CFC's and second-tier CFC's section 961(c) basis can and should be increased to reflect the resulting PTEP. The Treasury Department and the IRS request comments on this topic.

D. Tax Consequences of Positive Derived Basis (Proposed § 1.961–8)

1. In General

The rules for a partnership's positive derived basis with respect to a covered shareholder are generally intended to replicate the outcome that would occur on a sale, exchange, or other disposition of the derivative ownership unit if such basis were an additional amount of common basis taken into account in determining gain or loss allocable to the covered shareholder. These rules are generally modeled after the rules in § 1.743–1.

Under the proposed regulations, in a sale, exchange, or other disposition by a partnership (transferring partnership)

of one or more derivative ownership units (transferred units), each partner's distributive share of gain or loss recognized by the transferring partnership is first determined under section 704 without regard to positive derived basis (but with regard to any section 743(b) basis adjustment with respect to the partner). See proposed § 1.961–8(b)(1). Then, positive derived basis is applied to each covered shareholder's distributive share of such gain or loss, in an amount equal to the transferring partnership's positive derived basis with respect to the covered shareholder of the transferred units, subject to two limitations (discussed in part III.D.2 of the Explanation of Provisions). See proposed § 1.961–8(b)(2)(i); see also proposed § 1.961–12(c)(4) (*Example 4*). This application of positive derived basis can decrease a distributive share of gain, increase a distributive share of loss, or convert a distributive share of gain to a distributive share of loss.

The application of positive derived basis to a covered shareholder's distributive share is generally treated as an application of positive derived basis by the transferring partnership. See proposed § 1.961–8(b)(1). However, if the covered shareholder owns the transferred units through tiered partnerships, only the partnership in which the covered shareholder directly owns an interest is treated as applying the positive derived basis).

To coordinate with section 705, the proposed regulations provide that adjusted basis of a partnership interest directly owned by the covered shareholder is adjusted under section 705 after taking into account the partnership's application of positive derived basis to the covered shareholder's distributive share of gain or loss with respect to the transferred units. See proposed § 1.961–8(c). On the other hand, in tiered partnership structures, an upper-tier partnership's common basis in a lower-tier partnership interest is adjusted under section 705 without regard to the application of positive derived basis to the covered shareholder's distributive share. See proposed § 1.961–8(d). Additionally, an upper-tier partnership's derived basis with respect to the covered shareholder in a lower-tier partnership interest (starting at the lowest-tier if there is more than one lower-tier partnership) is concurrently reduced (or gain is recognized, as applicable) by the amount of positive derived basis applied to the covered shareholder's distributive share. In this way, an upper-tier partnership's derived basis in a lower-tier partnership interest

is replaced with common basis under section 705 (which may be decreased under section 705(a)(2) when the lower-tier partnership makes a distribution).

2. Limitations

As discussed in part III.D.1 of the Explanation of Provisions, the amount of positive derived basis applied to a covered shareholder's distributive share of gain or loss with respect to transferred units is equal to the transferring partnership's positive derived basis with respect to the covered shareholder of the transferred units, subject to two limitations. *See* proposed § 1.961–8(b)(2)(i).

The first limitation applies in nonrecognition transactions to replicate the effect of additional basis under the “boot-within-gain” rule of section 351(b) or 356(a)(1), where additional basis might reduce the amount of gain realized but not the amount of gain recognized. *See* proposed § 1.961–8(b)(2)(ii). Under this limitation, the amount of positive derived basis applied to the covered shareholder's distributive share is equal to the excess of the amount of positive derived basis with respect to the covered shareholder of the transferred units over the covered shareholder's share of the gain realized but not recognized by the transferring partnership with respect to the transferred units (determined without regard to derived basis). In this way, positive derived basis is available for use only to the extent that, if the positive derived basis were additional common basis taken into account in determining gain allocable to the covered shareholder, such derived basis would reduce gain recognized with respect to the transferred units.

To illustrate this limitation, assume US1, a covered shareholder, directly owns a 50 percent interest in PRS1, a partnership, and PRS1 directly owns the single share of outstanding stock of F1, a foreign corporation. The fair market value of the share is \$150x. PRS1's common basis of the share is \$100x, and PRS1's derived basis with respect to US1 of the share is \$15x. PRS1 exchanges the share for \$120x of stock and \$30x of money in a reorganization described in section 368(a)(1)(D), recognizing \$30x of gain on the exchange under section 356(a)(1) (the lesser of the \$30x of money received and the \$50x of gain in the stock of F1) and therefore \$20x of the \$50x of realized gain is not recognized due to the boot limitation in section 356(a)(1). US1's distributive share of the recognized gain is \$15x ($\$30x \times 50\%$), determined without regard to derived basis. Under the limitation in the

proposed regulations, only \$5x of positive derived basis is applied to such distributive share (thus, \$10x of the \$15x of derived basis is not available for use). The \$5x is computed as the excess of \$15x (the amount of positive derived basis with respect to US1 without regard to the limitation), over \$10x ($\$20x \times 50\%$, which represents US1's share of the realized-but-not-recognized gain). Accordingly, US1's distributive share of gain taking into account derived basis is \$10x (US1's \$15x distributive share of gain without regard to derived basis over \$5x of positive derived basis available under the limitation). This \$10x represents the amount of gain that would be recognized under section 356(a)(1) and allocated to US1 if such were determined based on \$75x of value (50% of each of the \$120x of stock consideration and \$30x of money) and \$65x of basis (50% of the \$100x of common basis, increased by the \$15x of derived basis).

Under the second limitation, positive derived basis can increase or create a distributive share of loss only if the transferring partnership recognizes, or would recognize, loss on the sale, exchange, or other disposition of the transferred units and a current deduction in respect of the loss is, or would be, allowable. *See* proposed § 1.961–8(b)(2)(iii). Thus, for example, positive derived basis cannot create a distributive share of loss if the gain recognized with respect to the transferred units is pursuant to section 301(c)(3).

3. Certain Scenarios Not Addressed

The proposed regulations do not address the interaction of derived basis with the rules regarding distributions by a partnership (for example, sections 732 and 734). The Treasury Department and the IRS request comments on this interaction, including whether derived basis with respect to a covered shareholder should be taken into account in the case of a distribution by a partnership of a derivative ownership unit to the covered shareholder or to another partner and whether derived basis should be taken into account in the case of distributions of other types of assets by a partnership.

The proposed regulations also do not address the effect of derived basis under the dividend recharacterization rules of section 1248. The Treasury Department and the IRS are studying this and other issues with respect to the application of section 1248 when stock of a foreign corporation is owned through a partnership (for example, the manner in which section 1248(d)(1) applies to exclude PTEP in determining deemed

dividend treatment), and welcome comments on these issues.

E. Tax Consequences of Positive Section 961(c) Basis (Proposed § 1.961–9)

1. In General

As discussed in part III.B.4 of the Explanation of Provisions, a CFC's section 961(c) basis applies only for the purposes prescribed in the section 961 regulations and thus does not affect the amount of the CFC's gross income or E&P. Under the rules in the proposed regulations for the tax consequences of positive section 961(c) basis, gain to which positive section 961(c) basis is applied is treated as PTEP that is generally excluded from the CFC's gross income under section 961(c) (section 961(c) exclusion). *See* proposed § 1.961–9. The proposed regulations describe the section 961(c) exclusion, the application of section 961(c) basis to gain, and the PTEP that results from such application (including the character of the PTEP).

2. Section 961(c) Exclusion

i. In General

The section 961(c) exclusion operates in a similar manner to the section 959(b) exclusion. It provides that PTEP resulting from the application of a CFC's section 961(c) basis to gain recognized by the CFC is excluded from the CFC's gross income for purposes of determining the CFC's subpart F income and tested income or tested loss, provided that the PTEP relates to a covered shareholder that is a United States shareholder in the CFC. *See* proposed § 1.961–9(b); *see also* part III.E.3 of the Explanation of Provisions (determining PTEP resulting from section 961(c) basis).

The Treasury Department and the IRS are of the view that E&P attributable to gain to which section 961(c) basis is applied gives rise to PTEP. Section 959(a) refers to E&P of a foreign corporation that is “attributable to amounts which are, or have been, included in gross income under section 951(a) [or 951A(a)].” Gain recognized by an upper-tier foreign corporation on the disposition of stock of a lower-tier foreign corporation may likewise reflect amounts included in gross income under section 951(a) or 951A(a) with respect to the lower-tier foreign corporation and, thus, give rise to E&P that is attributable to such amounts. Because section 961(c) basis reflects amounts included in gross income under section 951(a) or 951A(a), the application of section 961(c) basis to such gain means that the resulting E&P is attributable to an amount included in gross income under section 951(a) or

951A(a) in accordance with the language of section 959(a). Additionally, treating the resulting E&P as PTEP (rather than section 959(c)(3) E&P) prevents double non-taxation and double taxation and provides symmetry between distributions and dispositions involving foreign stock, as discussed in part III.E.2.ii of the Explanation of Provisions.

The proposed regulations apply the section 961(c) exclusion for purposes of determining a CFC's tested income or tested loss pursuant to the express delegation of authority in section 951A(f)(1)(B), which prevents double taxation and is therefore consistent with the policy of section 961. Additionally, this approach is consistent with section 951A(f)(1)(A) (treating an inclusion under section 951A(a) in the same manner as an inclusion under section 951(a)(1)(A) for purposes of section 961), which should be interpreted as allowing references to section 951 in section 961(c) to be treated as including a reference to section 951A(a). This approach is also consistent with a comment received in response to the 2019 notice, which requested clarification that section 961(c) basis applies for purposes of determining tested income, noting that some comments asserted that section 961(c) basis only applies in determining a CFC's subpart F income. *See also* TD 9866, 84 FR 29288, 29298 (describing similar comments received in response to proposed regulations under section 951A).

Further, the application of the section 961(c) exclusion at the CFC-level is coordinated with the pro rata share rules of section 951(a) (discussed in part IV.C of the Explanation of Provisions). Under this approach, a CFC's subpart F income is determined with respect to all shareholders by excluding the same amount of PTEP resulting from section 961(c) basis of the CFC, and United States shareholders' pro rata shares of the CFC's subpart F income are computed in a manner so that any benefits of the application of the section 961(c) exclusion to PTEP with respect to a United States shareholder generally inure only to that United States shareholder. For instance, if two United States shareholders own equal interests in a CFC and, on a sale of foreign stock by the CFC, the CFC recognizes gain half of which is treated as PTEP with respect to one United States shareholder (because there is positive section 961(c) basis with respect to the United States shareholder at least equal to its share of the gain) and the other half of which gives rise to subpart F income (because there is no section 961(c) basis with

respect to the other United States shareholder and no exception from subpart F income applies), then only the United States shareholder with respect to which there is no section 961(c) basis has a pro rata share of the subpart F income resulting from the sale.

Lastly, by applying section 961(c) at the CFC-level, the proposed regulations provide symmetry between sections 959(b) and 961(c), which are companion provisions with a common purpose. Thus, PTEP is generally treated the same under the proposed regulations regardless of whether it arises from a distribution or disposition involving stock of a foreign corporation. As indicated in part II.D.1.iii of the Explanation of Provisions, the Treasury Department and the IRS request comments on the CFC-level approach in the proposed regulations, including alternative approaches providing symmetry between sections 959(b) and 961(c) (such as a shareholder-level approach), or whether symmetry is necessary under the statute.

ii. Considerations in Treating Sheltered E&P as PTEP

The Treasury Department and the IRS considered treating a CFC's E&P that is sheltered from tax by positive section 961(c) basis with respect to a covered shareholder as section 959(c)(3) E&P. However, such an approach could give rise to double non-taxation or double taxation. Moreover, treating sheltered E&P as PTEP provides symmetry between distributions and dispositions involving foreign stock because both E&P to which annual PTEP accounts are applied and E&P to which section 961(c) basis is applied are treated as PTEP.

For example, double non-taxation could occur if the sheltered E&P were to subsequently give rise to a dividend for which the covered shareholder is allowed a dividends received deduction under section 245A (including as a result of a disposition pursuant to section 1248(j)). In that case, the taxable portion of any unrealized appreciation in stock of the CFC, to the extent attributable to unrealized appreciation in the CFC's assets, could be reduced by the amount of the dividend (because the dividend reduces the value of the CFC stock without a corresponding basis reduction or, in a disposition of stock, because gain attributable to the appreciation is recharacterized as a dividend). *See also* TD 9866, 84 FR 29288, 29298 (discussing this concern and requesting comments). This would result in double non-taxation when combined with the covered shareholder's adjusted basis (increased under section 961(a)) in its top-tier CFC

stock, which generally would not be reduced when section 959(c)(3) E&P is distributed with respect to the stock. Treating the sheltered E&P as PTEP prevents this outcome because section 961 reduces basis for distributions of PTEP (thereby preventing double benefits) and, in a disposition, PTEP is not taken into account under section 1248.

In a case where the covered shareholder is not eligible for a section 245A deduction (for example, because the covered shareholder is an individual), the covered shareholder would generally include the sheltered E&P in gross income when distributed by the CFC if the sheltered E&P were treated as section 959(c)(3) E&P. This would represent double taxation with respect to the E&P that gave rise to the section 961(c) basis because such E&P was taxed under section 951(a) or 951A(a) when earned and would in effect be taxed again when the sheltered E&P is distributed to the covered shareholder. Although the covered shareholder's adjusted basis under section 961(a) in its top-tier CFC stock would generally not be reduced for the distribution of the sheltered E&P, there would nevertheless be double taxation until or unless that basis can be utilized, and even in that case there may be a character mismatch. *See also* TD 9866, 84 FR 29288, 29298 (requesting comments on the extent to which adjustments should be made to the operation of section 961(c) to minimize the potential for the same item of income being subject to tax more than once); 2006 proposed regulations, 71 FR 51155, 51162 (noting similar concerns). Treating the sheltered E&P as PTEP prevents this outcome because a distribution of PTEP to a covered shareholder is generally excluded from gross income under section 959(a).

The Treasury Department and the IRS also considered treating sheltered E&P as section 959(c)(3) E&P but reducing basis (including the covered shareholder's adjusted basis in its top-tier CFC stock) to the extent the sheltered E&P is eligible for a section 245A deduction. However, this approach is not being proposed because it would raise other issues, including the timing of the basis reduction (either immediately upon creation of sheltered E&P, which may later cause excess taxation, or only upon distribution of sheltered E&P, which would require additional tracking), and would not address the double taxation issue for covered shareholders that do not qualify for a section 245A deduction.

3. Application of Section 961(c) Basis to Gain and Resulting PTEP

i. In General

The rules for applying a CFC's positive section 961(c) basis with respect to a covered shareholder are generally intended to replicate the outcome that would occur on a sale, exchange, or other disposition of the section 961(c) ownership unit if such basis were an additional amount of adjusted basis taken into account in determining gain allocable to the covered shareholder under section 951.

Under the proposed regulations, in a sale, exchange, or other disposition by a CFC of one or more section 961(c) ownership units that are shares of stock of a single foreign corporation (transferred units), the CFC first determines gain recognized with respect to the transferred units (covered gain). *See* proposed § 1.961–9(c)(1). Covered gain is determined on an aggregate basis with respect to all transferred units, without regard to section 961(c) basis or loss recognized on any transferred unit (and before any application of section 964(e) or other dividend recharacterization provisions). Then, portions of the covered gain are assigned to covered shareholders under proposed § 1.951–2 (the same rules that assign covered distributions, discussed in part IV.B of the Explanation of Provisions), and this determines a covered shareholder's share of the covered gain. *See* proposed § 1.961–9(d)(1).

Next, positive section 961(c) basis is applied (on an aggregate basis) to each covered shareholder's share of the covered gain, in an amount equal to the CFC's positive section 961(c) basis with respect to the covered shareholder of the transferred units (but not in excess of such share), and subject to a limitation in nonrecognition transactions (similar to the limitation rule that applies to derived basis discussed in part III.D.1 of the Explanation of Provisions). *See* proposed § 1.961–9(d)(2), (e). This application of positive section 961(c) basis characterizes the covered shareholder's share of the covered gain as PTEP with respect to the covered shareholder, and that PTEP is generally excluded from the CFC's gross income for purposes of determining its subpart F income and tested income or tested loss. *See* proposed § 1.961–9(b), (d)(3); *see also* proposed § 1.961–12(c)(5) (*Example 5*).

An aggregate approach to applying positive section 961(c) basis allows positive section 961(c) basis of a transferred unit to be applied to a portion of the covered shareholder's

share of the covered gain that is recognized with respect to another transferred unit. For example, in a case where there are two transferred units, one of which is sold at a loss but has positive section 961(c) basis with respect to the covered shareholder and the other of which is sold at a gain but has no section 961(c) basis with respect to the covered shareholder, positive section 961(c) basis in the first transferred unit will be applied to gain recognized with respect to the second transferred unit (and, to the extent so applied, the gain will be treated as PTEP and will be reduced only by any foreign income taxes allocated and apportioned to the PTEP). Aggregating positive section 961(c) basis in this manner is intended to replicate the effect of netting gains and losses on similar types of property in determining a CFC's subpart F income. *See* section 954(c)(1)(B) (foreign personal holding company income includes the portion of gross income that consists of the excess of gains over losses from the sale or exchange of certain property). Although aggregation differs from the share-by-share approach under section 961 to adjusting basis (including for purposes of determining the consequences of distributions of PTEP), it provides a simpler and more direct way of achieving the same effect as a share-by-share approach to the use of positive section 961(c) basis that allows excess section 961(c) basis on a particular share to be applied to gain recognized on another share of stock in the same foreign corporation for which there is not sufficient section 961(c) basis to fully offset the gain. *See also* part III.E.4 of the Explanation of Provisions (discussing a rule allocating PTEP to shares of stock in order to facilitate the application of dividend recharacterization provisions like section 964(e)).

The proposed regulations, however, do not allow positive section 961(c) basis of transferred units in excess of the covered shareholder's share of the covered gain to be applied to other covered gain or to create a loss that reduces subpart F income or tested income. Allowing section 961(c) basis in stock of a foreign corporation to only reduce a section 951 inclusion attributable to sales, exchanges, or other dispositions of stock of that foreign corporation is consistent with the language of section 961(c), with the result that only shares of stock of the same foreign corporation should be viewed as similar types of property for purposes of replicating the effect of netting under section 961(c). Unused

positive section 961(c) basis, however, may be applied to gain recognized pursuant to section 961(c), provided the gain is recognized with respect to stock of the foreign corporation to which the section 961(c) basis relates, as discussed in part III.G of the Explanation of Provisions.

ii. Character and Dollar Basis of Resulting PTEP

As discussed in part II.C of the Background, the character of PTEP (for example, the taxable year, section 904 category, and PTEP group to which the PTEP relates) must be tracked to ensure the proper application of provisions regarding the treatment of PTEP. Accordingly, the proposed regulations provide rules for determining the character of a CFC's PTEP with respect to a covered shareholder that results from the application of positive section 961(c) basis to the covered shareholder's share of covered gain (section 961(c) PTEP). *See* proposed § 1.961–9(d)(3) and (f)(1). Generally, the effect of these rules is to duplicate undistributed PTEP of lower-tier foreign corporations by having the PTEP “tier up” into the CFC, but without reducing PTEP of the lower-tier foreign corporations, and this effect is analogous to the effect of section 964(e)(1) (“tiering-up” certain section 959(c)(3) E&P of lower-tier foreign corporation in certain sales or exchanges of stock by a CFC).

The proposed regulations generally adopt a mirroring approach, which provides that section 961(c) PTEP takes the same character as PTEP that transfers from the covered shareholder under section 959 or is eliminated (for example, by reason of an election under section 338(g)) in the sale, exchange, or other disposition of the transferred units (referred to as mirrored PTEP). *See* proposed § 1.961–9(f)(2); *see also* proposed § 1.961–12(c)(5) (*Example 5*). Mirrored PTEP is increased for foreign income taxes associated with such transferred or eliminated PTEP because those taxes relate to PTEP to which section 961(c) basis used in the transaction is attributable. The mirroring rule is intended to identify (and duplicate) PTEP to which section 961(c) basis used in the transaction is attributable in an administrable manner that does not impose undue burden on taxpayers. Alternative approaches that were considered include requiring section 961(c) basis to be established and maintained with the same characterizations with which annual PTEP accounts are established and maintained (so that section 961(c) PTEP could be characterized based on section 961(c) basis, portions of would relate to

each PTEP group). However, the view of the Treasury Department and the IRS is that those approaches would be unduly burdensome because they would substantially increase the information required to be tracked under section 961(c).

In some cases, section 961(c) PTEP may be less than mirrored PTEP. This could occur, for example, if a foreign corporation's assets depreciate in value before the transaction or if mirrored PTEP consists of PTEP attributable to section 965(b) (which does not increase section 961(c) basis). In that case, section 961(c) PTEP takes the same character as a pro rata portion of mirrored PTEP. In other words, the mirroring rule applies but mirrored PTEP is pro rata reduced to equal section 961(c) PTEP.

In other cases, section 961(c) PTEP may exceed mirrored PTEP. This could occur if section 961(c) basis used in the transaction is attributable to PTEP that was distributed before the transaction in a manner different than how the PTEP was expected to be distributed when the section 961(c) basis was provided. In that case, the mirroring rule applies to the extent of mirrored PTEP, with a "lookback" rule applying to the portion of section 961(c) PTEP that is not characterized under the mirroring rule (excess section 961(c) PTEP). *See* proposed § 1.961–9(f)(3). Under the lookback rule, excess section 961(c) PTEP takes the same character as lookback PTEP, which is PTEP that resulted from income inclusions under sections 951(a) and 951A(a) of the covered shareholder attributable to the transferred units (including stock of a lower-tier foreign corporation owned through the transferred units) during a 36-month lookback period (without any reduction for foreign income taxes imposed on that PTEP). The lookback rule is intended to provide an administrable method to approximate PTEP that should be viewed as duplicated in the transaction, while minimizing taxpayer burden in the limited cases where section 961(c) PTEP exceeds mirrored PTEP. Like under the mirroring rule, lookback PTEP is pro rata reduced to equal excess section 961(c) PTEP if excess section 961(c) PTEP is less than lookback PTEP.

If excess section 961(c) PTEP is greater than lookback PTEP, the portion of excess section 961(c) PTEP that is not characterized under the lookback rule is characterized as PTEP relating to the section 245A(d) PTEP group, the taxable year in which the transaction occurs, and the general category under section 904(d)(1)(D). *See* proposed § 1.961–9(f)(4). The Treasury Department and

the IRS are of the view that this rule is a necessary consequence of balancing compliance and administrative burden with precision under the mirroring rule and lookback rule, and that alternative characterizations could inappropriately incentivize transactions intended to distribute PTEP to which section 961(c) basis used in the transaction is attributable in a manner different than the manner in which the PTEP was expected to be distributed when the section 961(c) basis was provided.

Finally, the proposed regulations provide that the dollar basis of section 961(c) PTEP is equal to the U.S. dollar amount of section 961(c) basis giving rise to the PTEP. *See* proposed § 1.961–9(g). Because section 961(c) basis is adjusted to take into account foreign currency gain or loss recognized in the transaction (as discussed in part III.C.3 of the Explanation of Provisions), any foreign currency gain or loss subsequently recognized with respect to the section 961(c) PTEP is determined by reference to the time the section 961(c) PTEP comes into existence.

4. Coordination With Dividend Recharacterization Provisions

The proposed regulations provide two rules to coordinate with provisions of the Code or regulations that would treat covered gain, in whole or in part, as a dividend. The first rule provides that such dividend recharacterization provisions do not apply to the portion of covered gain that is PTEP. *See* proposed § 1.961–9(c)(2). Thus, for example, section 961(c) basis applies and characterizes covered gain as PTEP before the application of section 964(e) (treating gain recognized by a CFC on the sale or exchange of stock in a foreign corporation as a dividend in certain cases), similar to how adjusted basis must be taken into account to determine gain recognized before applying section 964(e).

The second rule allocates PTEP resulting from section 961(c) basis to transferred units. *See* proposed § 1.961–9(d)(5) and (h). This rule is intended to facilitate the application of dividend recharacterization provisions by providing certainty about the amount of gain with respect to a particular transferred unit that is treated as PTEP, which otherwise might be unclear in light of the aggregation component in applying positive section 961(c) basis (discussed in part III.E.3.i of the Explanation of Provisions).

Further, the Treasury Department and the IRS are studying other issues involving dividend recharacterization provisions (for example, the application of section 1248(d)(1) in section 964(e)

transactions) and may address these issues in future guidance.

F. Gain Recognition in Transactions Involving Property Units With Negative Basis (Proposed § 1.961–10)

To account for negative derived basis and negative section 961(c) basis, the proposed regulations provide rules that treat a partnership or CFC as recognizing gain with respect to a property unit. *See* proposed § 1.961–10. These rules are consistent with the theory of negative basis described in part III.C.2.v the Explanation of Provisions, which provides that negative basis is akin to a reduction to common basis or adjusted basis that only has a tax effect when the common basis or adjusted basis becomes relevant to determining taxable income in a transaction.

One set of rules applies in any transaction in which a partnership's common basis or CFC's adjusted basis of a property unit is relevant in determining gain or loss recognized with respect to the property unit—for example, a sale or exchange of the property unit or a distribution under section 301(c)(2) on the property unit. *See* proposed § 1.961–10(b)(1) and (c)(1); *see also* proposed § 1.961–12(c)(6) and (7) (*Examples 6 and 7*). In these cases, the partnership or CFC is treated as recognizing gain with respect to the property unit to the extent of the additional amount of gain, plus the lesser amount of loss, that it would have recognized in the transaction if its common basis or adjusted basis of the property unit were reduced by all negative derived basis or negative section 961(c) basis of the property unit. In this way, negative basis gives rise to gain that reflects income that would exist or counteracts loss that would not exist if common basis or adjusted basis were reduced by the negative basis, thereby replicating the outcome that would occur in the transaction if common basis or adjusted basis were so reduced.

So, for example, in a sale of a property unit, negative basis of the property unit generally gives rise to an equal amount of gain. In contrast, in a distribution under section 301(c)(2) with respect to a property unit or an exchange of a property unit under section 351, negative basis of the property unit gives rise to an amount of gain equal to the gain that would have been recognized under section 301(c)(3) or 351(b), as applicable, if common basis (in the case of a partnership) or adjusted basis (in the case of a CFC) were reduced by all negative basis of the property unit.

Another set of rules applies in any transaction in which a property unit loses its status as a derivative ownership unit or section 961(c) ownership unit. This could occur, for example, as a result of a transfer by a partnership of a derivative ownership unit to a foreign corporation in an exchange to which section 351 applies, or a distribution by a CFC of a section 961(c) ownership unit to a domestic corporation in a transaction to which sections 332 and 337 apply. *See* proposed § 1.961–10(b)(2)(ii) and (c)(2)(ii). This could also occur if an upper-tier foreign corporation ceases to be a CFC, in which case shares of stock of a lower-tier foreign corporation directly owned by the upper-tier foreign corporation would no longer be section 961(c) ownership units. In these cases, the partnership or CFC is treated as recognizing gain with respect to the property unit to the extent of all negative derived basis or negative section 961(c) basis of the property unit, and this addresses a concern that the negative basis might otherwise not be taken into account. The Treasury Department and the IRS are studying to what extent this set of rules should be narrowed or eliminated in future guidance if a rule is adopted that converts one type of basis into another type (for example, a rule that converts derived basis into section 961(c) basis or section 961(c) basis into adjusted basis in a nonrecognition transaction).

A portion of gain recognized by a partnership or CFC under these rules is allocated by the partnership or assigned from the CFC, as applicable, to each covered shareholder by multiplying the gain by the percentage of the aggregate negative basis of the property unit that is negative basis with respect to the covered shareholder. *See* proposed § 1.961–10(b)(3) and (c)(3). This approach treats the gain (which may be less than the aggregate negative basis of the property unit) as relating pro rata to the negative basis with respect to each covered shareholder, thereby preventing a covered shareholder from disproportionality benefiting from common basis or adjusted basis that enabled the creation of negative basis (as discussed in part III.C.2.v of the Explanation of Provisions) and ensuring the tax consequences of negative basis are specific to the covered shareholder to which the negative basis relates.

Additionally, the gain is treated in the same manner as gain recognized in connection with distributions of PTEP in excess of basis (discussed in part III.C.2.iii and iv of the Explanation of Provisions), which reflects that the negative basis giving rise to the gain arose as a result of prior distributions of

PTEP. *See* proposed § 1.961–10(b)(4) and (c)(4). Thus, the gain applies for all purposes of the Code in the case of a partnership and, in the case of a CFC, is recognized pursuant to section 961(c) and applies only for purposes of determining amounts included in gross income of United States shareholders under the rules discussed in part III.G of the Explanation of Provisions. Further, the gain is treated as separate from the transaction and therefore, for example, does not give rise to basis adjustments under section 358 or 362 in a nonrecognition transaction.

Lastly, after determining gain required to be recognized under these rules, negative derived basis or negative section 961(c) basis that causes the gain to be recognized is eliminated concurrently with the transaction. *See* proposed § 1.961–10(b)(5) and (c)(5). Thus, if the covered shareholder continues to own the property unit (for example, if the transaction is a section 301(c)(2) distribution), then such negative basis will cease to be taken into account with respect to the covered shareholder and, if the transaction is a general successor transaction, then the negative basis will not be taken into account with respect to the successor covered shareholder.

G. United States Shareholder Inclusions for Gain Recognized Under Section 961(c) (Proposed § 1.961–11)

1. In General

The proposed regulations provide rules requiring United States shareholders of a CFC to include in gross income their allocated portions of the CFC's section 961(c) income. *See* proposed § 1.961–11; *see also* proposed § 1.961–12(c)(8) (*Example 8*). A CFC's section 961(c) income is, for a taxable year of the CFC, all gain recognized by the CFC pursuant to section 961(c) for amounts in excess of basis or by reason of a trigger of negative section 961(c) basis (as discussed in parts III.C.2.iv, C.3, and F of the Explanation of Provisions).

These rules are intended to ensure section 961(c) income is taken into account (and thus has a tax consequence) at the covered shareholder-level such that section 961(c) basis is treated in the same manner as adjusted basis in directly held CFC stock or derived basis (where, for example, amounts in excess of basis under section 961 are always taken into account at the covered shareholder-level). Specifically, a United States shareholder owning stock of a CFC on the last relevant day of a taxable year of the CFC must include in gross income

its allocated amount of the CFC's section 961(c) income for that taxable year. *See* proposed § 1.961–11(b). The amount so allocated to a United States shareholder is the sum of any portions of such section 961(c) income assigned to the United States shareholder under the section 961 regulations (adjusted, if applicable, for transfers of stock of the CFC, as discussed in part III.G.2 of the Explanation of Provisions), reduced by any loss that the CFC is treated as recognizing under section 961(c) with respect to the United shareholder. *See* proposed § 1.961–11(c).

This loss under section 961(c) is equal to the CFC's positive section 961(c) basis with respect to the United States shareholder of section 961(c) ownership units sold, exchanged, or disposed of by the CFC in the taxable year, but only to the extent the positive section 961(c) basis is not applied to covered gain, and subject to two limitations. *See* proposed § 1.961–11(e). Under the first limitation, positive section 961(c) basis can create or increase a loss under section 961(c) only if the CFC recognizes, or would recognize, loss on the sale, exchange, or other disposition and a current deduction in respect of the loss is, or would be, allowable. Under the second limitation, positive section 961(c) basis can create or increase a loss under section 961(c) only to the extent of the amount of section 961(c) income that both is otherwise allocable to the United States shareholder and relates to stock of the same foreign corporation to which the positive section 961(c) basis relates. This is consistent with the same foreign corporation limitation for applying positive section 961(c) basis to covered gain (discussed in part III.E.3.i of the Explanation of Provisions).

The United States shareholder includes its allocated amount of section 961(c) income in gross income in its taxable year in which or with which the CFC's taxable year ends, and the allocated amount is treated in the same manner as an amount included in gross income under section 951(a)(1)(A) for purposes of applying sections 961 and 989(b). *See* proposed § 1.961–11(b). Thus, under section 961, the inclusion increases basis in the United States shareholder's stock of the CFC and any property units through which the United States shareholder owns stock of the CFC, consistent with how a subpart F income inclusion increases basis. The inclusion does not increase the CFC's PTEP, however, because the section 961(c) income does not give rise to E&P at the level of the CFC, and thus there is no amount related to the inclusion satisfying section 959's description of PTEP (E&P attributable to amounts

which are, or have been, included in gross income under section 951(a)). Moreover, increasing basis but not PTEP helps to ensure that gain is not recognized on subsequent distributions of PTEP the distribution of which gave rise to the section 961(c) income.

2. Adjustments for Transfers of CFC Stock

The proposed regulations provide additional rules in allocating a CFC's section 961(c) income for a taxable year if stock of the CFC is transferred during the taxable year. *See* proposed § 1.961–11(d). These rules are necessary because gain comprising section 961(c) income is assigned to covered shareholders at the time of the transaction giving rise to the gain (for example, a distribution in excess of basis) but, due to a transfer of stock of the CFC, a covered shareholder to which a portion of the gain is assigned may not own stock of the CFC stock on the last relevant day of the CFC's taxable year.

One set of rules applies if the CFC is an acquired foreign corporation in a general successor transaction that occurs during the taxable year. *See* proposed § 1.961–11(d)(1). In such a case, if the general successor transaction occurs before the last relevant day of the taxable year, then a pro rata portion of section 961(c) income that is recognized before the general successor transaction and assigned to the transferor covered shareholder is treated as instead assigned to the successor covered shareholder. Alternatively, if the general successor transaction occurs on or after the last relevant day of the taxable year, then a pro rata portion of section 961(c) income that is recognized after the general successor transaction and assigned to the successor covered shareholder is treated as instead assigned to the transferor covered shareholder. In both cases, the pro rata portion is determined based on the percentage of the CFC's section 961(c) basis that transfers in the general successor transaction.

A second set of rules applies the principles of the first set of rules to transactions, other than general successor transactions, in which the CFC's section 961(c) basis is transferred to another covered shareholder. *See* proposed § 1.961–11(d)(2).

IV. Section 951 Regulations

A. Overview

The proposed regulations under section 951 provide two coordinated sets of rules regarding the assignment and allocation of covered items, which are gross income of a foreign

corporation consisting of covered distributions or covered gains. One set applies at the foreign corporation-level to assign covered items to covered shareholders, with these rules identifying the portions of covered items to which attributes specific to a covered shareholder (PTEP or section 961(c) basis) may be applied to exclude such portions under section 959(b) or 961(c). *See* proposed § 1.951–2 (discussed in part IV.B of the Explanation of Provisions). The other set applies at the shareholder-level to allocate a CFC's subpart F income to United States shareholders, with these rules ensuring that the CFC's subpart F income attributable to covered items is allocated consistently with how the covered items were assigned under the first set of rules. *See* proposed § 1.951–1(c) (discussed in part IV.C of the Explanation of Provisions).

B. Foreign Corporation-Level Rules for Assigning Covered Items (Proposed § 1.951–2)

1. In General

The proposed regulations assign portions of a foreign corporation's covered items to covered shareholders that own stock of the foreign corporation during the foreign corporation's taxable year in which the covered items are received or recognized by the foreign corporation. *See* proposed § 1.951–2(b). The assignments are done on a covered-item-by-covered-item basis, in each case first by assigning the covered item under a general assignment rule, and then by adjusting assignments for any general successor transactions.

2. General Assignment Rule

The general assignment rule assigns a pro rata portion of a covered item of a foreign corporation to each covered shareholder that owns stock of the foreign corporation on the last relevant day of the foreign corporation's taxable year in which the covered item is received or recognized by the foreign corporation (that is, the last day of such taxable year on which the foreign corporation is a CFC). *See* proposed § 1.951–2(c)(1); *see also* proposed § 1.951–2(h)(3)(i) (*Example 1*). The pro rata portion is determined based on the percentage of the foreign corporation's allocable E&P for the taxable year that would be allocated to the covered shareholder in the hypothetical distribution described in § 1.951–1(e), applied by treating allocable E&P as equal to the greater of the foreign corporation's E&P for the taxable year and all covered items of the foreign

corporation. *See* proposed § 1.951–2(d). By applying § 1.951–1(e) in this way, the general assignment rule is consistent with the principles of the pro rata share rules under section 951(a). *See* § 1.951–1(e).

3. Adjustments for General Successor Transactions

A foreign corporation that is an acquired foreign corporation in a general successor transaction that occurs before the last relevant day of a taxable year of the foreign corporation may receive or recognize a covered item before the general successor transaction (pre-transaction covered item). In that case, the general successor transaction could preclude PTEP or section 961(c) basis with respect to the transferor covered shareholder from being applied to the covered item (as a result of reducing the allocation of the foreign corporation's E&P to the covered shareholder in the hypothetical distribution described in § 1.951–1(e) and therefore reducing the covered shareholder's assignment under the general assignment rule). This could inappropriately separate PTEP and basis from the appropriate covered shareholder.

To illustrate this issue, assume US1 is a covered shareholder and each of CFC1 and CFC2 is a CFC with a calendar taxable year. On January 1 of year 1, US1 owns all the stock of CFC1, and CFC1 owns all the stock of CFC2. On June 30 of year 1, CFC2 makes a \$100x covered distribution to CFC1, which immediately makes a \$100x covered distribution to US1. On September 30 of year 1, US1 sells all its stock of CFC1 to US2, an unrelated covered shareholder in what constitutes a general successor transaction. Without regard to the covered distributions, CFC2 has \$100x of PTEP with respect to US1 (relating to the prior year) and CFC1 has \$0 of PTEP.

Under the general assignment rule, the entire \$100x of the covered distribution received by CFC1 would be assigned to US2 (the covered shareholder owning all the stock of CFC1 on December 31 of year 1, the last relevant day of CFC1's taxable year). As a result, no PTEP would be applied to either covered distribution (and each covered distribution would reduce the distributing CFC's section 959(c)(3) E&P by \$100x).

The proposed regulations include additional rules to address this issue. Specifically, the additional rules increase the portion of a pre-transaction covered item that otherwise (without the additional rules) would be assigned to the transferor covered shareholder

and correspondingly decrease the portions of the item that otherwise (without the additional rules) would be assigned to connected covered shareholders. *See* proposed § 1.951–2(e); *see also* proposed § 1.951–2(h)(3)(ii) (*Example 2*). A connected covered shareholder means the successor covered shareholder (or any other covered shareholder owning the stock acquired in the general successor transaction, in the case of back-to-back general successor transactions, for example) and any covered shareholder related to such covered shareholder (determined under section 267(b) or 707(b)). *See* proposed § 1.951–2(g).

Thus, in the example above, the additional rules assign all the covered distribution received by CFC1 to US1 (rather than to US2, a connected covered shareholder), and \$100x of CFC2's PTEP with respect to US1 is applied to the covered distribution (which, in turn, increases CFC1's PTEP with respect to US1 by \$100x). As a result, that covered distribution is treated in the same manner as if the sale had not occurred, and \$100x of CFC1's PTEP with respect to US1 is then available to be (and in fact is) distributed by CFC1 to US1. If, instead, CFC1 did not make a covered distribution before the sale, then \$100x of PTEP of CFC1 with respect to US1 would transfer from US1 to US2 in the sale.

Subject to two limitations, the increase to the transferor covered shareholder's assignment is equal to the additional amount of the pre-transaction covered item that would have been assigned to the transferor covered shareholder if the date on which the covered item is received or recognized were the last relevant day and the hypothetical distribution for purposes of the general assignment rule were treated as made immediately before the covered item is received or recognized. *See* proposed § 1.951–2(e)(2)(i). In this way, the transferor covered shareholder's assignment of a pre-transaction covered item is, as illustrated above, generally consistent with what would have been its assignment if the general successor transaction and any subsequent transactions that change the ownership of stock of the acquired foreign corporation (for example, issuances of stock by the acquired foreign corporation) had not occurred.

With the limitations, the increase applies only to the extent it results in additional PTEP or section 961(c) basis with respect to the transferor covered shareholder being applied to the pre-transaction covered item, and the increase cannot exceed the portions of

the covered item that otherwise (without the additional rules) would be assigned to connected covered shareholders. *See* proposed § 1.951–2(e)(2)(iii). Thus, the additional rules only shift an assignment of gross income identified under the principles of section 951(a) as allocable to covered shareholders that bear a defined relationship to the transferor covered shareholder (through the general successor transaction or relatedness). The Treasury Department and the IRS are of the view that this approach reasonably balances the policies of the general assignment rule (following the principles of section 951(a)) and the additional rules (assuring the tax consequences of PTEP and basis remain with the appropriate covered shareholder).

The corresponding decrease applies, first, to assignments of connected covered shareholders owning, on the last relevant day, stock acquired in the general successor transaction and, next, to assignments of other connected covered shareholders, in each case on a pro rata basis. *See* proposed § 1.951–2(e)(3) and (4). With this ordering, assignments of such other connected covered shareholders are decreased only if their ownership of stock of the acquired foreign corporation increases after the general successor transaction. The Treasury Department and the IRS are of the view that applying the additional rules to such other connected covered shareholders maintains the integrity of the additional rules (for example, by preventing issuances to covered shareholders related to the successor covered shareholder from reducing the application of the additional rules, as could otherwise occur because the issuances would have the effect of reducing the successor covered shareholder's assignment under the general assignment rule, which, in turn, would limit the increase to the transferor covered shareholder's assignment).

Similar additional rules apply if a foreign corporation is an acquired foreign corporation in a general successor transaction that occurs on or after the last relevant day of a taxable year of the foreign corporation and the foreign corporation receives or recognizes a covered item after the general successor transaction. *See* proposed § 1.951–2(e)(2)(ii). In these cases, the additional rules increase the portion of such an item that otherwise (without the additional rules) would be assigned to the successor covered shareholder, generally by correspondingly decreasing the portion of the item that otherwise (without the

additional rules) would be assigned to the transferor covered shareholder. *See also* proposed § 1.951–2(h)(3)(iii) (*Example 3*).

C. Shareholder-Level Rules for Allocating Subpart F Income (Proposed § 1.951–1)

Under § 1.951–1 (and as discussed in part II.B.1 of the Background), a CFC's subpart F income is allocated to each United States shareholder of the CFC based on a fraction, the numerator of which is the United States shareholder's share of the CFC's allocable E&P, and denominator of which is the CFC's allocable E&P. *See* § 1.951–1(e). The amount of subpart F income so allocated to a United States shareholder is the United States shareholder's pro rata share of the foreign corporation's subpart F income, subject to certain adjustments. *See* § 1.951–1(b); *see also* § 1.951A–1(d) (determining pro rata shares of tested income in the same manner).

If a CFC's subpart F income attributable to covered items were allocated to United States shareholders in the same manner, the income might be allocated differently than how the covered items were assigned at the CFC-level as part of determining the extent to which the covered items are PTEP excluded from the CFC's gross income under section 959(b) or 961(c). *See also* proposed § 1.951–2 (assignment rules, discussed in part IV.B of the Explanation of Provisions). This could cause the tax consequences of PTEP or section 961(c) basis to not be specific to the United States shareholder to which such attribute relates, which would be inconsistent with the shareholder-specific nature of sections 959(b) and 961(c) and could result in partial double taxation to the United States shareholder.

For instance, assume two unrelated United States shareholders are assigned equal portions of covered gain recognized by a CFC, with the half assigned to one United States shareholder characterized as PTEP excluded from the CFC's gross income under section 961(c) (because there is positive section 961(c) basis with respect to the United States shareholder at least equal to such shareholder's share of the covered gain) and the half assigned to the other United States shareholder characterized as subpart F income (because there is no section 961(c) basis with respect to the other United States shareholder and no exception from subpart F income applies). In such a case, the Treasury Department and the IRS are of the view that allocating half of the subpart F

income from the covered gain to each United States shareholder would be inconsistent with sections 951(a) and 961(c), as doing so would cause the United States shareholders to share both any benefits of the section 961(c) exclusion and any detriments of the inclusion in subpart F income.

To address this, the proposed regulations modify § 1.951–1 so that a CFC's subpart F income attributable to covered items is separately allocated to United States shareholders. *See* proposed § 1.951–1(c)(1); *see also* proposed § 1.951–1(h)(2)(ii) (*Example 1*). Subpart F income attributable to covered items is determined on a covered-item-by-covered-item basis, and in each case is the portion of the covered item that is included in the CFC's foreign base company income (adjusted net foreign base company income as defined in § 1.954–1(a)(5)) or insurance income (adjusted net insurance income as defined in § 1.954–1(a)(6)). *See* proposed § 1.951–1(c)(2)(i). The proposed regulations facilitate these determinations by treating each portion of gross foreign base company income (as defined in § 1.954–1(a)(2)) that consists of a covered item as a single item of income. *See* proposed § 1.954–1(c)(1)(iii)(C).

Subpart F income attributable to a covered item is allocated to United States shareholders consistently with how the covered item was assigned at the CFC-level as part of determining the extent to which the covered item is PTEP excluded from the CFC's gross income under section 959(b) or 961(c). Specifically, subpart F income attributable to a covered item is allocated to each United States shareholder based on a fraction, the numerator of which is the portion of the covered item that is both assigned at the CFC-level to the United States shareholder and included in the CFC's adjusted gross foreign base company income or adjusted gross insurance company income (as defined in § 1.954–1(a)(3) or (6)), and the denominator of which is the portion of the covered item that is included in adjusted gross foreign base company income or adjusted gross insurance company income. *See* proposed § 1.951–1(c)(2)(ii). In this way, a United States shareholder's pro rata share of subpart F income attributable to a covered item is the subpart F income that results from the United States shareholder's assigned portion of the covered item.

Then, remaining subpart F income (that is, subpart F income not attributable to covered items) is allocated pro rata to United States shareholders in accordance with

existing § 1.951–1. Specifically, such subpart F income is allocated to each United States shareholder based on a fraction, the numerator of which is the United States shareholder's share of the CFC's allocable E&P (determined under § 1.951–1(e)), and the denominator of which is the CFC's allocable E&P. *See* proposed § 1.951–1(c)(2)(iii).

Thus, under the proposed regulations, the effect of sections 959(b) and 961(c) on allocations under section 951(a) is limited to ensuring that any benefits of the application of the relevant exclusion to a portion of a covered item, or any detriments of an inclusion of such portion in subpart F income, generally inure only to the United States shareholder to which the portion was assigned in determining the extent to which the portion is excludable PTEP. Accordingly, under the proposed regulations, sections 959(b) and 961(c) do not affect the allocation of subpart F income attributable to gross income not eligible for exclusion under those sections. Similarly, the proposed regulations do not affect the allocation of tested items under section 951A. *See* proposed § 1.951A–1(d) (pro rata shares of tested income, tested loss, and qualified business asset investment are determined in the same manner as the determination of pro rata shares of subpart F income not attributable to covered items); *see also* § 1.951A–1(d)(5) and (6) (pro rata shares of tested interest expense and tested interest income determined by reference to pro rata shares of tested income and tested loss, as applicable).

An alternative approach that treated the allocation of subpart F income attributable to covered items as altering the manner in which other income of the CFC is allocated would require broader revisions to § 1.951–1. Under this type of approach, a CFC would be treated as having four types of allocable income, which together would equal allocable E&P: subpart F income, tested income, excludable PTEP income (that is, PTEP that is distributed to, or results from section 961(c) basis of, the CFC and is excluded from the CFC's gross income under section 959(b) or 961(c), reduced by current year taxes allocated and apportioned thereto), and residual income (equal to the excess of the CFC's E&P for the taxable year over the sum of the other types of income). A United States shareholder's share of the CFC's allocable E&P would be treated as first relating to income attributable to covered items, with any remaining portion of the share treated as relating on a pro rata basis to all other income. However, this approach would generally produce the same results as the

approach in the proposed regulations, except in cases where a deductible item (other than current year taxes) disproportionately reduces a covered item (because some, but not all, of the covered item is excludable PTEP and thus the deduction reduces only the non-PTEP portion of the covered item). Moreover, the Treasury Department and the IRS are of the view that sections 959(b) and 961(c) do not require such an approach.

Lastly, the Treasury Department and the IRS request comments on whether additional rules are warranted for allocating tested items in cases where a covered item is excluded from subpart F income by reason of section 954(b)(3)(A)'s de minimis rule and may consequently give rise to tested income (which, under the proposed regulations, would be allocated under the rules for subpart F income not attributable to covered items).

V. Section 986(c) Regulations (Proposed § 1.986(c)–1)

A. Overview

The proposed regulations under section 986(c) describe the circumstances in which a covered shareholder recognizes foreign currency gain or loss with respect to PTEP and provide rules for determining the amount of gain or loss that is recognized. These rules are issued pursuant to the express delegations of authority under sections 986(c)(2), 965(o), and 989(c). *See also* part VIII.F of the Explanation of Provisions (proposing to withdraw or studying whether to withdraw provisions regarding foreign currency gain or loss in §§ 1.985–5 and 1.985–7).

B. Circumstances in Which Foreign Currency Gain or Loss Is Recognized

Under the proposed regulations, a covered shareholder recognizes foreign currency gain or loss under section 986(c) with respect to PTEP in two circumstances. *See* proposed § 1.986(c)–1(b)(1). The first circumstance is when PTEP is distributed to the covered shareholder (including PTEP treated as received through a partnership). The second circumstance is when PTEP ceases to be with respect to the covered shareholder (for example, as a result of being transferred to another covered shareholder in a general successor transaction or eliminated as a consequence of an election under section 338(g)). These rules, which are generally consistent with the 1988 notice, provide parity between distributions of PTEP and dispositions of foreign stock that in each case present

the last opportunity for the covered shareholder to recognize foreign currency gain or loss with respect to PTEP.

The proposed regulations provide that no foreign currency gain or loss is recognized in a distribution of PTEP to a foreign corporation. *See* proposed § 1.986(c)–1(c). In these cases, the Treasury Department and the IRS are of the view that preserving the dollar basis of the PTEP (through adjustments to shareholder-level dollar basis pools) is the appropriate application of section 986(c) at the time of the distribution, with such dollar basis then determining foreign currency gain or loss when the PTEP is subsequently distributed to the covered shareholder.

Foreign currency gain or loss is also generally not recognized (and dollar basis is preserved) when PTEP transfers in a transaction other than a general successor transaction (for example, a transfer of stock of a CFC by a domestic corporation to a non-consolidated domestic corporation in a section 351 transaction). *See* proposed § 1.986(c)–1(b)(5); *but see* § 1.367(b)–2(j)(2)(i). This rule limits the ability to recognize foreign currency gain or loss in nonrecognition transactions or other transactions where gain or loss is generally not recognized. Comments are requested on this rule and, more generally, whether foreign currency gain or loss should not be recognized and thus deferred in sales or other transactions involving related parties.

Foreign currency gain or loss recognized with respect to PTEP is recognized concurrently with the transaction requiring recognition of such gain or loss. *See* proposed § 1.986(c)–1(b)(4). Additionally, the foreign currency gain or loss is treated as ordinary income or loss from the same source and relating to the same section 904 category as the income inclusion that gave rise to the PTEP (consistent with the rule in § 1.904–4(p) for distributions of PTEP). *See also* proposed § 1.961–5(b) (adjusting basis for foreign currency gain or loss recognized in a transaction other than a distribution, as discussed in part III.C.3 of this Explanation of Provisions).

C. Determining Foreign Currency Gain or Loss

Foreign currency gain or loss with respect to PTEP is determined by translating the PTEP (which is denominated in the foreign corporation's functional currency) into U.S. dollars at the spot rate on the day of the transaction requiring recognition of such gain or loss and subtracting from that U.S. dollar amount the dollar basis

of the PTEP. *See* proposed § 1.986(c)–1(b)(2); *see also* proposed § 1.959–10(c)(2) (*Example 2*). A positive difference is foreign currency gain and the absolute value of a negative difference is foreign currency loss.

As a result, foreign currency gain or loss with respect to PTEP is based on movements in exchange rates between the time of the income inclusion giving rise to the PTEP (translated pursuant to the appropriate exchange rate) or, if applicable, the most recent prior transfer of the PTEP (treated as the deemed distribution described in section 986(c)(1)), and the date of the transaction requiring recognition of such gain or loss (treated as the actual distribution described in section 986(c)(1)).

D. Limitations

Consistent with existing § 1.986(c)–1 (discussed in part II.C.3 of the Background of this preamble), only a portion of foreign currency gain or loss with respect to PTEP resulting from section 965(a) is recognized, based on the section 965(c) deduction percentage with respect to the PTEP, and no foreign currency gain or loss is recognized with respect to PTEP resulting from section 965(b). *See* proposed § 1.986(c)–1(b)(3)(i) and (ii). Further, no foreign currency gain or loss is recognized with respect to taxable section 962 PTEP because such PTEP is included in gross income pursuant to section 962(d) and, therefore, the foreign currency gain or loss is accounted for in gross income. *See* proposed § 1.986(c)–1(b)(3)(iii).

VI. Section 960 Regulations (Proposed §§ 1.960–1 and 1.960–3)

Current §§ 1.960–1 and 1.960–2 provide rules for computing the amount of foreign income taxes deemed paid under section 960(a) and (d), and current §§ 1.960–1 and 1.960–3 provide rules for computing the amount of foreign income taxes deemed paid under section 960(b). The PTEP accounting rules under proposed § 1.959–2 replace the rules in current § 1.960–3 that describe a CFC's PTEP, and the rules allocating and apportioning current year taxes to PTEP in proposed § 1.959–6 replace the rules in current § 1.960–1 for purposes of applying section 960(b). Other rules relating to PTEP that are included in current §§ 1.960–1 and 1.960–3 have also been replaced by rules in the proposed regulations under section 959 to ensure conformity and proper tracking of amounts described in sections 959 and 960(b). Current §§ 1.960–1 through 1.960–3, as modified by proposed §§ 1.960–1 and 1.960–3,

will generally continue to describe how deemed paid taxes are computed under section 960, and incorporate updates to coordinate those rules with the proposed regulations under sections 959 and 961.

Proposed § 1.960–1 limits the rules in § 1.960–1 to the computation of deemed paid taxes under section 960(a) and (d). To this end, proposed § 1.960–1 treats a CFC's PTEP arising by reason of a PTEP realization event during its taxable year as gross income in a residual income group, rather than as gross income in a PTEP group. *See* proposed § 1.960–1(d)(2)(ii)(D). However, proposed § 1.959–6 provides specific rules for allocating and apportioning current year taxes arising by reason of a PTEP realization event that occurred during a taxable year to the statutory groupings of PTEP of a foreign corporation. Additionally, proposed § 1.959–2 generally provides rules for tracking the foreign income taxes associated with PTEP. *See* parts II.F and II.B of the Explanation of Provisions for a discussion of proposed §§ 1.959–6 and 1.959–2, respectively. Finally, proposed § 1.960–1(d)(3)(ii)(B) (consistent with current § 1.960–1(d)(3)(ii)(B)) provides specific rules for assigning foreign gross income to the statutory and residual groupings of income of a CFC when the CFC pays or accrues current year taxes with respect to a PTEP realization event that occurs in a different U.S. taxable year. Proposed § 1.960–1 also includes changes to current § 1.960–1 to conform with the approach and terminology used in the proposed regulations under sections 959 and 961 and in proposed § 1.960–3.

Proposed § 1.960–3 provides rules for determining foreign income taxes that are deemed paid under section 960(b) with respect to the receipt of a distribution of PTEP, primarily by reference to PTEP tax pools. In particular, the foreign income taxes that are properly attributable to a distribution of PTEP are the foreign income taxes removed from the corporate PTEP tax pools of the distributing CFC under proposed § 1.959–2(d)(2) and the PTEP tax pools of the covered shareholder under § 1.959–3(e)(1)(iii) (that is, the foreign income taxes associated with the distributed PTEP under proposed § 1.959–4), but only to the extent the foreign income taxes are in the creditable PTEP tax group immediately before the distribution.

These rules are issued pursuant to the express delegation of authority under section 960(f).

VII. Section 1502 Regulations (Proposed § 1.1502–59)

The proposed regulations provide rules specific to members of a consolidated group. *See* proposed § 1.1502–59. These rules are issued pursuant to the express delegation of authority under section 1502.

The proposed regulations provide that members of a consolidated group are treated as a single covered shareholder for purposes of section 959 and the regulations thereunder. *See* proposed § 1.1502–59(c). This approach is consistent with guidance on the application of other international tax rules to consolidated groups (for example, §§ 1.1502–50, 1.1502–51, and 1.1502–80(j)).

Consequently, a consolidated group maintains only a single set of annual PTEP accounts, dollar basis pools, and PTEP tax pools with respect to a foreign corporation whose stock is owned by one or more members. These annual PTEP accounts track the foreign corporation's PTEP with respect to the group and thus, for example, determine whether a covered distribution received by any member of the group from the foreign corporation is a distribution of PTEP.

This application of single-entity treatment is important to ensure the proper reflection of the consolidated group's income. Without the application of single-entity treatment for purposes of shareholder-level PTEP accounting, a consolidated group effectively could elect in or out of PTEP distributions by changing the structure through which it owns stock of foreign corporations. For example, assume that a member of a consolidated group (M1) owns all the stock of CFC and has a subpart F income inclusion of \$100x in year 1 with respect to CFC. Absent single-entity treatment, M1, and not the consolidated group, would have \$100x of PTEP in its annual PTEP accounts with respect to CFC. In year 2, the first \$100x of covered distributions from CFC would be characterized as distributions of PTEP. However, if another member (M2) made a contribution to CFC at the beginning of year 2 in exchange for 50% of the stock of CFC, only the first \$100x of covered distributions to M1, and no covered distribution to M2, would be characterized as a distribution of PTEP. Therefore, if CFC made a pro rata covered distribution of \$100x, only \$50x would be characterized as PTEP. Applying single-entity treatment thus ensures that changes in the location of ownership of foreign stock within a consolidated group do not change the

group's characterization of a distribution by the foreign corporation.

In contrast, the proposed regulations incorporate a mix of single- and separate-entity treatment for purposes of section 961 in order to prevent basis shifting between members. *See* proposed § 1.1502–59(d); *see also* part III.C.2.ii of the Explanation of Provisions (describing how, outside of the consolidated group context, basis cannot be shared among section 961(a) ownership units even if owned by the same covered shareholder). The proposed regulations respect each member's separate basis in its directly held property units, and adjustments to the basis of section 961(a) ownership units are thus computed on a separate-entity basis. Consequently, a distribution of PTEP may result in the recognition of gain under section 961(b)(2) if the distributee member has insufficient basis in a section 961(a) ownership unit. The Treasury Department and the IRS are of the view that an approach like that in the 2006 proposed regulations, in which one member may access basis belonging to another member, would create opportunities for inappropriate tax planning by shifting basis among members in a way that does not reflect the economics of the members' investments.

For indirectly held property units (for example, lower-tier CFC stock), a consolidated group is treated as a single covered shareholder. For example, a partnership has only a single derived basis in a derivative ownership unit with respect to a group, and, similarly, a CFC has only a single section 961(c) basis in a section 961(c) ownership unit with respect to a group and increases to derived basis and section 961(c) basis generally are computed on a single-entity basis. However, the proposed regulations also include rules to prevent basis shifting among members with respect to these property units, because member shareholders may have different bases in these property units under other rules (for example, under section 743(b)). When computing reductions in basis to derivative ownership units or section 961(c) ownership units, the proposed rules provide that the group basis of the relevant property unit is allocated to the member shareholders, the basis reduction is computed separately for each member (and may trigger gain if there is insufficient basis), and then the basis is recombined.

The proposed regulations also provide rules for corporations that become or cease to be members of a consolidated group. *See* proposed § 1.1502–59(e).

These rules generally implement single-entity treatment by mirroring the principles that would apply if members of the group were divisions of a single corporation. For example, if a shareholder of a foreign corporation joins a consolidated group, solely for purposes of applying sections 959 and 961, the transaction is treated as if the group directly acquired the stock in the foreign corporation. Similarly, if a shareholder of a foreign corporation ceases to be a member of a consolidated group, solely for purposes of applying sections 959 and 961, the transaction is treated as if the group directly disposed of the stock in the foreign corporation.

When the proposed regulations are finalized, the Treasury Department and the IRS intend to conform the terminology in § 1.1502–80(j) (treating a consolidated group as a single United States shareholder for purposes of applying section 951(a)(2)(B) to distributions of PTEP from one CFC to another) to match these regulations, and may relocate that rule to § 1.1502–59.

VIII. Miscellaneous Provisions

A. S Corporations

Consistent with section 1373(a), the proposed regulations generally treat an S corporation in the same manner as a domestic partnership and thus as not a covered shareholder. *See* proposed §§ 1.959–1(c)(1) and 1.961–1(c)(1). When this treatment applies, each owner of the S corporation maintains annual PTEP accounts, dollar basis pools, and PTEP tax pools (as applicable) with respect to a foreign corporation in which the S corporation owns stock (rather than the S corporation itself). Also, like domestic partnerships, an S corporation is provided derived basis in a derivative ownership unit directly owned by the S corporation.

Notwithstanding the general rule that an S corporation is not treated as a covered shareholder, an exception provides that an S corporation is a covered shareholder for any taxable year of the S corporation for which the S corporation is treated as an entity separate from its owners in determining stock ownership for purposes of section 951(a) or 951A(a). *See* proposed §§ 1.959–11(d) and 1.961–13(c); *see also* part IX.B.5 of the Explanation of Provisions (describing transition rules applicable to domestic partnerships, including S corporations). Thus, the exception applies if the S corporation has made an election described in § 1.958–1(e), as proposed to be amended at 87 FR 3890 (Jan. 25, 2022), or section 3.02 of Notice 2020–69, 2020–39 I.R.B.

604. Accordingly, an S corporation is a covered shareholder if such election is in effect and the S corporation thus includes amounts in gross income under sections 951(a) and 951A(a).

Where the exception applies to an S corporation (and thus both the S corporation and its owners are covered shareholders), rules relating to distributions of PTEP, derived basis (of a partnership that is owned by the S corporation), and section 961(c) basis (of a CFC that is owned by the S corporation) apply to the S corporation in its capacity as a covered shareholder before those rules apply to an owner of the S corporation. *See* proposed §§ 1.959–11(d) and 1.961–13(c). For example, a covered distribution made to the S corporation is first a distribution of the distributing foreign corporation's PTEP with respect to the S corporation, and then, to the extent remaining, a distribution of the distributing foreign corporation's PTEP with respect to owners of the S corporation.

B. Passive Foreign Investment Companies

The proposed regulations do not address passive foreign investment companies (PFICs) (as defined in 1297(a)) or a PFIC's earnings and profits described in section 1293(c). The Treasury Department and the IRS are studying issues involving PFICs, including coordination of sections 959 and 1293(c), and may address these issues in future guidance.

C. Foreign Trusts and Foreign Estates

For purposes of determining ownership under section 958(a)(2), stock owned by a foreign trust (within the meaning of section 7701(a)(31)(B)) described in sections 671 through 679 (relating to grantors and others treated as substantial owners) is treated as being owned proportionately by its grantors or other persons treated as owners under sections 671 through 679 of any portion of the trust that includes the stock. *See* § 1.958–1(b). Similarly, stock owned by any other foreign trust (not described in sections 671 through 679) or a foreign estate (within the meaning of section 7701(a)(31)(A)) is treated as being owned proportionately by its beneficiaries. *See id.* Consistent with section 961(a) and (b), which provide for adjustments to the basis of property of a United States shareholder by reason of which the shareholder is considered under section 958(a)(2) as owning stock of a CFC, the current regulations under section 961 provide for adjustments to a United States shareholder's basis in a beneficial interest in a foreign trust or foreign estate through which the United

States shareholder owns stock of a CFC. *See* §§ 1.961–1 and 1.961–2.

The proposed regulations, however, do not address the operation of sections 959 and 961 with respect to foreign trusts (thus, for example, if a covered shareholder owns stock of a CFC through a foreign trust, the proposed regulations do not address the treatment of a covered distribution received by the foreign trust from the CFC or basis in the covered shareholder's interest in the foreign trust or the trust's stock of the CFC). The Treasury Department and the IRS are studying the manner in which section 959 should be applied in these structures to ensure that PTEP distributed to a covered shareholder through a foreign trust is properly excluded from the covered shareholder's gross income. Comments are requested on the treatment of foreign trusts under section 959, including whether treatment similar to a foreign corporation or partnership is appropriate or would impose significant burdens on such trusts, their owners, or beneficiaries. Comments are also requested on the appropriateness and effect of providing basis adjustments under section 961 in structures involving these entities as well as the interaction between these provisions and the rules in section 643(i) that treat certain loans from foreign trusts as distributions.

Comments are likewise requested on how foreign estates, which are also not addressed in the proposed regulations, should be treated for purposes of sections 959 and 961.

D. Section 962

Consistent with section 962(d), the proposed regulations do not exclude taxable section 962 PTEP that is distributed to a covered shareholder from the shareholder's gross income. *See* proposed § 1.959–4(b)(1). Similarly, consistent with section 961(a) and (b), the proposed regulations do not increase or reduce adjusted basis or derived basis for taxable section 962 PTEP. *See* proposed §§ 1.961–3(f)(2) and 1.961–4(b)(1), (c)(1). However, the proposed regulations apply the section 959(b) exclusion to, and provide section 961(c) basis for, taxable section 962 PTEP to prevent further tax on such PTEP in distributions to, or dispositions of stock by, a CFC. *See* proposed §§ 1.959–4(b)(2) and 1.961–3. Thus, taxable section 962 PTEP is generally subject to an additional level of taxation only in distributions to a covered shareholder or dispositions of section 961(a) ownership units or derivative ownership units.

Under the proposed regulations, PTEP retains its character as taxable section

962 PTEP in a general successor transaction and thus may transfer from a transferor covered shareholder to a successor covered shareholder. Likewise, taxable section 962 PTEP may be reflected in PTEP resulting from section 961(c) basis. In this way, the proposed regulations are consistent with the requirement in section 962(d) that taxable section 962 PTEP be included in gross income when distributed because it has not been sufficiently taxed.

Further, the proposed regulations remove § 1.962–3 because the proposed regulations generally incorporate the rules in § 1.962–3. *See, for example,* proposed § 1.959–4. The proposed regulations, however, do not incorporate § 1.962–3(b)(3)(iv), which describes the application of a foreign corporation's E&P deficit to taxable section 962 PTEP, and § 1.962–3(b)(4), which provides that § 1.962–3 does not apply to a distribution of section 962 PTEP treated as in exchange for stock. The Treasury Department and the IRS request comments on these rules, including whether they continue to be needed and, if so, their interaction with these regulations.

E. Currency Translation

In applying the proposed regulations in certain cases, an amount must be translated into a currency different than the currency in which it is denominated. For example, in a distribution of PTEP to a foreign corporation, the PTEP must be translated into the functional currency of the recipient foreign corporation (if the recipient foreign corporation and distributing foreign corporation have different functional currencies) so that the PTEP can be added to annual PTEP accounts with respect to the recipient foreign corporation (which are maintained in the recipient foreign corporation's functional currency). As an additional example, in applying section 961(c) basis to a CFC's covered gain, the section 961(c) basis (which is maintained in U.S. dollars) must be translated into the CFC's functional currency if the CFC does not use the U.S. dollar as its functional currency. Accordingly, the proposed regulations provide currency translation rules where relevant. *See, for example,* proposed §§ 1.951–2(f), 1.959–3(c)(5), 1.959–6(d)(2), and 1.961–9(e)(3). The Treasury Department and the IRS welcome comments on these rules.

F. Section 985

When a CFC changes its functional currency to the U.S. dollar, § 1.985–5(e)(2) requires a United States shareholder of that CFC to recognize

foreign currency gain or loss with respect to PTEP under section 986(c) as if all of the PTEP were distributed to the United States shareholder immediately before the change. No rules currently require recognition of foreign currency gain or loss with respect to PTEP when a CFC with a functional currency other than the U.S. dollar distributes PTEP to a CFC with a functional currency that is the U.S. dollar, nor does § 1.985–5(e)(2) apply when a CFC changes its functional currency to a currency other than the U.S. dollar. As a result, current law requires recognizing foreign currency gain or loss on PTEP deemed distributed to a CFC immediately before it converts its functional currency to the U.S. dollar but not immediately after.

As noted in part V.A of this Explanation of provisions, the rules in the proposed regulations for recognizing foreign currency gain or loss with respect to PTEP require recognizing such gain or loss in distributions of PTEP to a covered shareholder and dispositions of foreign stock because those circumstances present the last opportunity for the covered shareholder to recognize foreign currency gain or loss with respect to the PTEP. In the case of a distribution of PTEP to a foreign corporation, the dollar basis is preserved, which in turn preserves the appropriate application of section 986(c) until one of the circumstances noted in the previous sentence occurs. The Treasury Department and the IRS are of the view that the appropriate time to recognize foreign currency gain or loss should not depend on whether and when a CFC changes its functional currency, nor on the functional currencies involved. The proposed regulations provide a comprehensive system for determining and tracking the dollar basis of PTEP (through dollar basis pools, PTEP groups, and annual PTEP accounts), as well as for using these accounts to determine foreign currency gain or loss when appropriate. To the extent the rule in § 1.985–5(e)(2) was supported by concerns that having a U.S. dollar basis in PTEP that are measured in the U.S. dollar might create administrative difficulties or lead to the undercounting of foreign currency gain or loss, the Treasury Department and the IRS are of the view that the comprehensive system promulgated in the proposed regulations alleviates that concern. *See, for example*, part V of this Explanation of Provisions for rules determining currency gain and loss. Finally, the Treasury Department and the IRS are also concerned that the rule in § 1.985–5(e)(2) may permit taxpayers to inappropriately accelerate foreign

currency loss by deeming a distribution of such PTEP to a CFC that then changes its functional currency to the U.S. dollar. Accordingly, the proposed regulations withdraw the rule in § 1.985–5(e)(2).

For similar reasons, the Treasury Department and the IRS are studying whether § 1.985–7(c)(3), which requires certain adjustments by a United States shareholder related to foreign currency gain or loss with respect to PTEP in cases involving dollar approximate separate transactions method of accounting, should be modified.

G. Qualified Deficit Transition Rule for Domestic Partnerships (Including S Corporations)

Under the qualified deficit rule of section 952(c)(1)(B), a United States shareholder's pro rata share of any prior-year E&P deficit of a CFC may generally be used to reduce the United States shareholder's subpart F income inclusion with respect to the CFC to the extent such deficit is attributable to the same qualified activity as the activity that gives rise to the current year subpart F income of the CFC (and has not already been taken into account under section 952(c)(1)(B)). For this purpose, the United States shareholder's pro rata share of any prior-year E&P deficit is the lesser of the amount determined (under rules similar to section 951(a)(2)) at the close of the current taxable year or at the close of the taxable year in which the deficit arose. Section 952(c)(1)(B)(iv).

As described in part III.A of the Background, because a domestic partnership was previously treated as an entity for purposes of including amounts in income under section 951(a)(1)(A) with respect to CFCs it owned, the domestic partnership would have been entitled to utilize those CFCs' qualified deficits to reduce its subpart F income inclusions. However, under § 1.958–1(d), a domestic partnership is now generally treated as an aggregate of its partners for purposes of determining which United States shareholder has a subpart F income inclusion with respect to a CFC. To accommodate this aggregate approach for domestic partnerships, and like the transition rule for partnership-level accounts described in proposed § 1.959–11(e) and part IX.B.5 of the Explanation of Provisions, the proposed regulations provide a transition rule that ensures a prior-year E&P deficit of a CFC is taken into account by a domestic partnership's United States shareholder partners for taxable years of the CFC to which § 1.958–1(d) applies to the domestic

partnership. *See* proposed § 1.952–1(c)(5).

Under the transition rule, a United States shareholder that owns stock of a CFC through an interest in a domestic partnership on the transition date (which is the last day of the first taxable year of the CFC to which § 1.958–1(d) applies to the domestic partnership) takes into account its assigned portion of any prior-year E&P deficit of the CFC that arose before the application of § 1.958–1(d) in determining the shareholder's pro rata share of a prior-year E&P deficit under section 952(c)(1)(B)(iv)(II). *See* proposed § 1.952–1(c)(5)(i). The United States shareholder's assigned portion is determined based on liquidation rights as of the transition date. *See* proposed § 1.952–1(c)(5)(ii); *see also* part IX.B.5 of the Explanation of Provisions (discussing a similar concept used in pushing out annual PTEP accounts, dollar basis pools, and PTEP tax pools to partners). The United States shareholder's pro rata share of the prior-year E&P deficit as of the close of the taxable year in which section 952(c)(1)(B) would apply to reduce its subpart F income inclusion is determined by reference to the United States shareholder's ownership of the stock of the CFC at such time.

As with the proposed regulations generally, an S corporation is treated in the same manner as a domestic partnership for purposes of applying this transition rule. *See* section 1373(a) and part VIII.A of the Explanation of Provisions. However, unlike domestic partnerships, an S corporation may have elected to defer the application of § 1.958–1(d) and maintain entity treatment for purposes of section 951(a)(1)(A), in which case the transition rule may not apply until such election ceases to have effect. *See* part VIII.A of the Explanation of Provisions.

The transition rule generally applies with respect to taxable years of foreign corporations beginning on or after the date the proposed regulations are finalized in a Treasury Decision, although taxpayers are permitted to apply the transition rule to earlier taxable years if certain consistency requirements are satisfied and the period of limitations on assessment is open for those taxable years under section 6501. *See* proposed § 1.952–1(c)(5)(iii).

H. Anti-Avoidance Rules

The proposed regulations include anti-avoidance rules. *See* proposed §§ 1.959–1(d) and 1.961–1(d). Under these rules, appropriate adjustments are made if a transaction, series of

transactions, plan, or arrangement is engaged in with a principal purpose of avoiding the purposes of section 959 or 961 or the regulations thereunder. These rules are intended to address transactions that are designed to produce double-nontaxation by, for instance, converting distributions of E&P from PTEP (which generally may be received tax-free under section 959 but requires a basis reduction under section 961) to section 959(c)(3) E&P (which may be received tax-free under other provisions and may not require a basis reduction) or vice versa.

For example, assume a corporate covered shareholder owns all the stock of a foreign corporation and the foreign corporation has PTEP with respect to the corporate covered shareholder. If an individual who would have purchased newly issued shares in the foreign corporation instead purchases shares from the corporate covered shareholder with a principal purpose of succeeding to a portion of the foreign corporation's PTEP with respect to the corporate covered shareholder's PTEP and with the expectation that at some point in the future the corporate covered shareholder will contribute the proceeds to the foreign corporation (thus achieving the individual's intended effect of acquiring newly issued shares, while also transferring the PTEP from the corporate covered shareholder to the individual), appropriate adjustments may be made to disregard the transfer of PTEP. The result would be the same if the transaction was entered into with a principal purpose of reducing the foreign corporation's PTEP with respect to the corporate covered shareholder.

I. Clarifications and Other Matters

The proposed regulations clarify that a distribution of PTEP does not increase the E&P of a recipient domestic corporation (because the E&P of a domestic corporation is increased for, and at the time of, an inclusion giving rise to PTEP, and distributions to which sections 959 and 961(b) apply are described in section 312(f)(2)). See proposed §§ 1.312–6(f) and 1.312–8(c). No inference is intended as to the treatment under these provisions of other amounts a domestic corporation includes in its gross income as a result of ownership of stock in a foreign corporation, such as inclusions with respect to a PFIC, and the Treasury Department and IRS continue to consider these issues. Additionally, the proposed regulations clarify that, solely for purposes of the limitation in section 952(c)(1)(A), PTEP received by, or resulting from section 961(c) basis of, a CFC is not included in the CFC's current

year E&P. See proposed § 1.952–1(c)(4). This treatment is consistent with § 1.952–1(c)(3) (*Example 1*) and coordinates sections 952(c), 959(b), and 961(c) so that PTEP does not have the effect of increasing subpart F income.

The proposed regulations also provide that, for purposes of section 163(j), PTEP received by, or resulting from section 961(c) basis of, a foreign corporation does not give rise to tentative taxable income (because the income that gave rise to the PTEP has already been taken into account), and this rule is issued under the express delegation of authority in section 163(j)(8)(B). See proposed § 1.163(j)–7(g)(2). Moreover, the proposed regulations revise § 1.951–1(a)(1) to reflect the repeal of provisions relating to foreign base company shipping income and foreign investments in less developed countries and move the examples in § 1.951–1(e)(7) to a separate example paragraph.

The proposed regulations modify § 1.905–3(b)(2)(ii) to clarify that if a foreign tax redetermination impacts the characterization or amount of a distribution or inclusion in any other year, that year is an affected year for which a redetermination of U.S. tax is required. This is a conforming change relating to the timing and ordering rules in the proposed regulations, which could, in certain situations, result in a foreign tax redetermination impacting the characterization or amount of a distribution or inclusion not only in a subsequent year, but in a prior year.

IX. Applicability Dates and Transition Rules

A. Applicability Dates

1. General Applicability Date and Application to 2019 Notice Years

The proposed regulations would generally apply to taxable years of foreign corporations beginning on or after the date the proposed regulations are finalized in a Treasury Decision and to taxable years of persons for which such taxable years of foreign corporations are relevant (general applicability date). See, for example, proposed §§ 1.951–1(i), 1.951–2(i), 1.959–12(b), 1.960–7(c), 1.961–14(b), 1.986(c)–1(e), and 1.1502–59(g).

Notwithstanding the general applicability date, portions of the proposed section 959 regulations relating to rules described in the 2019 notice would apply before the general applicability date to taxable years of United States shareholders (and successors in interest) ending after December 14, 2018, and taxable years of foreign corporations ending with or

within those taxable years, as described in the 2019 notice (2019 notice years). See proposed § 1.959–12(c). For this purpose, taxpayers are required to apply to 2019 notice years the rules in proposed §§ 1.959–1(c) (treatment of S corporations), 1.959–2 (accounting of PTEP), 1.959–3 (adjustments to shareholder-level accounts and, consequently, foreign-corporation level accounts), 1.959–4(e) and 1.959–5(d) (allocation of distributions and section 956 amounts), and the relevant definitions in 1.959–1(b) (collectively, the 2019 notice provisions). Consistent with the 2019 notice, PTEP is treated as distributed under section 959 to the extent the distribution constitutes a dividend under section 316 (determined without regard to section 959(d)). Additionally, because taxpayers may have maintained PTEP groups in accordance with the groups described in the 2019 notice, taxpayers may use those PTEP groups for 2019 notice years instead of the PTEP groups listed in proposed § 1.959–2. Furthermore, neither the portions of proposed §§ 1.959–2 and 1.959–3 relating to PTEP tax pools, corporate PTEP tax pools, adjusted applicable percentages, and section 965(c) deduction percentages, nor the portions of proposed §§ 1.959–3 through 1.959–5 and 1.959–7 relating to the timing of adjustments and determinations, are 2019 notice provisions, and, therefore, taxpayers are not required to apply these provisions to 2019 notice years.

Apart from the 2019 notice provisions, the proposed regulations would apply before the general applicability date only if taxpayers choose to apply the proposed regulations early in accordance with the rules described in part IX.A.2 of the Explanation of Provisions.

2. Early Application Option

Taxpayers would be permitted to choose to apply the proposed regulations in their entirety to taxable years of foreign corporations beginning before the general applicability date (such years to which the regulations are applied, the early application years) if certain conditions prescribed in proposed § 1.959–12(d) are satisfied (early application option). See, for example, proposed §§ 1.951–1(i), 1.951–2(i), 1.960–7(c), 1.961–14(b), 1.986(c)–1(e), and 1.1502–59(g). The early application option would satisfy, and therefore supersede, the required application of the 2019 notice provisions if the first early application year precedes, or is the same as, the first 2019 notice year. See proposed § 1.959–12(c).

Under the early application option, taxpayers must apply the proposed regulations, as finalized, in their entirety to an early application year and all succeeding early application years, all taxable years of covered shareholders for which the early application years are relevant, and all taxable years of related foreign corporations (determined under section 267(b)) that end on or after the later of the last day of the first early application year and the first day on which the foreign corporations are related. *See* proposed § 1.959–12(d)(2). Further, all taxable years of covered shareholders for which the early application years are relevant must be open under section 6501, which each covered shareholder must confirm in a written statement to the foreign corporation that also provides the covered shareholder's consent to apply the proposed regulations before the general applicability date. *See* proposed § 1.959–12(d)(3) and (4). These conditions are intended to promote consistency and administrability.

B. Transition Rules

1. In General

To facilitate the initial application of the proposed regulations, the proposed regulations include transition rules under section 959 for establishing and conforming accounts under section 959, as well as rules under section 961 for establishing derived basis and section 961(c) basis. These rules also address particular transition issues relating to the treatment of domestic partnerships (including S corporations).

2. Annual PTEP Accounts, Dollar Basis Pools, and Corporate PTEP Accounts

As of the beginning of the first taxable year of a foreign corporation to which the proposed section 959 regulations apply pursuant to the 2019 notice or the early application option, a reasonable method must be used to establish annual PTEP accounts, dollar basis pools, and corporate PTEP accounts in accordance with proposed § 1.959–2, including to reflect any prior adjustments that would have been made under the principles of proposed §§ 1.959–2 through 1.959–5 and 1.959–7. *See* proposed § 1.959–11(b)(1) and (2)(i). Additionally, adjustments must be made to account for the transition tax under section 965. *See* proposed § 1.959–11(b)(3).

In establishing these accounts, any existing accounts of a covered shareholder must be conformed to the requirements of proposed § 1.959–2. *See* proposed § 1.959–11(b)(2)(i). Further, in the case of existing accounts tracking

PTEP or dollar basis in multi-year pools, a reasonable method to conforming the accounts includes an approach consistent with the rules in the 2019 notice. *See* proposed § 1.959–11(b)(2)(ii).

Lastly, a reasonable method used to establish annual PTEP accounts, dollar basis pools, and corporate PTEP accounts must be consistently applied by the covered shareholder with respect to all foreign corporations in which the covered shareholder owns stock. The same method must also be applied by all covered shareholders that join in filing a federal income tax return (for example, domestic corporations that file a consolidated federal income tax return in cases where the early application option does not apply). *See* proposed § 1.959–11(b)(2)(i). In cases where there are multiple covered shareholders of a foreign corporation, corporate PTEP accounts of a foreign corporation are established based on the reasonable method applied by each covered shareholder. Thus, for example, assume US1, a covered shareholder, owns all the stock of CFC1 and 40% of the stock of CFC2, and that both CFC1 and CFC2 are foreign corporations. The remaining 60% of the stock of CFC2 is owned by US2, a covered shareholder unrelated to US1. US1 must consistently use a reasonable method for establishing its annual PTEP accounts and dollar basis pools with respect to CFC1 and CFC2, and US2 must use a reasonable method for its own determination of those accounts with respect to CFC2. CFC1's corporate PTEP accounts would then reflect the annual PTEP accounts of US1, and CFC2's corporate PTEP accounts would then reflect the annual PTEP accounts of US1 and US2.

3. PTEP Tax Pools, Corporate PTEP Tax Pools, and Section 965 Related Amounts

As of the beginning of the first taxable year of a foreign corporation to which the proposed section 959 regulations apply pursuant to the general applicability date or the early application option, the proposed regulations require the establishment of PTEP tax pools, corporate PTEP tax pools, adjusted applicable percentages, and section 965(c) deduction percentages reflecting the foreign corporation's PTEP. *See* proposed § 1.959–11(c)(1).

PTEP tax pools and corporate PTEP tax pools are established by adding a pro rata portion of the foreign corporation's PTEP group taxes (prior-law PTEP group taxes) with respect to PTEP groups (prior-law PTEP group), as those terms are defined in current § 1.960–3, to each PTEP tax pool with

respect to the foreign corporation. *See* proposed § 1.959–11(c)(2). This is determined by multiplying the prior-law PTEP group taxes by a fraction, the numerator of which is the balance of the prior-law PTEP group that is PTEP relating to the PTEP tax pool, and the denominator of which is the balance of the prior-law PTEP group.

An adjusted applicable percentage is established with respect to all the foreign corporation's PTEP resulting from section 965 within a covered shareholder's annual PTEP accounts relating to the same section 904 category by calculating a weighted average of the applicable percentages with respect to the PTEP (as defined in § 1.965–5(d)). *See* proposed § 1.959–11(c)(3). A section 965(c) deduction percentage is established with respect to all the foreign corporation's PTEP resulting from section 965(a) within a covered shareholder's annual PTEP accounts relating to the same section 904 category by calculating a weighted average of the percentages for which foreign currency gain or loss recognized under section 986(c) with respect to distributions of the PTEP would be reduced under current § 1.986(c)–1. *See* proposed § 1.959–11(c)(4).

4. Derived Basis of Partnerships and Section 961(c) Basis

As of the beginning of the first taxable year of a foreign corporation to which the proposed section 961 regulations apply pursuant to the general applicability date or the early application option, a partnership's derived basis or a CFC's section 961(c) basis of a property unit is established based on the amount of basis that would exist in the property unit if the principles of the applicable proposed section 961 regulations were to have applied for all prior periods, determined using a reasonable method. *See* proposed § 1.961–13(b)(1), (2), and (3). The reasonable method must be consistently applied to each foreign corporation owned by the partnership or CFC and with respect to each covered shareholder that owns an interest in the partnership or stock in the CFC. For this purpose, the establishment of section 961(c) basis includes replacing any existing basis under section 961(c) in the property unit, to the extent a foreign corporation took the position under current law that it was afforded such basis, with section 961(c) basis as prescribed in the proposed section 961 regulations.

The rule for establishing derived basis applies to foreign partnerships and is also applicable to domestic partnerships (including S corporations) to the extent

that aggregate treatment applies with respect to the domestic partnership under § 1.958–1(d) or former § 1.951A–1(e)(1) (as in effect before TD 9960, 87 FR 3648) before the application of the proposed section 961 regulations. However, in the case of a domestic partnership, the amount of any derived basis does not take into account amounts included in income by the domestic partnership or any lower-tier domestic partnership for periods in which aggregate treatment does not apply. For example, if a domestic partnership directly owns stock in a CFC, the domestic partnership's derived basis is determined without regard to any subpart F income inclusion of the domestic partnership attributable to the CFC in a period before § 1.958–1(d) applies to the domestic partnership, which instead gives rise to adjusted basis of the domestic partnership under section 961(a). *See* part IX.B.5 of the Explanation of Provisions for a discussion of the treatment of such basis under the proposed regulations, which is not converted into derived basis as a result of § 1.958–1(d) applying to the domestic partnership.

The proposed regulations also provide that a specified foreign corporation that is not otherwise a CFC is treated as a CFC for purposes of applying the principles of proposed § 1.961–3 to an income inclusion under section 951(a)(1)(A) that arises by reason of section 965(a). *See* proposed § 1.961–13(b)(4). This rule is intended to clarify that basis increases are made to stock of a foreign corporation for inclusions arising under section 965(a) regardless of CFC status. However, no basis increases are afforded under section 961 for PTEP attributable to section 965(b). *See* section 965(b)(4)(A) (providing that the amount of the reduction described in section 965(b) is treated as included in gross income under section 951(a) only for purposes of applying section 959).

The transition rules for the establishment of derived basis and section 961(c) basis are intended to facilitate the application of the rules governing such basis under the proposed regulations and should not be interpreted in a manner that results in a double benefit. To ensure this result, the proposed regulations provide that derived basis or section 961(c) basis is increased to reflect an income inclusion under section 951(a)(1)(A) or 951A(a) only to the extent such an increase would not duplicate basis at the level of the partnership or CFC to reflect the income inclusion. *See* proposed § 1.961–13(b)(5). Thus, for example, if a foreign partnership was provided basis

with respect to stock in a foreign corporation under § 1.965–2(h)(5)(ii) for an income inclusion, no derived basis is provided to the foreign partnership under the proposed regulations for the inclusion (and any existing basis under § 1.965–2(h)(5)(ii) in the property unit remains and, thus, is not converted to derived basis). As an additional example, if a CFC previously claimed basis under section 961(c) for an income inclusion, section 961(c) basis is provided to the CFC under the proposed regulations for the inclusion only to the extent the previously-claimed-basis has not been used (and, therefore, can be replaced with section 961(c) basis pursuant to the proposed regulations).

5. Treatment of Domestic Partnerships (Including S Corporations)

For taxable years of a domestic partnership (including an S corporation by operation of section 1373(a)) to which § 1.958–1(d)(1) does not apply, the domestic partnership is treated as an entity separate from its owners in determining stock ownership for purposes of section 951(a) and therefore is required to include amounts in gross income under section 951(a). In these cases, foreign corporations may have PTEP with respect to the domestic partnership and the domestic partnership may have been provided basis under section 961(a). Moreover, in a case where former § 1.951A–1(e)(1) (as in effect before TD 9960, 87 FR 3648) treated the domestic partnership as an aggregate of its partners for purposes of applying section 951A and related provisions, both the domestic partnership and its partners may be United States shareholders with income inclusions attributable to the same CFC.

The proposed regulations address the treatment of domestic partnerships before the application of § 1.958–1(d)(1) by, in these cases, treating the domestic partnership as a covered shareholder. *See* proposed §§ 1.959–11(d) and 1.961–13(c). In addition, rules regarding distributions of PTEP, derived basis (of a partnership that is owned by the domestic partnership), and section 961(c) basis (of a CFC that is owned by the domestic partnership) apply to the domestic partnership in its capacity as a covered shareholder before those rules apply to covered shareholders that own interests in the domestic partnership. *See* proposed §§ 1.959–11(d) and 1.961–13(c). In this way, the PTEP and basis afforded with respect to a domestic partnership as a covered shareholder are taken into account before looking to the PTEP and basis with respect to covered shareholders that own interests in the partnership. In addition to providing a

rule for coordinating the operation of these provisions in the interim period before § 1.958–1(d)(1) applies, this rule should reduce the amount of PTEP and basis of a domestic partnership that ultimately must be converted to be with respect to covered shareholders that own interests in the partnership when § 1.958–1(d) applies.

Once both § 1.958–1(d)(1) and the proposed regulations apply to a domestic partnership (and, consequently, the domestic partnership is no longer a covered shareholder), the proposed regulations convert the domestic partnership's accounts described in proposed § 1.959–2 (annual PTEP accounts, dollar basis pools, and PTEP tax pools) to accounts with respect to covered shareholders owning interests in the domestic partnership, including the deemed covered shareholder to the extent any interest in the domestic partnership is not owned by a covered shareholder. *See* proposed § 1.959–11(e). Similarly, the proposed regulations convert a CFC's section 961(c) basis with respect to the domestic partnership to section 961(c) basis with respect to covered shareholders owning interests in the domestic partnership (including the deemed covered shareholder). *See* proposed § 1.961–13(d). Additionally, because another partnership may have derived basis with respect to the domestic partnership (for example, if the domestic partnership owns an interest in a foreign partnership that owns stock of a CFC, with the foreign partnership having derived basis with respect to the domestic partnership), the proposed regulations likewise convert the other partnership's derived basis to derived basis with respect to covered shareholders owning interests in the domestic partnership. *See id.*

The conversion of the domestic partnership's annual PTEP accounts, dollar basis pools, and PTEP tax pools is based on liquidation rights and occurs once the proposed regulations apply to the domestic partnership (either pursuant to the general applicability date or the early application option) or, if later, once § 1.958–1(d) first applies to the domestic partnership (including, in the case of S corporations, because an election not to apply § 1.958–1(d) ceases to have effect). *See* proposed § 1.959–11(e)(2)(i)(B). Because the conversion of accounts under these rules depends on when § 1.958–1(d) first applies to a particular domestic partnership, the rules may apply at different times in cases where stock of a foreign corporation is owned through tiers of domestic partnerships.

The conversion of derived basis or section 961(c) basis is determined consistently, and occurs concurrently, with the conversion of the accounts under section 959. *See* proposed § 1.961–13(d)(2)(i) and (3)(i). The proposed regulations do not convert basis previously provided to the domestic partnership under section 961(a) into derived basis, nor do the proposed regulations affect prior basis adjustments made under section 705. Thus, for example, if a domestic corporation owns an interest in a foreign partnership, and that foreign partnership owns an interest in a domestic partnership that owns stock of a CFC, the proposed regulations do not alter the treatment of basis provided to the domestic partnership in its CFC stock under section 961(a) or the related basis afforded to the foreign partnership in its domestic partnership interest under section 705.

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

II. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) generally requires that a Federal agency obtain the approval of the Office of Management and Budget before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. There are no additional information collection requirements associated with the proposed regulations.

III. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (5 U.S.C. chapter 6) (RFA) requires the agency to prepare and make available for public comment an initial regulatory flexibility analysis that will describe the impact of the proposed rule on small entities. *See* 5 U.S.C. 603(a). Section 605 of the RFA provides an exception to this requirement if the agency certifies that the proposed rulemaking will not have a substantial economic impact on a substantial number of small entities. A small entity is defined as a small business, small nonprofit organization,

or small governmental jurisdiction. *See* U.S.C. 601(3) through (6).

The Treasury Department and the IRS do not expect that the proposed regulations will have a significant economic impact on a substantial number of small entities within the meaning of sections 601(3) through (6) of the RFA. The proposed regulations provide guidance on issues regarding sections 959 and 961 and related provisions but do not change the economic impact of the existing regulations or impose any new costs on small entities. It is unlikely the proposed regulations will affect a substantial number of small businesses due to the significant resources and investment required to engage in the type of foreign operations to which the proposed regulations are relevant. However, because there is a possibility of significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis for the regulation is provided below. The Treasury Department and the IRS request comments from the public on the number of small entities that may be impacted and whether that impact will be economically significant.

Pursuant to section 7805(f) of the Code, the proposed regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses.

A. Reasons Why the Action Is Being Considered

The proposed regulations update the core aspects of the PTEP system in a manner that addresses both longstanding issues and more recent issues (such as those arising under the Act), thereby reducing potential uncertainty under the existing regulations, ensuring consistent outcomes across taxpayers and economically similar transactions, and preventing double taxation and double non-taxation. These updates to the PTEP system involve PTEP accounting, the application of section 959(b), the application of section 961 as to certain property owned by a partnership, the application of section 961(c), and rules coordinating sections 951(a), 959(b), and 961(c).

The proposed regulations described in part II of the Explanation of Provisions establish covered shareholder-specific PTEP accounts, and this accounting prevents inappropriate outcomes that could arise under an alternative approach in light of the Act (such as share-specific accounting) while ensuring a covered shareholder the benefit of PTEP relating to it. This

covered shareholder-specific accounting applies to the other aspects of the PTEP system—namely, sections 986(c) and 960(b)—and ensures consistency across the PTEP system. The proposed regulations also provide rules under sections 959(b) and 951 that address longstanding issues that arise in certain split-ownership structures (that is, structures in which stock of a CFC is not all owned by a single United States shareholder), which issues were exacerbated by the Act.

The proposed regulations described in part III of the Explanation of Provisions provide guidance addressing longstanding issues under section 961. That is, the proposed regulations provide rules to adjust the basis in shares of stock of a foreign corporation owned indirectly by a covered shareholder through only one or more partnerships, and the basis under section 961(c) in shares of stock of a foreign corporation owned by a CFC, to reflect the foreign corporation's PTEP with respect to the covered shareholder. Additionally, the proposed regulations, as discussed in part III.E of the Explanation of Provisions, provide rules treating E&P generated by gain to which section 961(c) is applied as PTEP. This approach ensures consistent outcomes across economically similar transactions regardless of how a foreign corporation's PTEP is monetized (whether through a distribution to which section 959(b) applies or a disposition to which section 961(c) applies), and, by treating the E&P as PTEP, reflects the policy of sections 959 and 961 and prevents both double taxation and double non-taxation.

The proposed regulations, as discussed in part IV of the Explanation of Provisions, provide rules under section 951 that work in tandem with sections 959(b) and 961(c) to perfect the approach discussed in the preceding paragraphs. These rules comprise two sets of rules, one applying at the foreign corporation-level and one applying at the shareholder-level, that together ensure that attributes like PTEP and section 961(c) basis are allocated to the appropriate shareholder, consistent with the shareholder-specific nature of sections 959(b) and 961(c).

B. Objectives of, and Legal Basis for, the Proposed Regulations

The proposed regulations are intended to provide guidance addressing core aspects of the PTEP system and significant statutory changes since the current regulations were finalized. The legal basis for these regulations is contained in various sections of the Code, including sections 959, 960, 961, 965, 986, and 7805.

C. Small Business Entities to Which These Regulations Will Apply

Because an estimate of the number of small businesses affected is not currently feasible, this initial regulatory flexibility analysis assumes that a substantial number of small businesses will be affected. However, as noted above, the Treasury Department and the IRS believe that it is unlikely the proposed regulations will affect a substantial number of small businesses due to the significant resources and investment required to engage in the type of foreign operations to which the proposed regulations are relevant. The Treasury Department and the IRS do not expect that these regulations will affect a substantial number of small nonprofit or small governmental jurisdictions.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

In certain cases, the proposed regulations require information that currently is tracked at the foreign corporation-level to also be tracked at the shareholder-level.

E. Duplicate, Overlapping, or Relevant Federal Rules

The proposed regulations would replace portions of existing regulations. The Treasury Department and the IRS are not aware of any Federal rules that duplicate, overlap, or conflict with these regulations.

F. Alternatives Considered

The Treasury Department and the IRS considered alternatives including alternatives to treating E&P generated by gain to which section 961(c) applies as PTEP. One alternative, as discussed in part III.E.2.ii of the Explanation of Provisions, involved treating such E&P as section 959(c)(3) E&P. However, this approach was not adopted because it could lead to double taxation or double non-taxation, while also creating dissymmetry between distributions (E&P to which annual PTEP accounts apply is PTEP) and dispositions involving foreign stock (E&P to which section 961(c) basis applies is not PTEP). The proposed regulations, by providing certainty regarding longstanding issues under section 961(c), reduce economic burden, and, by protecting the policies underlying sections 959 and 961, ensure a covered shareholder the benefit of PTEP relating to it; this represents the approach with the least economic impact.

The Treasury Department and the IRS also considered alternatives to the proposed rules under section 951 that work in tandem with sections 959(b) and 961(c). But the alternatives either

could not provide the certainty or the consistency of the approach in the proposed regulations or could not properly protect against double taxation or double non-taxation.

The proposed regulations, and the PTEP system generally, apply uniformly to large and small business entities. The Treasury Department and the IRS are of the view that such an approach is necessitated by the statutory scheme; in other words, a small business exception could undermine the provisions comprising the PTEP system. Accordingly, there is no viable alternative to the proposed regulations for small entities.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. The proposed regulations do not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. The proposed regulations do not have federalism implications, do not impose substantial direct compliance costs on State and local governments, and do not preempt State law within the meaning of the Executive order.

Comments and Requests for a Public Hearing

Before the proposed regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the **ADDRESSES** section. In addition to the comments specifically requested in the Explanation of Provisions, the Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any comments submitted will be made available at www.regulations.gov or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits written comments. Requests for a public hearing are encouraged to be made electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**.

Statement of Availability of IRS Documents

Any IRS Revenue Procedures, Revenue Rulings, Notices, or other guidance cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at www.irs.gov.

Drafting Information

The principal authors of these regulations are Karen R. Li, Elena M. Madaj and Chadwick Rowland, Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by revising the entry for § 1.951–1, adding entries in numerical order for §§ 1.951–2, 1.959–1 through 1.959–12, and 1.961–1 through 1.961–13, revising the entry for § 1.986(c)–1, and adding an entry in numerical order for § 1.1502–59 to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

* * * * *

Sections 1.951–1 and 1.951–2 also issued under 26 U.S.C. 951, 959, and 961.

* * * * *

Sections 1.959–1 through 1.959–12 also issued under 26 U.S.C. 245A(g), 904(d)(7), 951A(f)(1)(B), 959, 960(f), 962, 965(o), 986, 986(c)(2), 989(c), and 1373.

* * * * *

Sections 1.961–1 through 1.961–13 also issued under 26 U.S.C. 743(b), 959, 961 and 961(a), (b), and (c), 965(o), and 1373.

* * * * *

Section 1.986(c)–1 also issued under 26 U.S.C. 962, 965(o), 986 and 986(c)(2), and 989(c).

* * * * *

Section 1.1502–59 also issued under 26 U.S.C. 959, 960, 961, 986, and 1502.

* * * * *

■ **Par. 2.** Section 1.163(j)–7 is amended by:

- 1. Revising paragraph (g)(2); and
- 2. Adding a sentence to the end of paragraph (m)(2).

The revision and addition read as follows:

§ 1.163(j)–7 Application of the section 163(j) limitation to foreign corporations and United States shareholders.

* * * * *

(g) * * *

(2) *Treatment of certain dividends and previously taxed earnings and*

profits. For purposes of computing the ATI of a relevant foreign corporation for a taxable year, the following amounts are (without duplication) subtracted from tentative taxable income—

(i) Any dividend included in gross income that is received from a related person, within the meaning of section 954(d)(3), with respect to the distributee; and

(ii) Any previously taxed earnings and profits that are distributed to the foreign corporation in a covered distribution (determined under § 1.959–4) or that result from the application of section 961(c) basis to covered gain recognized by the foreign corporation (determined under § 1.961–9).

* * * * *

(m) * * *

(2) * * * Paragraph (g)(2)(ii) of this section applies to a taxable year of a foreign corporation that begins on or after [date of publication of final regulations in the **Federal Register**] or is an early application year (as described in § 1.959–12(d)) and to a taxable year of a person for which such taxable year of that foreign corporation is relevant.

* * * * *

■ **Par. 3.** Section 1.245A(d)–1 is amended by:

- 1. Revising the first sentence of paragraph (c)(22); and
- 2. For each paragraph listed in the table, removing the language in the “Remove” column wherever it appears and adding in its place the language in the “Add” column:

Paragraph	Remove	Add
(d)(2)(i)	section 951A PTEP (as defined in § 1.960–3(c)(2)(viii)) in a single annual PTEP account (as defined in § 1.960–3(c)(1)).	previously taxed earnings and profits assigned to the section 951A PTEP group (as defined in § 1.959–1(b)) within a single annual PTEP account (as defined in § 1.959–1(b)).
(d)(2)(ii)(B)	section 951A PTEP	previously taxed earnings and profits assigned to the section 951A PTEP group.
(d)(3)(i)	section 951A PTEP (as defined in § 1.960–3(c)(2)(viii)) in a single annual PTEP account (as defined in § 1.960–3(c)(1)).	previously taxed earnings and profits assigned to the section 951A PTEP group (as defined in § 1.959–1(b)) within a single annual PTEP account (as defined in § 1.959–1(b)).
(d)(3)(ii)(B)	section 951A PTEP	previously taxed earnings and profits assigned to the section 951A PTEP group.
(d)(4)(i)	section 951(a)(1)(A) PTEP (as defined in § 1.960–3(c)(2)(x)) in a single annual PTEP account (as defined in § 1.960–3(c)(1)).	previously taxed earnings and profits assigned to the section 951(a)(1)(A) PTEP group (as defined in § 1.959–1(b)) within a single annual PTEP account (as defined in § 1.959–1(b)).
(d)(4)(i)	section 951(a)(1)(A) PTEP	previously taxed earnings and profits assigned to the section 951(a)(1)(A) PTEP group.
(d)(4)(ii)(B)(1) through (3), and (D)	section 951(a)(1)(A) PTEP	previously taxed earnings and profits assigned to the section 951(a)(1)(A) PTEP group.

The revision reads as follows:

§ 1.245A(d)–1 Disallowance of foreign tax credit or deduction.

* * * * *

(c) * * *

(22) * * * The term *section 245A(d) PTEP* means previously taxed earnings and profits assigned to a section 245A(d) PTEP group or a reclassified section 245A(d) PTEP group (each as defined in § 1.959–1(b)). * * *

* * * * *

■ **Par. 4.** Section 1.312–6 is amended by adding paragraph (f) to read as follows:

§ 1.312–6 Earnings and profits.

* * * * *

(f) An amount included in a corporation’s gross income under section 951(a) or 951A(a) for a particular period is taken into account in computing the corporation’s earnings and profits for that period. *See also* § 1.312–8(c) (domestic corporation’s

receipt of previously taxed earnings and profits does not increase earnings and profits). This paragraph (f) applies to a taxable year of a corporation beginning on or after [date of publication of final regulations in the **Federal Register**]. This paragraph (f) also applies to a taxable year of a domestic corporation that is a shareholder in a foreign corporation, if a taxable year of the foreign corporation that is an early application year (as described in § 1.959–12(d)) ends with or within the taxable year of the domestic corporation.

■ **Par. 5.** Section 1.312–8 is amended by adding paragraph (c) to read as follows:

§ 1.312–8 Effect on earnings and profits of receipt of tax-free distributions requiring adjustment or allocation of basis of stock.

* * * * *

(c) Previously taxed earnings and profits that are distributed to a domestic corporation in a covered distribution

(determined under § 1.959–4) do not increase the corporation’s earnings and profits. *See* §§ 1.959–4 and 1.961–4 for rules excluding distributed previously taxed earnings and profits from gross income and reducing basis. *See also* § 1.312–6(f) (sections 951(a) and 951A(a) inclusions increase earnings and profits). This paragraph (c) applies to a taxable year of a domestic corporation beginning on or after [date of publication of final regulations in the **Federal Register**]. This paragraph (c) also applies to a taxable year of a domestic corporation that is a shareholder in a foreign corporation, if a taxable year of the foreign corporation that is an early application year (as described in § 1.959–12(d)) ends with or within the taxable year of the domestic corporation.

■ **Par. 6.** Section 1.743–1 is amended by adding paragraphs (d)(4) and (j)(7) to read as follows:

§ 1.743–1 Optional adjustment to basis of partnership property.

* * * * *

(d) * * *

(4) *Coordination with derived basis.*

See § 1.961–5(d) for a rule coordinating the application of this paragraph (d) with derived basis that transfers to a transferee.

* * * * *

(j) * * *

(7) *Covered distributions treated as previously taxed earnings and profits.*

See § 1.961–4(c)(2)(iii) for rules regarding the use of a positive basis adjustment under section 743(b) upon the receipt of a covered distribution that is treated as previously taxed earnings and profits with respect to certain direct or indirect partners of the partnership.

* * * * *

§ 1.861–20 [Amended]

■ **Par. 7.** Section 1.861–20 is amended by:

■ 1. In paragraph (a), adding the language “1.959–6,” after the language, “1.904–6,”;

■ 2. In paragraph (d)(2)(ii)(B), adding the language “§ 1.959–6(c) and” before the language “§ 1.960–1(d)(3)(ii)”, and removing the language “income groups or PTEP groups” and adding the language “previously taxed earnings and profits and to income groups, respectively,” in its place;

■ 3. In paragraph (d)(3)(i)(B)(1), adding the language “§ 1.959–6(c) and” before the language “§ 1.960–1(d)(3)(ii)”, and removing the language “income groups or PTEP groups” and adding the language “previously taxed earnings and profits and to income groups, respectively,” in its place; and

■ 4. In paragraph (g)(6)(i), removing the language “section 965(a) PTEP (as defined in § 1.960–3(c)(2)(vi)) in a single annual PTEP account (as defined in § 1.960–3(c)(1))” and adding the language “previously taxed earnings and profits assigned to the section 965(a) PTEP group (as defined in § 1.959–1(b)) within a single annual PTEP account (as defined in § 1.959–1(b))” in its place.

§ 1.904–6 [Amended]

■ **Par. 8.** Section 1.904–6 is amended by:

■ 1. In paragraph (e)(2), removing the language “§ 1.959–1” and adding the language “§ 1.959–4” in its place, adding the language “(as defined in § 1.959–1(b))” after “annual PTEP account”, and removing the language “§ 1.960–3(c)” and adding the language “§ 1.959–1(b)” in its place;

■ 2. Removing paragraph (e)(3);

■ 3. Redesignating paragraph (e)(4) as new paragraph (e)(3);

■ 4. In newly redesignated paragraph (e)(3)(i), removing the language “(e)(4)(ii)” and adding the language “(e)(3)(ii)” in its place; and

■ 5. In newly redesignated paragraph (e)(3)(ii)(C), removing the language “(e)(4)(ii)(B)” and adding the language “(e)(3)(ii)(B)” in its place.

§ 1.905–3 [Amended]

■ **Par. 9.** Section 1.905–3 is amended by:

■ 1. In paragraph (a), removing the language “PTEP group taxes (as defined in § 1.960–3(d)(1))” and adding the language “a tax pool described in § 1.959–2(b)(4) or (d)(2)” in its place;

■ 2. In the fifth sentence of paragraph (a), removing the language “PTEP group taxes” and adding the language “a tax pool described in § 1.959–2(b)(4) or (d)(2)” in its place;

■ 3. In the last sentence of paragraph (a), removing the language “PTEP group taxes” and adding the language “a tax pool described in § 1.959–2(b)(4) or (d)(2)” in its place; and

■ 4. In the last sentence of paragraph (b)(2)(ii), removing the language “subsequent”.

§ 1.905–4 [Amended]

■ **Par. 10.** Section 1.905–4 is amended by, in paragraph (c)(6), removing the language “PTEP group taxes (as defined in § 1.960–3(d)(1))” and adding the language “a tax pool described in § 1.959–2(b)(4) or (d)(2)” in its place.

■ **Par. 11.** Section 1.951–1 is amended by:

■ 1. Removing the introductory text of paragraph (a), revising paragraphs (a)(1) and (2), and adding headings for paragraphs (a)(3) and (4);

■ 2. In the introductory text of paragraph (b)(1), removing the language “(a)(2)(i)” and “(e)” and adding the language “(a)(1)(i)” and “(c)” in their places, respectively;

■ 3. Adding paragraph (c);

■ 4. Revising the heading for paragraph (e) and revising paragraph (e)(1)(i);

■ 5. In paragraph (e)(1)(ii)(A), adding the language “and not reduced by distributions during the year” immediately before the semicolon;

■ 6. In paragraph (g)(1), adding the language “(or, if applicable pursuant to section 953(c)(1)(A), any stock of such foreign corporation)” immediately before the period;

■ 7. Revising paragraph (h);

■ 8. Redesignating paragraph (e)(7) as paragraph (h)(1) and revising the heading and introductory text of newly redesignated paragraph (h)(1);

■ 9. In newly redesignated paragraph (h)(1)(i)(I), adding the language

“covered items (within the meaning of paragraph (c)(3) of this section),” immediately after the language “neither”;

■ 10. In newly redesignated paragraphs (h)(1)(ii) through (viii), removing the language “(e)(1) of this section” wherever it may appear and adding the language “(c)(1) of this section” in its place;

■ 11. In newly redesignated paragraph (h)(1)(viii)(A), removing the language “(e)(7)(vii)(A) of this section” and adding the language “(h)(1)(vii)(A) of this section” in its place;

■ 12. Adding paragraph (h)(2); and

■ 13. Adding paragraph (i).

The revisions and additions read as follows:

§ 1.951–1 Amounts included in gross income of United States shareholders.

(a) * * *

(1) *Section 951(a) inclusions.* If a foreign corporation is a controlled foreign corporation (within the meaning of section 957 or, if applicable, section 953(c)(1)(B)) at any time during a taxable year of the foreign corporation, every person who is a United States shareholder (as defined in section 951(b) and paragraph (g) of this section) of the foreign corporation at any time during such taxable year and owns (within the meaning of section 958(a)) stock in the foreign corporation on the last day in such taxable year on which the foreign corporation is a controlled foreign corporation shall, for the United States shareholder’s taxable year in which or with which such taxable year of the foreign corporation ends, include in gross income the sum of—

(i) The United States shareholder’s pro rata share (determined under paragraph (b) of this section) of the foreign corporation’s subpart F income (as defined in section 952) for the taxable year of the foreign corporation; and

(ii) The amount determined under section 956 with respect to the United States shareholder for the taxable year of the foreign corporation, but only to the extent not excluded from gross income under section 959(a)(2) and § 1.959–5.

(2) *Currency translation.* See section 989(b) for translating an amount included in income under this section into U.S. dollars.

(3) *Characterization of inclusion in determining a personal holding company.* * * *

(4) *Certain stock ownership rules.*

* * *

* * * * *

(c) *Pro rata share of subpart F income—(1) In general.* For purposes of paragraph (b) of this section, a United

States shareholder's pro rata share of the foreign corporation's subpart F income for the taxable year of the foreign corporation is the sum of all subpart F income allocated to the United States shareholder in accordance with the rules described in paragraph (c)(2) of this section. Under those rules, subpart F income attributable to covered items (that is, subpart F income attributable to certain distributions and certain gain with respect to stock) is separately allocated, in each case consistently with how the covered item is assigned at the foreign corporation-level under § 1.951-2 as part of determining the extent to which attributes specific to the United States shareholder (that is, previously taxed earnings and profits or section 961(c) basis) are applied to exclude the covered item from the foreign corporation's subpart F income under section 959(b) or 961(c). Then, subpart F income not attributable to covered items is allocated based on the United States shareholder's share of the foreign corporation's allocable earnings and profits (as determined under paragraph (e) of this section). See paragraphs (c)(3) and (h) of this section for definitions and examples, respectively.

(2) *Rules for allocating subpart F income*—(i) *Determine subpart F income attributable to each covered item.* First, determine the subpart F income of the foreign corporation attributable to each covered item, computed as the portion of the covered item that is included in foreign base company income (as defined in § 1.954-1(a)(5)) or insurance income (as defined in § 1.954-1(a)(6)). See § 1.951-2(b) for the definition of a covered item.

(ii) *Allocate subpart F income attributable to each covered item.* Second, allocate to the United States shareholder a pro rata portion of the subpart F income attributable to each covered item, determined by multiplying such subpart F income by a fraction. The numerator of the fraction is the portion of the covered item that is both assigned to the United States shareholder under § 1.951-2 and included in adjusted gross foreign base company income (as defined in § 1.954-1(a)(3)) or adjusted gross insurance company income (as defined in § 1.954-1(a)(6)), and the denominator of the fraction is the portion of the covered item that is included in adjusted gross foreign base company income or adjusted gross insurance company income. However, if the denominator of the fraction would be zero, then the fraction is considered to be zero.

(iii) *Allocate subpart F income not attributable to covered items.* Third, allocate to the United States shareholder

a pro rata portion of all subpart F income of the foreign corporation not attributable to covered items, determined by multiplying all such subpart F income by a fraction. The numerator of the fraction is the portion of the foreign corporation's hypothetical distribution described in paragraph (e) of this section that would be distributed with respect to the stock of the corporation that the United States shareholder owns (within the meaning of section 958(a)), and the denominator of the fraction is the amount of such hypothetical distribution.

(3) *Definitions.* For purposes of this paragraph (c), the term *covered item* has the meaning provided in § 1.951-2(b).

* * * * *

(e) *Hypothetical distribution*—(1)

* * *

(i) *Hypothetical distribution and hypothetical distribution date.* For a taxable year of a controlled foreign corporation, the hypothetical distribution described in this paragraph (e) (*hypothetical distribution*) is a distribution treated as made by the corporation with respect to stock of the corporation owned by all shareholders of the corporation in an amount equal to the corporation's allocable earnings and profits for the taxable year, on the last day of the taxable year on which the corporation is a controlled foreign corporation (*hypothetical distribution date*).

* * * * *

(h) *Examples*—(1) *Examples not involving covered items.* The following examples illustrate the application of paragraphs (c) and (e) of this section in cases not involving covered items.

* * * * *

(2) *Examples involving covered items.* The following examples illustrate the application of paragraphs (c) and (e) of this section in cases involving covered items.

(i) *Assumed facts.* For purposes of the examples in this paragraph (h)(2), unless otherwise indicated, the following facts are assumed:

(A) US1 and US2 are unrelated domestic corporations that are covered shareholders. Neither US1 nor US2 is a member of a consolidated group (as defined in § 1.1502-1(h)).

(B) F1, F2, and F3 are foreign corporations, each of which is a controlled foreign corporation and uses the British pound (£) as its functional currency.

(C) Each entity uses the calendar year as its taxable year, and no entity has a short taxable year.

(D) To the extent a covered item received or recognized by a foreign

corporation is previously taxed earnings and profits, the covered item is excluded in determining the foreign corporation's subpart F income and tested income or tested loss under section 959(b) and § 1.959-4 or section 961(c) and § 1.961-9, as applicable.

(E) To the extent a covered item received or recognized by a foreign corporation is not previously taxed earnings and profits, the covered item is—

(1) In the case of a covered distribution, excluded in determining the foreign corporation's subpart F income and tested income or tested loss under sections 954(c)(6) and 951A(c)(2)(A)(i)(IV); and

(2) In the case of covered gain, included in the foreign corporation's foreign personal holding company income (as defined in section 954(c)) and then its adjusted gross foreign base company income (as defined in § 1.954-1(a)(3)) either because section 964(e)(1) does not apply or because section 964(e)(4) applies.

(F) The only reductions to adjusted gross foreign base company income (as defined in § 1.954-1(a)(3)) are for deductions under § 1.954-1(a)(4). Thus, there are no reductions by reason of section 952(c) (subpart F income limited to current earnings and profits) or section 954(b)(4) (exception for certain income subject to high foreign taxes).

(G) To the extent a covered item received or recognized by a foreign corporation is excluded in determining the foreign corporation's subpart F income and tested income or tested loss as described in this paragraph (h)(2)(i), the listed exclusion is not necessarily the only applicable exclusion.

(ii) *Example 1: Subpart F income attributable to covered items*—(A) *Facts*—(1) *In general.* US1 and US2 each directly own 50% of the single class of outstanding stock of F1. F1 directly owns all the outstanding stock of each of F2 and F3. For F1's taxable year ending on December 31 of year 3, F1's gross income consists of two covered items, which are a £60x covered distribution received from F2 and £40x of covered gain recognized with respect to stock of F3. US1 and US2 are assigned equal portions of each covered item under § 1.951-2. The entirety of US1's assigned portion of each covered item is previously taxed earnings and profits (because, in the case of the covered distribution, £30x of F2's previously taxed earnings and profits with respect to US1 is applied to US1's assigned portion and, in the case of the covered gain, £20x of F1's section 961(c) basis with respect to US1 is applied to US1's assigned portion). None of US2's

assigned portion of either covered item is previously taxed earnings and profits (because F2 has no previously taxed earnings and profits with respect to US2 and F1 has no section 961(c) basis with respect to US2). F1 has no deductions for the taxable year.

(2) *Subpart F income.* For F1's taxable year ending on December 31 of year 3, F1 has £20x of subpart F income consisting of foreign base company income (adjusted net foreign base company income as defined in § 1.954–1(a)(5)), which in turn consists of

foreign personal holding company income (as defined in section 954(c)). Table 1 in this paragraph (h)(2)(ii)(A)(2) provides the treatment of F1's gross income in computing its adjusted net foreign base company income.

TABLE 1 TO PARAGRAPH (h)(2)(ii)(A)(2) OF THIS SECTION—FOREIGN BASE COMPANY INCOME ANALYSIS

Gross income	Foreign base company income		
	Adjusted gross FBCI	Reductions	Adjusted net FBCI
£60x covered distribution from F2:			
US1's £30x assigned portion	£0 (§ 959(b)).		
US2's £30x assigned portion	£0 (§ 954(c)(6)).		
£40x covered gain on F3 stock:			
US1's £20x assigned portion	£0 (§ 961(c))	£0	£20x (£20x – £0).
US2's £20x assigned portion	£20x.		

(B) *Analysis.* Under paragraph (c) of this section, F1's subpart F income attributable to each covered item is separately allocated to US1 and US2. F1 has £0 of subpart F income attributable to the covered distribution and £20x of subpart F income attributable to the covered gain because in each case that is the portion of the covered item that is included in F1's adjusted net foreign base company income. See paragraph (c)(2)(i) of this section. The £20x of subpart F income attributable to the covered gain is allocated to each of US1 and US2 by multiplying the amount of such subpart F income by a fraction, the numerator of which is the portion of the covered gain that is both assigned to the United States shareholder under § 1.951–2 and included in F1's adjusted gross foreign base company income (£0 in the case of US1, and £20x in the case of US2), and the denominator of which is the portion of the covered gain that is included in F1's adjusted gross foreign base company income (£20x).

See paragraph (c)(2)(ii) of this section. Thus, US2 is allocated all £20x of the subpart F income attributable to the covered gain. Accordingly, for purposes of paragraph (b) of this section, US1 has a £0 pro rata share, and US2 has a £20x pro rata share, of F1's £20x of subpart F income. See paragraph (c)(1) of this section.

(C) *Alternative facts: expenses—(1) Facts.* The facts are the same as in paragraph (h)(2)(ii)(A) of this section, except as follows. Only £10x of US1's assigned portion of the covered gain is previously taxed earnings and profits (because there is only £10x of section 961(c) basis with respect to US1 available to be applied to US1's assigned portion). In addition, F1 has £5x of deductions, which are not foreign income taxes, that are definitely related to the covered gain. The deductions reduce F1's adjusted gross foreign base company income by £5x in computing net foreign base company income under § 1.954–1(a)(4). Thus, F1 has £25x of

subpart F income, all of which is attributable to the covered gain.

(2) *Analysis.* As summarized in Table 1 in this paragraph (h)(2)(ii)(C)(2), the £25x of subpart F income attributable to the covered gain is allocated to each of US1 and US2 by multiplying the amount of such subpart F income by a fraction, the numerator of which is the portion of the covered gain that is both assigned to the United States shareholder under § 1.951–2 and included in F1's adjusted gross foreign base company income (£10x in the case of US1, and £20x in the case of US2), and the denominator of which is the portion of the covered gain that is included in F1's adjusted gross foreign base company income (£30x). See paragraph (c)(2)(ii) of this section. Accordingly, for purposes of paragraph (b) of this section, US1 has a £8.3x pro rata share, and US2 has a £16.7x pro rata share, of F1's £25x of subpart F income.

TABLE 1 TO PARAGRAPH (h)(2)(ii)(C)(2) OF THIS SECTION—FOREIGN BASE COMPANY INCOME ANALYSIS

Gross income	Foreign base company income			Allocation of subpart F income attributable to the covered item under § 1.951–1(c)(2)(ii)	
	Adjusted gross FBCI	Reductions	Adjusted net FBCI	US1	US2
£60x covered distribution from F2:					
US1's £30x assigned portion	£0 (§ 959(b)).				
US2's £30x assigned portion	£0 (§ 954(c)(6)).				
£40x covered gain on F3 stock:					
US1's £20x assigned portion	£10x (§ 961(c) for remaining £10x).	£5x	£25x (£30x – £5x)	£8.3x (£25x × £10x/£30x).	£16.7x (£25x × £20x/£30x).
US2's £20x assigned portion	£20x.				

(iii) *Example 2: Subpart F income attributable and not attributable to covered items—(A) Facts—(1) In general.* US1 and US2 each directly own 50% of the single class of outstanding stock of F1. F1 directly owns all the outstanding stock of each of F2 and F3. For F1's taxable year ending on

December 31 of year 3, F1 has £500x of allocable earnings and profits for purposes of the hypothetical distribution described in paragraph (e) of this section. F1's gross income for the taxable year consists of a £60x covered distribution received from F2, £40x of covered gain recognized with respect to

stock of F3, £295x of royalty income received from an unrelated person, and £125x of foreign oil and gas extraction income (as defined in section 907(c)(1)). US1 and US2 are assigned equal portions of each covered item under § 1.951–2, and the entirety of US1's assigned portion of each covered item,

but none of US2's assigned portion of either covered item, is previously taxed earnings and profits (because, in the case of the covered distribution, there are sufficient previously taxed earnings and profits with respect to US1 to be applied to US1's assigned portion and there are no previously taxed earnings and profits with respect to US2 to be applied to US2's assigned portion, and, in the case of the covered gain, there is sufficient section 961(c) basis with respect to US1 to be applied to US1's

assigned portion and there is no section 961(c) basis with respect to US2 to be applied to US2's assigned portion). F1 has £20x of deductions for the taxable year, consisting of £15x of foreign withholding taxes imposed on the covered distribution and £5x of expenses, which are not foreign income taxes, that are definitely related to the covered gain. The £5x of expenses reduce F1's adjusted gross foreign base company income by £5x in computing

net foreign base company income under § 1.954–1(a)(4).

(2) *Subpart F income.* For F1's taxable year ending on December 31 of year 3, F1 has £310x of subpart F income consisting of foreign base company income (adjusted net foreign base company income as defined in § 1.954–1(a)(5)). Table 1 in this paragraph (h)(2)(iii)(A)(2) provides the treatment of F1's items of gross income in computing its adjusted net foreign base company income.

TABLE 1 TO PARAGRAPH (h)(2)(iii)(A)(2) OF THIS SECTION—FOREIGN BASE COMPANY INCOME ANALYSIS

Gross income	Foreign base company income		
	Adjusted gross FBCI	Reductions	Adjusted net FBCI
£60x covered distribution from F2:			
US1's £30x assigned portion	£0 (§ 959(b)).		
US2's £30x assigned portion	£0 (§ 954(c)(6)).		
£40x covered gain on F3 stock:			
US1's £20x assigned portion	£0 (§ 961(c))	£5x	£15x (£20x – £5x).
US2's £20x assigned portion	£20x.		
£295x royalty income	£295x	£0	£295x (£295x – £0).
£125x foreign oil and gas extraction income	£0.		

(B) *Analysis—(1) In general.* Under paragraph (c) of this section, F1's subpart F income attributable to each covered item is separately allocated to US1 and US2, and then F1's remaining subpart F income is allocated to the United States shareholders. As

described in paragraphs (h)(2)(iii)(B)(2) and (3) of this section and summarized in Table 1 in this paragraph (h)(2)(iii)(B)(1), US1 is allocated a total of £147.5x, and US2 is allocated a total of £162.5x, of subpart F income. Accordingly, for purposes of paragraph

(b) of this section, US1 has a £147.5x pro rata share, and US2 has a £162.5x pro rata share, of F1's £310x of subpart F income. See paragraph (c)(1) of this section.

TABLE 1 TO PARAGRAPH (h)(2)(iii)(B)(1) OF THIS SECTION—FOREIGN BASE COMPANY INCOME ANALYSIS

Gross income	Foreign base company income			Allocation of subpart F income under § 1.951–1(c)(2)(ii) and (iii)	
	Adjusted gross FBCI	Reductions	Adjusted net FBCI	US1	US2
£60x covered distribution from F2:					
US1's £30x assigned portion	£0 (§ 959(b)).				
US2's £30x assigned portion	£0 (§ 954(c)(6)).				
£40x covered gain on F3 stock:					
US1's £20x assigned portion	£0 (§ 961(c))	£5x	£15x (£20x – £5x)	£0 (£15x × £0/£20x) ...	£15x (£15x × £20x/£20x).
US2's £20x assigned portion	£20x.				
£295x royalty income	£295x	£0	£295x (£295x – £0)	£147.5x (£295x × £250x/£500x).	£147.5x (£295x × £250x/£500x).
£125x foreign oil and gas extraction income.	£0.				

(2) *Allocation of subpart F income attributable to covered items.* F1 has £0 of subpart F income attributable to the covered distribution and £15x of subpart F income attributable to the covered gain because in each case that is the portion of the covered item that is included in F1's adjusted net foreign base company income. See paragraph (c)(2)(i) of this section. The £15x of subpart F income attributable to the covered gain is allocated to each of US1 and US2 by multiplying the amount of such subpart F income by a fraction, the numerator of which is the portion of the covered gain that is both assigned to the United States shareholder under

§ 1.951–2 and included in F1's adjusted gross foreign base company income (£0 in the case of US1, and £20x in the case of US2), and the denominator of which is the portion of the covered gain that is included in F1's adjusted gross foreign base company income (£20x). See paragraph (c)(2)(ii) of this section. Thus, US2 is allocated all £15x of the subpart F income attributable to the covered gain.

(3) *Allocation of subpart F income not attributable to covered items.* F1 has £295x of subpart F income not attributable to covered items (£310x – £15x). This subpart F income is allocated to each of US1 and US2 by

multiplying the amount of the subpart F income by a fraction, the numerator of which is portion of F1's £500x hypothetical distribution described in paragraph (e) of this section that would be distributed with respect to stock of F1 that the United States shareholder owns (£250x in the case of each of US1 and US2), and the denominator of which is the amount of the hypothetical distribution (£500x). See paragraph (c)(2)(iii) of this section. Thus, each of US1 and US2 is allocated £147.5x of the subpart F income not attributable to covered items.

(C) *Alternative facts: tested income—(1) Facts.* The facts are the same as in

paragraph (h)(2)(iii)(A) of this section, except that F1's £125x item of foreign oil and gas extraction income is instead gross tested income. Because there are no allowable deductions properly allocable to the gross tested income, F1 thus has £125x of tested income.

(2) *Analysis.* The results are the same as in paragraph (h)(2)(iii)(B) of this section. In addition, each of US1 and US2 has a £62.5x pro rata share of F1's £125x of tested income, determined by multiplying the amount of the tested income by the fraction used in allocating F1's subpart F income not attributable to covered items to the United States shareholder (£250x/£500x, as described in paragraph (h)(2)(iii)(B)(3) of this section). See § 1.951A-1(d)(2).

(i) *Applicability date.* This section applies to taxable years of foreign corporations that begin on or after [date of publication of final regulations in the **Federal Register**] or are early application years (as described in described in § 1.959-12(d)) and to taxable years of persons for which such taxable years of those foreign corporations are relevant. See § 1.951-1 as contained in 26 CFR part 1 revised as of April 1, 2024, for a version of this section applicable to prior taxable years. ■ **Par. 12.** Add section 1.951-2 to read as follows:

§ 1.951-2 Foreign corporation-level assignment rules for covered items.

(a) *Scope.* This section sets forth the rules for assigning a foreign corporation's covered items to covered shareholders. Under §§ 1.959-4 and 1.961-9, these assignments determine the extent to which shareholder-specific attributes (previously taxed earnings and profits or section 961(c) basis) are applied to the covered items. Paragraph (b) of this section defines a covered item. Paragraph (c) of this section describes the rules for assigning covered items. Paragraph (d) of this section describes a fraction determining assignments under the general assignment rule. Paragraph (e) of this section adjusts assignments to account for general successor transactions. Paragraph (f) of this section provides a currency translation rule. Paragraph (g) of this section provides definitions and rules of general applicability for purposes of this section. Paragraph (h) of this section provides examples illustrating the application of this section. Paragraph (i) of this section provides the applicability date of this section.

(b) *Covered items.* A covered item is gross income of a foreign corporation that consists of either the portion of a

covered distribution received by the foreign corporation (determined under § 1.959-4) or a covered gain recognized by the foreign corporation (determined under § 1.961-9). Covered shareholders that own stock of a foreign corporation during a taxable year of the foreign corporation in which the foreign corporation receives or recognizes a covered item are assigned portions of the covered item in accordance with the rules described in paragraph (c) of this section. See also paragraph (g) of this section, incorporating § 1.959-1(b) for the definition of covered shareholder, § 1.959-4(c) for the definition of covered distribution, and § 1.961-9(c) for the definition of covered gain.

(c) *Rules for assigning a covered item—(1) Determine assignments based on stock ownership on the last relevant day.* First, assign a pro rata portion of the covered item to each covered shareholder that owns stock of the foreign corporation on the last relevant day of the foreign corporation's taxable year (defined in § 1.959-1(b) as the last day of the taxable year on which the foreign corporation is a controlled foreign corporation), determined by multiplying the amount of the covered item by the fraction computed in accordance with paragraph (d) of this section. If there is no day during the taxable year on which the foreign corporation is a controlled foreign corporation, then treat the last day of the taxable year as the last relevant day.

(2) *Adjust assignments for general successor transactions.* Second, if the foreign corporation is an acquired foreign corporation in one or more general successor transactions that occur during the foreign corporation's taxable year, then, for each such general successor transaction (starting with the earliest transaction), adjust covered shareholders' assigned portions of the covered item in accordance with paragraph (e) of this section. See also paragraph (g) of this section, incorporating § 1.959-7(b) for the definitions of acquired foreign corporation and general successor transaction.

(d) *Fraction in determining assignments—(1) In general.* In determining a covered shareholder's assigned portion of a covered item of a foreign corporation under paragraph (c)(1) of this section, the fraction described in that paragraph is computed as follows. The numerator of the fraction is the amount that would be the covered shareholder's share of the hypothetical distribution described in § 1.951-1(e) for the foreign corporation's taxable year if, for purposes of this paragraph (d), § 1.951-1(e) were applied

with the modifications described in paragraph (d)(2) of this section. The denominator of the fraction is the amount that would be the hypothetical distribution described in § 1.951-1(e) for the foreign corporation's taxable year if, for purposes of this paragraph (d), § 1.951-1(e) were applied with the modifications described in paragraph (d)(2) of this section.

(2) *Modifications—(i) Allocable earnings and profits.* For purposes of this paragraph (d), the foreign corporation's allocable earnings and profits (as defined in § 1.951-1(e)(1)(ii)) are treated as the amount that is the greater of—

(A) The earnings and profits of the foreign corporation for the taxable year, determined under section 964 and not reduced by distributions during the taxable year; and

(B) The sum of all covered items of the foreign corporation for the taxable year.

(ii) *Controlled foreign corporation status.* For purposes of this paragraph (d), § 1.951-1(e) applies without regard to whether the foreign corporation is a controlled foreign corporation. In addition, if there is no day during the taxable year on which the foreign corporation is a controlled foreign corporation, then the hypothetical distribution date (as defined in § 1.951-1(e)(1)(i)) is treated as the last day of the taxable year.

(e) *Rules for general successor transactions—(1) In general.* In adjusting covered shareholders' assignments of a covered item for a general successor transaction under paragraph (c)(2) of this section, increase an assignment in accordance with paragraph (e)(2) of this section, and then decrease assignments in accordance with paragraphs (e)(3) and (4) of this section. Generally, under these rules (together with §§ 1.959-4 and 1.961-9), previously taxed earnings and profits or section 961(c) basis with respect to the transferor covered shareholder (if the general successor transaction occurs before the last relevant day) or successor covered shareholder (if the general successor transaction occurs on or after the last relevant day) are applied to a covered item to the same extent such previously taxed earnings and profits or section 961(c) basis would have been applied if the general successor transaction had not occurred.

(2) *Increase—(i) General successor transaction occurring before the last relevant day.* If the general successor transaction occurs before the last relevant day of the taxable year but after the covered item is received or recognized, then, subject to the

limitation in paragraph (e)(2)(iii) of this section, increase the transferor covered shareholder's assignment of the covered item as follows. Increase the assignment by the additional portion of the covered item that would have been assigned to the transferor covered shareholder under paragraph (c)(1) of this section if the day on which the covered item is received or recognized were the last relevant day and the hypothetical distribution described in paragraph (d)(1) of this section were treated as made immediately before the covered item is received or recognized.

(ii) *General successor transaction occurring on or after the last relevant day.* If the general successor transaction occurs on or after the last relevant day of the taxable year but before the covered item is received or recognized, then, subject to the limitation in paragraph (e)(2)(iii) of this section, increase the successor covered shareholder's assignment of the covered item as follows. Increase the assignment by the additional portion of the covered item that would have been assigned to the successor covered shareholder under paragraph (c)(1) of this section if the day on which the covered item is received or recognized were the last relevant day and the hypothetical distribution described in paragraph (d)(1) of this section were treated as made immediately before the covered item is received or recognized.

(iii) *Limitations.* The increase pursuant to paragraph (e)(2)(i) or (ii) of this section applies only to the extent it results in an additional portion of the covered item being previously taxed earnings and profits that are both with respect to the covered shareholder described in that paragraph and excluded from the foreign corporation's gross income under section 959(b) and § 1.959-4 or section 961(c) and § 1.961-9. Further, the increase cannot exceed the aggregate of each connected covered shareholder's assigned portion of the covered item under paragraph (c)(1) of this section.

(3) *Decreases for connected covered shareholders owning acquired stock.* For each connected covered shareholder that owns acquired stock of the foreign corporation on the last relevant day of the taxable year, decrease the connected covered shareholder's assignment (but not below zero) by the product of the increase pursuant to paragraph (e)(2) of this section and a fraction. The numerator of the fraction is the connected covered shareholder's assigned portion of the covered item under paragraph (c)(1) of this section, and the denominator of the fraction is the aggregate of the assigned portion of

the covered item under paragraph (c)(1) of this section of each connected covered shareholder described in the preceding sentence.

(4) *Decreases for connected covered shareholders not owning acquired stock.* For each connected covered shareholder that does not own acquired stock of the foreign corporation on the last relevant day of the taxable year, decrease the connected covered shareholder's assignment by the product of the increase pursuant to paragraph (e)(2) of this section, reduced by the decreases pursuant to paragraph (e)(3) of this section, and a fraction. The numerator of the fraction is the connected covered shareholder's assigned portion of the covered item under paragraph (c)(1) of this section, and the denominator of the fraction is the aggregate of the assigned portion of the covered item under paragraph (c)(1) of this section of each connected covered shareholder described in the preceding sentence.

(f) *Currency rule.* For purposes of this section, if a covered item of a foreign corporation is denominated in a currency other than the foreign corporation's functional currency, then the covered item is translated into the foreign corporation's functional currency at the spot rate on the day on which the covered item is received or recognized.

(g) *Definitions and rules of general applicability.* The definitions in §§ 1.959-1(b) and 1.961-1(b), and the rules of general applicability in §§ 1.959-1(c) and (d) and 1.961-1(c) and (d), apply for purposes of this section, with the following additions.

Acquired stock. The term *acquired stock* means, in a general successor transaction, stock of an acquired foreign corporation the ownership of which is acquired by the successor covered shareholder.

Connected covered shareholder. The term *connected covered shareholder* means, in a general successor transaction, a covered shareholder that owns acquired stock of an acquired foreign corporation on the last relevant day of the acquired foreign corporation's taxable year in which the general successor transaction occurs, or any covered shareholder bearing a relationship described in section 267(b) (determined without regard to section 267(c)(3)) or 707(b) to a covered shareholder first described in this sentence.

Covered item. The term *covered item* has the meaning provided in paragraph (b) of this section.

(h) *Examples—(1) In general.* This paragraph (h) provides examples

illustrating the application of this section.

(2) *Assumed facts.* For purposes of the examples in this paragraph (h), unless otherwise indicated, the following facts are assumed:

(i) US1 and US2 are unrelated domestic corporations that are covered shareholders. Neither US1 nor US2 is a member of a consolidated group (as defined in § 1.1502-1(h)).

(ii) F1, F2, and F3 are foreign corporations, each of which is a controlled foreign corporation and uses the British pound (£) as its functional currency.

(iii) Each entity uses the calendar year as its taxable year, and no entity has a short taxable year.

(3) *Examples—(i) Example 1: General assignment rule and single class of stock—(A) Facts.* US1 and US2 each directly own 50% of the single class of outstanding stock of F1. F1 directly owns all the outstanding stock of each of F2 and F3. For F1's taxable year ending on December 31 of year 3, the last relevant day is December 31, and F1 has £500x of earnings and profits and two covered items. The covered items are a £60x covered distribution received from F2 and £40x of covered gain recognized with respect to stock of F3.

(B) *Analysis.* The portion of each covered item assigned to each of US1 and US2 is determined by multiplying the amount of the covered item by a fraction, the numerator of which is the portion of a £500x hypothetical distribution treated as made by F1 on the last relevant day that would be distributed with respect to stock of F1 that the covered shareholder owns (£250x in the case of each US1 and US2), and the denominator of which is the amount of the hypothetical distribution (£500x). See paragraphs (c)(1) and (d)(1) of this section; see also paragraph (d)(2) of this section (treating F1's hypothetical distribution as equal to the greater of £500x, F1's earnings and profits for the taxable year, and £100x, the sum of F1's covered items for the taxable year). Thus, US1 and US2 are each assigned £30x of the covered distribution (£60x × £250x/£500x) and £20x of the covered gain (£40x × £250x/£500x).

(C) *Alternative facts: common stock and preferred stock—(1) Facts.* The facts are the same as in paragraph (h)(3)(i)(A) of this section (*Example 1*), except as follows. The stock of F1 owned by US1 is an 8% nonparticipating, voting preferred share of stock with a par value of £1,000x, and the stock of F1 owned by US2 is common stock. There are no accrued but unpaid dividends with respect to the preferred stock.

(2) *Analysis.* The portion of each covered item assigned to each of US1 and US2 is determined by multiplying the amount of the covered item by a fraction, the numerator of which is the portion of a £500x hypothetical distribution treated as made by F1 on the last relevant day that would be distributed with respect to stock of F1 that the covered shareholder owns (£80x in the case of US1, computed as $0.08 \times £1,000x$, and £420x in the case of US2, computed as $£500x - £80x$), and the denominator of which is the amount of the hypothetical distribution (£500x). See paragraphs (c)(1) and (d) of this section. Thus, US1 is assigned £9.6x of the covered distribution ($£60x \times £80x / £500x$) and £6.4x of the covered gain ($£40x \times £80x / £500x$), and US2 is assigned £50.4x of the covered distribution ($£60x \times £420x / £500x$) and £33.6x of the covered gain ($£40x \times £420x / £500x$).

(ii) *Example 2: General successor transaction occurs before the last relevant day and after a covered distribution—(A) Facts.* US1 directly owns all the shares of the single class of outstanding stock of F1, and F1 directly owns all the outstanding stock of F2. On June 30 of year 3, US1 sells all the stock of F1 to US2 for money equal to the fair market value of the stock in a general successor transaction. For F1's taxable year ending on December 31 of year 3, the last relevant day is December 31, and F1 has £500x of earnings and profits and one covered item. The covered item is a £100x covered distribution received by F1 from F2 on March 31. Immediately before the covered distribution, F2 has £100x of previously taxed earnings and profits with respect to US1.

(B) *Analysis—(1) In general.* Without regard to paragraphs (c)(2) and (e) of this section (adjustments for general successor transactions), US2 would be assigned all £100x (and thus US1 would be assigned none) of the covered item because US2 owns all the stock of F1 on the last relevant day and therefore US2 would have a 100% share of a £500x hypothetical distribution treated as made by F1 on that day. See paragraphs (c)(1) and (d) of this section. However, because the sale is a general successor transaction occurring before the last relevant day but after F1 receives the covered item, the assignments to US1 (the transferor covered shareholder) and US2 (a connected covered shareholder by reason of owning acquired stock of F1 on the last relevant day) are adjusted. See paragraphs (c)(2) and (e)(1) of this section. The specific adjustments are described in paragraph (h)(3)(ii)(B)(2) of this section. As a result of these

adjustments, the entirety of the covered item is a distribution to F1 of F2's previously taxed earnings and profits with respect to US1 under § 1.959–4. Moreover, the previously taxed earnings and profits could be distributed by F1 to US1 before the sale and, to the extent not so distributed, are previously taxed earnings and profits of F1 that transfer from US1 to US2 in the sale under § 1.959–7.

(2) *Adjustments.* US1's assigned portion of the covered item is increased by £100x, which is the additional portion of the covered item that would have been assigned to US1 under paragraph (c)(1) of this section if March 31 were the last relevant day (and, thus, F1's £500x hypothetical distribution were treated as made when US1 owned all the stock of F1 and would therefore have a 100% share of the hypothetical distribution). See paragraph (e)(2)(i) of this section. In determining this increase, the first limitation in paragraph (e)(2)(iii) of this section does not apply because a £100x increase does not exceed the amount of F2's previously taxed earnings and profits with respect to US1 that could be applied to exclude such additional portion of the covered item from F1's gross income under section 959(b). In addition, the second limitation in paragraph (e)(2)(iii) of this section does not apply because a £100x increase does not exceed the amount of the covered item assigned to US2 under paragraph (c)(1) of this section. The £100x increase to US1's assigned portion of the covered item decreases US2's assigned portion of the covered item from £100x to £0. See paragraph (e)(3) of this section.

(C) *Alternative facts: limitation on increase and multiple connected covered shareholders—(1) Facts.* The facts are the same as in paragraph (h)(3)(ii)(A) of this section (*Example 2*), except as follows. Immediately before the £100x covered distribution on March 31, F2 has £90x (rather than £100x) of previously taxed earnings and profits with respect to US1. On September 30 of year 3, F1 issues shares of its single class of outstanding stock to US3, a corporate covered shareholder related to US2 within the meaning of section 267(b), with the result that US2 and US3 each own half of the stock of F1 on the last relevant day.

(2) *Analysis—(i) In general.* Without regard to paragraphs (c)(2) and (e) of this section (adjustments for general successor transactions), US2 and US3 would each be assigned £50x (and thus US1 would be assigned none) of the covered item because US2 and US3 each own half of the stock of F1 on the last relevant day and therefore would each

have a 50% share of a £500x hypothetical distribution treated as made by F1 on that day. See paragraphs (c)(1) and (d) of this section. However, because the sale is a general successor transaction occurring before the last relevant day but after F1 receives the covered item, the assignments to US1 (the transferor covered shareholder), US2 (a connected covered shareholder by reason of owning acquired stock of F1 on the last relevant day), and US3 (a connected covered shareholder by reason of bearing a relationship described in section 267(b) to US2) are adjusted. See paragraphs (c)(2) and (e)(1) of this section. The specific adjustments are described in paragraph (h)(3)(ii)(C)(2)(ii) of this section. As a result of these adjustments, £90x of the covered item is a distribution to F1 of F2's previously taxed earnings and profits with respect to US1 under § 1.959–4. Moreover, the previously taxed earnings and profits could be distributed by F1 to US1 before the sale and, to the extent not so distributed, are previously taxed earnings and profits of F1 that transfer from US1 to US2 in the sale under § 1.959–7.

(ii) *Adjustments.* US1's assigned portion of the covered item is increased by £90x, which is the lesser of the additional portion of the covered item that would have been assigned to US1 if March 31 were the last relevant day (£100x) and the amount of F2's previously taxed earnings and profits with respect to US1 that could be applied to exclude such additional portion of the covered item from F1's gross income under section 959(b) (£90x). See paragraphs (e)(2)(i) and (iii) of this section. Because US2 owns acquired stock of F1 on the last relevant day, the £90x increase to US1's assigned portion of the covered item first decreases US2's assigned portion of the covered item, from £50x to £0. See paragraph (e)(3) of this section. Then, the remaining £40x increase to US1's assigned portion of the covered item decreases US3's assigned portion of the covered item, from £50x to £10x. See paragraph (e)(4) of this section.

(iii) *Example 3: General successor transaction occurs after the last relevant day—(A) Facts.* US1 directly owns all 100 shares of the single class of outstanding stock of F1. F1 directly owns all the outstanding stock of F2. On March 31 of year 3, F1 issues 100 shares of its single class of outstanding stock to a nonresident alien individual and, consequently, F1 ceases to be a controlled foreign corporation. On June 30 of year 3, US1 sells its 100 shares of stock of F1 to US2 for money equal to the stock's fair market value in a general

successor transaction. For F1's taxable year ending on December 31 of year 3, the last relevant day is March 31 and F1 has £500x of earnings and profits and one covered item. The covered item is a £100x covered distribution received by F1 from F2 on September 30. Immediately before the covered distribution, F2 has £50x of previously taxed earnings and profits with respect to US2 (all of which transferred from US1 to US2 in the Sale).

(B) *Analysis—(1) In general.* Without regard to paragraphs (c)(2) and (e) of this section (adjustments for general successor transactions), US2 would be assigned none of the covered item because US2 owns none of the stock of F1 on the last relevant day and therefore US2 would have a 0% share of a £500x hypothetical distribution treated as made by F1 on that day. *See* paragraphs (c)(1) and (d) of this section. However, because the sale is a general successor transaction occurring on or after the last relevant day but before F1 receives the covered item, the assignments to US2 (the successor covered shareholder) and US1 (a connected covered shareholder by reason of owning acquired stock of

F1 on the last relevant day) are adjusted. *See* paragraphs (c)(2) and (e)(1) of this section. The specific adjustments are described in paragraph (h)(3)(iii)(B)(2) of this section. As a result of these adjustments, £50x of the covered item is a distribution to F1 of F2's previously taxed earnings and profits with respect to US2 under § 1.959–4.

(2) *Adjustments.* US2's assigned portion of the covered item is increased by £50x, which is the additional portion of the covered item that would have been assigned to US2 under paragraph (c)(1) of this section if September 30 were the last relevant day (and, thus, F1's £500x hypothetical distribution were treated as made when US2 owned half of the stock of F1 and would therefore have a 50% share of the hypothetical distribution). *See* paragraph (e)(2)(ii) of this section. In determining this increase, the first limitation in paragraph (e)(2)(iii) of this section does not apply because a £50x increase does not exceed the amount of F2's previously taxed earnings and profits with respect to US2 that could be applied to exclude such additional portion of the covered item from F1's

gross income under section 959(b). In addition, the second limitation in paragraph (e)(2)(iii) of this section does not apply because a £50x increase does not exceed the amount of the covered item assigned to US1 under paragraph (c)(1) of this section. The £50x increase to US2's assigned portion of the covered item decreases US1's assigned portion of the covered item by £50x. *See* paragraph (e)(3) of this section.

(i) *Applicability date.* This section applies to taxable years of foreign corporations that begin on or after [date of publication of final regulations in the **Federal Register**] or are early application years (as described in § 1.959–12(d)) and to taxable years of persons for which such taxable years of those foreign corporations are relevant.

§ 1.951A–1 [Amended]

■ **Par. 13.** Section 1.951A–1 is amended by, for each paragraph listed in the following table, removing the language in the “Remove” column wherever it appears and adding in its place the language in the “Add” column:

Paragraph	Remove	Add
(d)(1)	§ 1.951–1(b) and (e)	§ 1.951–1(b) and (c).
(d)(1)	subpart F income	subpart F income not attributable to covered items.
(d)(2)(i)	§ 1.951–1(b) and (e)	§ 1.951–1(b) and (c).
(d)(2)(i)	substituting “tested income” for “subpart F income”	substituting “tested income” for “subpart F income”
	each place it appears, other than in § 1.951–	each place it appears in § 1.951–1(b) other than in
	1(e)(1)(ii)(B) and the denominator of the fraction de-	the denominator of the fraction described in § 1.951–
	scribed in § 1.951–1(b)(1)(ii)(A).	1(b)(1)(ii)(A), substituting “tested income of the for-
		foreign corporation” for “all subpart F income of the for-
		foreign corporation not attributable to covered items” in
		§ 1.951–1(c)(2)(iii), and substituting “such tested in-
		come” for “such subpart F income” in § 1.951–
		1(c)(2)(iii).
(d)(3)(iii)	§ 1.951–1(e)(7)(vii)	§ 1.951–1(h)(1)(vii).
(d)(3)(iii)(A)(2)(i)	§ 1.951–1(e)(1)	§ 1.951–1(c)(2)(iii).
(d)(4)(i)	§ 1.951–1(b) and (e)	§ 1.951–1(b) and (c).
(d)(4)(i)(A)	substituted for “subpart F income” each place it ap-	substituted for “subpart F income” each place it ap-
	pears.	pears in § 1.951–1(b) and (c), “tested loss of the for-
		foreign corporation” is substituted for “all subpart F in-
		come of the foreign corporation not attributable to
		covered items” in § 1.951–1(c)(2)(iii), and “such test-
		ed loss” is substituted for “such subpart F income” in
		§ 1.951–1(c)(2)(iii).
(d)(4)(iv)	§ 1.951–1(e)(7)(viii)	§ 1.951–1(h)(1)(viii).

■ **Par. 14.** Section 1.951A–2 is amended by:

■ 1. In paragraph (c)(1)(iv), removing the language “and”;

■ 2. In paragraph (c)(1)(v), removing the period and adding the language “, and” in its place; and

■ 3. Adding paragraph (c)(1)(vi).

The addition reads as follows:

§ 1.951A–2 Tested income and tested loss.

* * * *

(c) * * *

(1) * * *
(vi) Previously taxed earnings and profits excluded from the corporation's gross income under section 959(b) and § 1.959–4 or section 961(c) and § 1.961–9.

* * * *

■ **Par. 15.** Section 1.951A–7 is amended by adding paragraph (f) to read as follows:

§ 1.951A–7 Applicability dates.

* * * *

(f) *Pro rata share determinations and exclusions under sections 959(b) and 961(c).* Sections 1.951A–1(d) and 1.951A–2(c)(1)(vi) apply to taxable years of foreign corporations that begin on or after [date of publication of final regulations in the **Federal Register**] or are early application years (as described in § 1.959–12(d)) and to taxable years of persons for which such taxable years of those foreign corporations are relevant. *See* § 1.951A–1(d) as contained in 26

CFR part 1 revised as of April 1, 2024, for a version of § 1.951A-1(d) applicable to prior taxable years.

■ **Par. 16.** Section 1.952-1 is amended by adding paragraphs (c)(4), (c)(5), and (h) to read as follows:

§ 1.952-1 Subpart F income defined.

* * * * *

(c) * * *

(4) *Coordination of earnings and profits limitation with sections 959(b) and 961(c)*—(i) *In general.* Distributions of previously taxed earnings and profits received by a controlled foreign corporation, and previously taxed earnings and profits resulting from the application of a controlled foreign corporation's section 961(c) basis to gain recognized by the controlled foreign corporation, are not included in the controlled foreign corporation's earnings and profits for the taxable year for purposes of the limitation in section 952(c)(1)(A). See paragraph (h) of this section (regarding excluding previously taxed earnings and profits from a controlled foreign corporation's gross income for purposes of determining its subpart F income).

(ii) *Applicability date.* Paragraph (c)(4)(i) of this section applies to taxable years of foreign corporations that begin on or after [date of publication of final regulations in the **Federal Register**] or are early application years (as described in § 1.959-12(d)) and to taxable years of persons for which such taxable years of those foreign corporations are relevant.

(5) *Transition rule for deficits of a domestic partnership that was an inclusion shareholder with respect to a controlled foreign corporation*—(i) *In general.* For purposes of applying section 952(c)(1)(B) to any taxable year of a controlled foreign corporation, a United States shareholder that owns (within the meaning of section 958(a)) stock of the controlled foreign corporation by reason of an interest in a domestic partnership on the last day of the first taxable year of the controlled foreign corporation during which § 1.958-1(d) applies to the domestic partnership (or, if earlier, the last day of such taxable year on which the foreign corporation is a controlled foreign corporation) (transition date) takes into account its assigned portion of any prior year deficit (determined under paragraph (c)(5)(ii) of this section) for any taxable year of the controlled foreign corporation ending before the application of § 1.958-1(d) in determining the United States shareholder's pro rata share of a prior year deficit under section 952(c)(1)(B)(iv)(II), and the domestic

partnership ceases to take into account such prior year deficit.

(ii) *Assigned portion of prior year deficit.* A United States shareholder's assigned portion of a prior year deficit is determined on the transition date by multiplying a domestic partnership's pro rata share of the prior year deficit (determined under section 952(c)(1)(B)(iv)(II) as of the close of the taxable year in which the deficit arose) by a fraction, the numerator of which is the liquidation value of the United States shareholder's interest in the partnership and the denominator of which is the aggregate liquidation value of all partners' interests in the partnership. For purposes of this fraction, the liquidation value of a partner's interest in the partnership is the amount of cash the partner would receive with respect to the interest if, on the transition date, the partnership (and any partnership through which the partner indirectly owns an interest in the partnership) sold all of its property for an amount of cash equal to the fair market value of the property (taking into account section 7701(g)), satisfied all of its liabilities (other than those described in § 1.752-7), paid an unrelated third party to assume all of its § 1.752-7 liabilities in a fully taxable transaction, and then the partnership (and any partnership through which the partner indirectly owns an interest in the partnership) liquidated.

(iii) *Applicability date.* This paragraph (c)(5) applies to taxable years of foreign corporations beginning on or after [date of publication of final regulations in the **Federal Register**], and to taxable years of United States shareholders in which or with which such taxable years of foreign corporation end. A United States shareholder may apply this paragraph (c)(5) to a taxable year of a foreign corporation that precedes the taxable years described in the preceding sentence if each of the following conditions is satisfied—

(A) *Consistent application condition.* This paragraph (c)(5) is applied in its entirety to the taxable year and all succeeding taxable years of the foreign corporation, to all taxable years of United States shareholders to which such a taxable year of the foreign corporation is relevant, and to all taxable years of related foreign corporations that end on or after the later of the last day of the first taxable year of the foreign corporation to which this paragraph (c)(5) applies and the first day on which the foreign corporations are related. For purposes of the preceding sentence, foreign corporations are related if the foreign

corporations bear a relationship to each other described in section 267(b).

(B) *Open period of limitations condition.* The period of limitations on assessment for each taxable year described in paragraph (c)(5)(iii)(A) of this section is open under section 6501.

(C) *Written consent condition.* Each United States shareholder described in paragraph (c)(5)(iii)(A) of this section provides to the foreign corporation a written statement in which the United States shareholder consents to apply the rules described in this paragraph (c)(5) to the taxable years of the United States shareholder described in paragraph (c)(5)(iii)(A) of this section and affirms that the period of limitations on assessment for each such taxable year is open under section 6501.

* * * * *

(h) *Exclusions from gross income under sections 959(b) and 961(c).* See §§ 1.959-4 and 1.961-9 for rules excluding previously taxed earnings and profits from a controlled foreign corporation's gross income for purposes of determining its subpart F income.

■ **Par. 17.** Section 1.954-1 is amended by:

■ 1. In paragraph (c)(1)(iii)(A), adding the language “or income from a covered item” immediately after the language “that is passive”; and

■ 2. Adding paragraphs (c)(1)(iii)(C) and (h)(4).

The additions read as follows:

§ 1.954-1 Foreign base company income.

* * * * *

(c) * * *

(1) * * *

(iii) * * *

(C) *Covered items.* A single item of income is the portion of a covered item (as defined in § 1.951-2(b)) that—

(1) Falls within a single category of foreign base company income described in paragraph (c)(1)(iii)(A)(1) or (2) of this section;

(2) Falls within a separate category (as defined in § 1.904-5(a)(4)(v)); and

(3) In the case of any amount which constitutes passive foreign personal holding company income, falls within a single group of passive income under the grouping rules of § 1.904-4(c)(3), (4), or (5).

* * * * *

(h) * * *

(4) *Paragraph (c)(1)(iii)(C) of this section.* Paragraph (c)(1)(iii)(C) of this section applies to taxable years of a foreign corporation that begin on or after [date of publication of final regulations in the **Federal Register**] or are early application years (as described in § 1.959-12(d)), and to taxable years of a

United States shareholder of the foreign corporation in which or with which such taxable year of such foreign corporation ends.

■ **Par. 18.** Section 1.959–1 is revised to read as follows:

§ 1.959–1 Overview, definitions, and rules of general applicability.

(a) *Overview*—(1) *In general.* The section 959 regulations provide rules regarding previously taxed earnings and profits. This section sets forth definitions and rules of general applicability. Section 1.959–2 sets forth rules for shareholder-level and foreign corporation-level accounting of a foreign corporation's previously taxed earnings and profits. Section 1.959–3 provides the adjustments under section 959 to shareholder-level accounts with respect to a foreign corporation. Section 1.959–4 provides rules for excluding previously taxed earnings and profits received in a distribution from gross income of a covered shareholder or controlled foreign corporation. Section 1.959–5 provides rules for excluding the portion of a section 956 amount that is allocated to previously taxed earnings and profits from gross income of a covered shareholder. Section 1.959–6 provides rules for allocating and apportioning current year taxes paid or accrued by a foreign corporation to its previously taxed earnings and profits. Section 1.959–7 provides rules for transferring previously taxed earnings and profits in a general successor transaction. Sections 1.959–8 through 1.959–9 are reserved. Section 1.959–10 provides examples illustrating the application of the section 959 regulations. Section 1.959–11 sets forth transition rules. Section 1.959–12 sets forth applicability dates. *See* § 1.1502–59 for additional rules for a consolidated group.

(2) *Scope.* This section sets forth definitions and rules of general applicability for purposes of the section 959 regulations. Paragraph (b) of this section provides definitions. Paragraph (c) of this section provides rules relating to S corporations. Paragraph (d) of this section provides an anti-avoidance rule.

(b) *Definitions.* The following definitions apply for purposes of the section 959 regulations.

2019 notice provisions. The term *2019 notice provisions* has the meaning provided in § 1.959–12(c)(2).

Acquired foreign corporation. The term *acquired foreign corporation* has the meaning provided in § 1.959–7(b).

Adjusted applicable percentage. The term *adjusted applicable percentage* has the meaning provided in § 1.959–2(b)(2)(iii)(A).

Annual PTEP account. The term *annual PTEP account* means an account that is described in § 1.959–2(b)(1) and tracks previously taxed earnings and profits.

Character. The term *character* means, with respect to previously taxed earnings and profits, the taxable year, section 904 category, PTEP group and, if applicable, PTEP subgroup to which the previously taxed earnings and profits relate, as well as, if applicable, the adjusted applicable percentage and section 965(c) deduction percentage with respect to the previously taxed earnings and profits.

Controlled foreign corporation. The term *controlled foreign corporation* has the meaning provided in section 957(a) (or, if applicable, section 957(b) or 953(c)(1)(B)).

Corporate PTEP account. The term *corporate PTEP account* has the meaning provided in § 1.959–2(d)(1).

Corporate PTEP tax pool. The term *corporate PTEP tax pool* has the meaning provided in § 1.959–2(d)(2).

Covered distribution. The term *covered distribution* has the meaning provided in § 1.959–4(c).

Covered gain. The term *covered gain* has the meaning provided in § 1.961–9(c).

Covered shareholder. The term *covered shareholder* means a United States person (as described in section 7701(a)(30)), other than a domestic partnership.

Creditable PTEP tax group. The term *creditable PTEP tax group* has the meaning provided in § 1.959–2(b)(4)(ii).

Current year taxes. The term *current year taxes* has the meaning provided in § 1.960–1(b)(4) except that “foreign corporation” is substituted for “controlled foreign corporation” and “the foreign corporation’s taxable year” is substituted for “current taxable year”.

Deemed covered shareholder. The term *deemed covered shareholder* has the meaning provided in § 1.959–7(g).

Dollar basis pool. The term *dollar basis pool* means an account that is described in § 1.959–2(b)(1) and that tracks the basis in U.S. dollars of previously taxed earnings and profits.

Domestic partnership. The term *domestic partnership* has the meaning provided in section 7701(a)(2) and (4). *See* paragraph (c) of this section, providing that an S corporation is treated in the same manner as a domestic partnership.

Early application corporation. The term *early application corporation* has the meaning provided in § 1.959–12(d)(1).

Early application years. The term *early application years* has the meaning provided in § 1.959–12(d)(1).

Foreign income taxes. The term *foreign income taxes* has the meaning provided in § 1.901–2(a).

General successor PTEP. The term *general successor PTEP* has the meaning provided in § 1.959–7(c)(1).

General successor transaction. The term *general successor transaction* has the meaning provided in § 1.959–7(b).

GILTI inclusion amount. The term *GILTI inclusion amount* has the meaning provided in § 1.951A–1(c)(1) (or § 1.1502–51(b) in the case of a member of a consolidated group, as defined in § 1.1502–1(h)).

Last relevant day. The term *last relevant day* means the last day of a taxable year of a foreign corporation on which the foreign corporation is a controlled foreign corporation.

Multi-year dollar basis account. The term *multi-year dollar basis account* has the meaning provided in § 1.959–11(b)(2)(ii)(B).

Multi-year PTEP account. The term *multi-year PTEP account* has the meaning provided in § 1.959–11(b)(2)(ii)(A).

Own. The term *own* (or *ownership* or *owned*), when used with respect to stock of a foreign corporation, means to own the stock within the meaning of section 958(a) and § 1.958–1(a) (thus determined by treating a domestic partnership in the same manner as a foreign partnership pursuant to § 1.958–1(d)). When used with respect to interests in a partnership, *own* (or *ownership* or *owned*) means to own the interests within the meaning of the preceding sentence, determined by treating the interests as stock of a foreign corporation.

Previously taxed earnings and profits. The term *previously taxed earnings and profits* means earnings and profits of a foreign corporation that are described in section 959(c)(1) or (2). *See* § 1.959–2(b) and (d) for covered shareholder-level and foreign corporation-level accounting of previously taxed earnings and profits.

Prior-law PTEP groups. The term *prior-law PTEP groups* has the meaning provided in § 1.959–11(c)(2)(iii).

Prior-law PTEP group taxes. The term *prior-law PTEP group taxes* has the meaning provided in § 1.959–11(c)(2)(iii).

PTEP group. The term *PTEP group* means any of the groups listed in § 1.959–2(b)(2)(i).

PTEP realization event. The term *PTEP realization event* has the meaning provided in § 1.959–6(b).

PTEP subgroup. The term *PTEP subgroup* means any of the groups listed in § 1.959–2(b)(2)(ii).

PTEP tax pool. The term *PTEP tax pool* means an account that is described in § 1.959–2(b)(1) and that tracks the U.S. dollar amount of foreign income taxes associated with previously taxed earnings and profits.

Relevant taxable year. The term *relevant taxable year* has the meaning provided in § 1.959–3(b).

S corporation. The term *S corporation* has the meaning provided in section 1361(a)(1). See paragraph (c) of this section, providing that an S corporation is treated in the same manner as a domestic partnership.

Same priority PTEP. The term *same priority PTEP* has the meaning provided in § 1.959–4(e)(5).

Section 904 category. The term *section 904 category* has the meaning provided in § 1.960–1(b).

Section 956 amount. The term *section 956 amount* has the meaning provided in § 1.959–5(c).

Section 959 regulations. The term *section 959 regulations* means the regulations in this part issued under section 959.

Section 965(c) deduction percentage. The term *section 965(c) deduction percentage* has the meaning provided in § 1.959–2(b)(2)(iii)(B).

Spot rate. The term *spot rate* has the meaning provided in § 1.988–1(d).

Substituted basis property. The term *substituted basis property* has the meaning provided in section 7701(a)(42).

Successor covered shareholder. The term *successor covered shareholder* has the meaning provided in § 1.959–7(b).

Subpart F income. The term *subpart F income* has the meaning provided in section 952 and § 1.952–1.

Taxable year. The term *taxable year* has the meaning provided in section 7701(a)(23), determined by treating a person (as described in section 7701(a)(1)) other than an individual that does not otherwise have a taxable year as computing taxable income on the basis of the calendar year.

Tested income. The term *tested income* has the meaning provided in section 951A(c)(2) and § 1.951A–2(b)(1).

Tested loss. The term *tested loss* has the meaning provided in section 951A(c)(2) and § 1.951A–2(b)(2).

Transferor covered shareholder. The term *transferor covered shareholder* has the meaning provided in § 1.959–7(b).

United States shareholder. The term *United States shareholder* has the meaning provided in section 951(b) (or, if applicable, section 953(c)(1)(A)).

(c) Treatment of an S corporation—(1) In general. Except as provided in paragraph (c)(2) of this section, for purposes of the section 959 regulations, an S corporation is treated in the same manner as a domestic partnership, a reference to a domestic partnership includes an S corporation, and shareholders of an S corporation are treated as partners of such partnership. See section 1373(a). As applicable, the treatment of an S corporation and its shareholders under the preceding sentence is determined by replacing any partnership-specific provision with the equivalent provision for S corporations (for example, a reference to a partner's distributive share of a partnership's income refers to a shareholder's pro rata share of an S corporation's income).

(2) Treatment as a covered shareholder for taxable years for which elective entity treatment applies for § 1.958–1(d)(1) purposes. See § 1.959–11(d) for a rule treating an S corporation as a covered shareholder for any taxable year of the S corporation for which § 1.958–1(d)(1) does not apply and § 1.959–11(e) for a transition rule converting S corporation-level accounts (for example, annual PTEP accounts) to accounts of covered shareholders owning interests in the S corporation once the S corporation is no longer treated as a covered shareholder.

(d) Anti-avoidance rule. If a transaction, series of transactions, plan, or arrangement is engaged in with a principal purpose of avoiding the purposes of section 959 and the section 959 regulations, then appropriate adjustments are made, which may

include adjustments to disregard the transaction, series of transactions, plan, or arrangement.

■ **Par. 19.** Section 1.959–2 is revised to read as follows:

§ 1.959–2 Accounting of previously taxed earnings and profits.

(a) Scope. This section sets forth rules for shareholder-level and foreign corporation-level accounting of a foreign corporation's previously taxed earnings and profits. Paragraph (b) of this section provides the shareholder-level accounting rules. Paragraph (c) of this section provides rules relating to combined pool elections for certain covered shareholder-level accounts. Paragraph (d) of this section provides the foreign corporation-level accounting rules.

(b) Shareholder-level accounting—(1) In general. A covered shareholder that owns stock of a foreign corporation must establish and maintain *annual PTEP accounts, dollar basis pools, and PTEP tax pools* with respect to the foreign corporation in accordance with this paragraph (b) and the adjustments prescribed in § 1.959–3. The annual PTEP accounts track the foreign corporation's previously taxed earnings and profits with respect to the covered shareholder, the dollar basis pools track the basis in U.S. dollars of the previously taxed earnings and profits, and the PTEP tax pools track the U.S. dollar amount of any foreign income taxes associated with the previously taxed earnings and profits. See also § 1.1502–59(c)(2), treating members of a consolidated group as a single covered shareholder for purposes of section 959.

(2) Annual PTEP accounts—(i) In general. Each annual PTEP account must relate to a single taxable year of the foreign corporation and a single section 904 category. In addition, previously taxed earnings and profits within each annual PTEP account must be maintained in the foreign corporation's functional currency and assigned to the PTEP groups identified in the following table.

TABLE 1 TO PARAGRAPH (b)(2)(i) OF THIS SECTION—PTEP GROUPS

Section 959(c)(1) PTEP groups		Section 959(c)(2) PTEP groups	
Group	Description	Group	Description
<i>General section 959(c)(1) PTEP group.</i>	Earnings and profits described in section 959(c)(1) and not described in another PTEP group.	<i>Section 951(a)(1)(A) PTEP group.</i>	Earnings and profits described in section 959(c)(2) and not described in another PTEP group.
<i>Reclassified section 951A PTEP group.</i>	Earnings and profits described in section 959(c)(1) and initially assigned to the section 951A PTEP group.	<i>Section 951A PTEP group.</i>	Earnings and profits described in section 959(c)(2) by reason of section 951A.

TABLE 1 TO PARAGRAPH (b)(2)(i) OF THIS SECTION—PTEP GROUPS—Continued

Section 959(c)(1) PTEP groups		Section 959(c)(2) PTEP groups	
Group	Description	Group	Description
<i>Reclassified section 245A(d) PTEP group.</i>	Earnings and profits described in section 959(c)(1) and initially assigned to the section 245A(d) PTEP group.	<i>Section 245A(d) PTEP group.</i>	Earnings and profits described in section 959(c)(2) by reason of an income inclusion to which section 245A(d) applies.
<i>Reclassified section 965(a) PTEP group.</i>	Earnings and profits described in section 959(c)(1) and initially assigned to the section 965(a) PTEP group.	<i>Section 965(a) PTEP group.</i>	Earnings and profits described in section 959(c)(2) by reason of section 965(a).
<i>Reclassified section 965(b) PTEP group.</i>	Earnings and profits described in section 959(c)(1) and initially assigned to the section 965(b) PTEP group.	<i>Section 965(b) PTEP group.</i>	Earnings and profits described in section 959(c)(2) by reason of section 965(b).

(ii) *Subgroups*—(A) *In general.* To the extent required under § 1.959–3(c), previously taxed earnings and profits assigned to a PTEP group within an annual PTEP account must be further assigned to the *taxable section 962 PTEP subgroup* or *taxable section 1411 subgroup*. These subgroups track previously taxed earnings and profits that will be includible in gross income under section 962(d) or includible in net investment income under section 1411(c) when distributed to the covered shareholder, as applicable.

(B) *Coordination rule.* A subgroup described in paragraph (b)(2)(ii)(A) of this section is not treated as a separate PTEP group for purposes of establishing and maintaining dollar basis pools and PTEP tax pools.

(iii) *Percentages with respect to section 965 previously taxed earnings and profits*—(A) *Adjusted applicable percentage.* An *adjusted applicable percentage* must be established and maintained with respect to all previously taxed earnings and profits assigned to the reclassified section 965(a) PTEP group, reclassified section 965(b) PTEP group, section 965(a) PTEP group, and section 965(b) PTEP group and relating to a single section 904 category (therefore without regard to the taxable years to which the previously taxed earnings and profits relate). The adjusted applicable percentage tracks the percentage of a credit or deduction for foreign income taxes associated with previously taxed earnings and profits that is disallowed under § 1.965–5. *See* § 1.959–11(c)(3) for the initial determination of the adjusted applicable percentage and § 1.959–3(c)(3) for adjustments.

(B) *Section 965(c) deduction percentage.* A *section 965(c) deduction percentage* must be established and maintained with respect to all previously taxed earnings and profits assigned to the reclassified section 965(a) PTEP group and section 965(a) PTEP group and relating to a single section 904 category (therefore without

regard to the taxable years to which the previously taxed earnings and profits relate). The section 965(c) deduction percentage tracks the percentage of foreign currency gain or loss with respect to previously taxed earnings and profits that is not recognized under § 1.986(c)–1. *See* § 1.959–11(c)(4) for the initial determination of the section 965(c) deduction percentage and § 1.959–3(c)(3) for adjustments.

(iv) *Deemed taxable years.* If previously taxed earnings and profits are distributed to an upper-tier foreign corporation or result from the application of section 961(c) basis to gain recognized by an upper-tier corporation, and the previously taxed earnings and profits relate to a taxable year of a lower-tier foreign corporation that includes one or more days on which the upper-tier foreign corporation did not exist, then, solely for purposes of the establishment and maintenance of annual PTEP accounts, the upper-tier corporation is treated as having the taxable year or taxable years it would have had if it were to have existed on those days, determined based on the manner in which it computes its taxable income for its initial taxable year.

(3) *Dollar basis pools.* Each dollar basis pool must relate to previously taxed earnings and profits assigned to a single PTEP group within a single annual PTEP account or, if a combined pool election applies to the covered shareholder, previously taxed earnings and profits assigned to a single PTEP group and relating to a single section 904 category (therefore without regard to the taxable years to which the previously taxed earnings and profits relate). Basis within each dollar basis pool must be maintained in U.S. dollars.

(4) *PTEP tax pools*—(i) *In general.* Each PTEP tax pool must relate to previously taxed earnings and profits assigned to a single PTEP group within a single annual PTEP account or, if a combined pool election applies to the covered shareholder, previously taxed earnings and profits assigned to a single

PTEP group and relating to a single section 904 category (therefore without regard to the taxable years to which the previously taxed earnings and profits relate). Foreign income taxes within each PTEP tax pool must be maintained in U.S. dollars.

(ii) *Creditable PTEP tax group.* To the extent required under § 1.959–3(e), foreign income taxes within each PTEP tax pool must be assigned to the *creditable PTEP tax group*. This group tracks foreign income taxes that are eligible to be deemed paid under section 960(b).

(c) *Combined pool elections*—(1) *In general.* For purposes of paragraph (c) of this section, a combined pool election is made for a taxable year of a covered shareholder and, once made, remains in effect until revoked. The combined pool election applies with respect to each foreign corporation in which the covered shareholder owns stock, beginning as of the first day of the first taxable year of the foreign corporation that ends with or within the taxable year of the covered shareholder for which the combined pool election is made or, if later, the first day in which the covered shareholder owns stock of the foreign corporation.

(2) *Revocation.* A combined pool election may only be revoked with the consent of the Commissioner (and in the time and manner specified by the Commissioner), and such consent will be granted only in rare and unusual circumstances.

(3) *Time and manner of making election*—(i) *In general.* Except as otherwise provided by a form, instruction, publication, or other guidance, a covered shareholder makes a combined pool election by, for a transaction related to a timely filed (including extensions) original Federal income tax return of the covered shareholder, computing the dollar basis of, or foreign income taxes associated with, previously taxed earnings and profits consistent with a combined pool election.

(ii) *Sixty-month limitation on a subsequent election.* A covered shareholder is not permitted to make a combined pool election for any taxable year beginning less than 60 months after the last day that a previous combined pool election applied to the covered shareholder (or a predecessor).

(4) *Converting to combined pools.* As of the beginning of the first day that a covered shareholder's combined pool election applies with respect to a foreign corporation, each of the covered shareholder's dollar basis pools or PTEP tax pools with respect to the foreign corporation (a *combined pool*) is equal to the sum of all of the dollar basis pools or PTEP tax pools, as applicable, that, immediately before the combined pool election applies, related to the same PTEP group and section 904 category to which the combined pool relates.

(d) *Foreign corporation-level accounting*—(1) *Corporate PTEP accounts.* Corporate PTEP accounts must be established and maintained with respect to a foreign corporation. Each corporate PTEP account must relate to a single covered shareholder, and previously taxed earnings and profits within a corporate PTEP account must be assigned to section 904 categories and the PTEP groups identified in the table to paragraph (b)(2)(i) of this section. A corporate PTEP account for a covered shareholder is equal to the aggregate of all previously taxed earnings and profits that are within such covered shareholder's annual PTEP accounts with respect to the foreign corporation. Thus, as a covered shareholder's annual PTEP accounts with respect to the foreign corporation are adjusted under § 1.959–3, the foreign corporation's corporate PTEP account for the covered shareholder and the foreign corporation's earnings and profits described in section 959(c)(1) or (c)(2) are also adjusted.

(2) *Corporate PTEP tax pools.* Corporate PTEP tax pools must be established and maintained by a foreign corporation. Each corporate PTEP tax pool must relate to a single covered shareholder, and foreign income taxes within a corporate PTEP tax pool must be assigned to section 904 categories and the PTEP groups identified in the table to paragraph (b)(2)(i) of this section. A corporate PTEP tax pool relating to a covered shareholder is equal to the aggregate of all foreign income taxes that are within that covered shareholder's PTEP tax pools with respect to the foreign corporation. Thus, as a covered shareholder's PTEP tax pools with respect to the foreign corporation are adjusted under § 1.959–

3, the foreign corporation's corporate PTEP tax pool relating to the covered shareholder is also adjusted. Foreign income taxes within a corporate PTEP tax pool that are eligible to be deemed paid under section 960(b) are assigned to the creditable PTEP tax group within the covered shareholder's PTEP tax pools.

(3) *Earnings and profits determined independently of previously taxed earnings and profits.* A foreign corporation's earnings and profits are determined independently of the foreign corporation's previously taxed earnings and profits. Thus, for example, the extent to which a distribution is made out of a foreign corporation's earnings and profits is determined independently of the foreign corporation's corporate PTEP accounts. See section 316. Similarly, a foreign corporation's earnings and profits may be less than the foreign corporation's previously taxed earnings and profits (with the result that the foreign corporation has a deficit in earnings and profits described in section 959(c)(3)).

■ **Par. 20.** Section 1.959–3 is revised to read as follows:

§ 1.959–3 Adjustments to shareholder-level accounts.

(a) *Scope.* This section provides the adjustments under section 959 to shareholder-level accounts with respect to a foreign corporation. Paragraph (b) of this section provides the general rule, pursuant to which shareholder-level accounts (annual PTEP accounts, dollar basis pools, and PTEP tax pools) are adjusted with respect to a foreign corporation to reflect income inclusions relating to, and transactions occurring within, the foreign corporation's taxable year. Paragraph (c) of this section describes adjustments to annual PTEP accounts. Paragraph (d) of this section describes adjustments to dollar basis pools. Paragraph (e) of this section describes adjustments to PTEP tax pools. Paragraph (f) of this section provides timing rules for when adjustments are treated as made. Paragraph (g) of this section provides an ordering rule for the application of this section to tiered foreign corporations. See also § 1.959–2(d)(1) and (2), providing that as shareholder-level accounts are adjusted with respect to a foreign corporation under this section, the foreign corporation-level accounts are consequently also adjusted.

(b) *In general.* To reflect income inclusions and transactions related to a taxable year of a foreign corporation (such taxable year for which this section is being applied, the *relevant taxable year*), a covered shareholder's annual

PTEP accounts, dollar basis pools, and PTEP tax pools with respect to the foreign corporation must be adjusted in accordance with the rules in this section.

(c) *Adjustments to annual PTEP accounts*—(1) *In general*—(i) *Increases for amounts included in gross income under section 951(a)(1)(A).* If the foreign corporation is a controlled foreign corporation and the covered shareholder includes in gross income its pro rata share of the corporation's subpart F income for the relevant taxable year under section 951(a)(1)(A) (including by reason of section 245A(e)(2) or 964(e)(4), but not including an amount described in section 959(e)), then, for each annual PTEP account that relates to the relevant taxable year and a section 904 category to which a portion of the inclusion is assigned (determined at the level of the covered shareholder, thus after the application of § 1.904–4(c)), add an amount of previously taxed earnings and profits equal to such portion to the annual PTEP account. Assign such previously taxed earnings and profits to the section 951(a)(1)(A) PTEP group, except assign previously taxed earnings and profits to the section 245A(d) PTEP group to the extent section 245A(d) applies to the inclusion giving rise to the previously taxed earnings and profits (see sections 245A(e)(3) and 964(e)(4)). If applicable, further assign previously taxed earnings and profits to a PTEP subgroup in accordance with paragraph (c)(2) of this section.

(ii) *Increases for amounts included in gross income under section 951A(a).* If the foreign corporation is a controlled foreign corporation and the covered shareholder includes in gross income the portion of its GILTI inclusion amount that is treated as with respect to the corporation for the relevant taxable year under section 951A(a) and (f)(2), then, for each annual PTEP account that relates to the relevant taxable year and a section 904 category to which a portion of the inclusion is assigned (determined at the level of the covered shareholder, thus after the application of § 1.904–4(c)), add an amount of previously taxed earnings and profits equal to such portion to the annual PTEP account. Assign such previously taxed earnings and profits to the section 951A PTEP group. If applicable, further assign previously taxed earnings and profits to a PTEP subgroup in accordance with paragraph (c)(2) of this section.

(iii) *Increases for receipt of distributed previously taxed earnings and profits.* If, during the relevant taxable year, previously taxed earnings and profits with respect to the covered shareholder

are distributed to the foreign corporation in a covered distribution (determined under § 1.959–4), then add such distributed previously taxed earnings and profits to the annual PTEP accounts in accordance with paragraph (c)(3) of this section.

(iv) *Increases for previously taxed earnings and profits resulting from section 961(c) basis.* If, during the relevant taxable year, previously taxed earnings and profits with respect to the covered shareholder result from the application of positive section 961(c) basis to covered gain recognized by the foreign corporation (determined under § 1.961–9), then add such resulting previously taxed earnings and profits to the annual PTEP accounts in accordance with paragraph (c)(3) of this section.

(v) *Decreases for current year taxes.* If previously taxed earnings and profits are added to a PTEP group within an annual PTEP account pursuant to paragraph (c)(1)(iii) or (iv) of this section, then reduce the previously taxed earnings and profits in that PTEP group by the amount of the current year taxes allocated and apportioned under § 1.959–6 to the corresponding PTEP group of the foreign corporation. The corresponding PTEP group of the foreign corporation is the PTEP group of the foreign corporation that is of the same type as the increased PTEP group and that is within a corporate PTEP account of the foreign corporation that is with respect to the covered shareholder. If the PTEP group of that type in multiple annual PTEP accounts increases pursuant to paragraph (c)(1)(iii) or (iv) of this section, apportion the amount of the current year taxes allocated and apportioned under § 1.959–6 to the corresponding PTEP group of the foreign corporation among those increased PTEP groups under the principles of § 1.861–20.

(vi) *Decreases for distributed previously taxed earnings and profits.* If, during the relevant taxable year, the foreign corporation distributes previously taxed earnings and profits with respect to the covered shareholder in a covered distribution (determined under § 1.959–4), then remove such distributed previously taxed earnings and profits from the annual PTEP accounts.

(vii) *Increases for amounts included in gross income as a dividend under section 1248(a) or (f).* If, during the relevant taxable year, gain recognized by the covered shareholder is included in gross income as a dividend under section 1248(a) or (f) by reason of earnings and profits of the foreign corporation, then, for each annual PTEP account that relates to the relevant

taxable year and a section 904 category to which a portion of the inclusion is assigned (determined at the level of the covered shareholder, thus after the application of § 1.904–4(c)), add an amount of previously taxed earnings and profits equal to such portion to the annual PTEP account (see section 959(e)). Assign such previously taxed earnings and profits to the section 951(a)(1)(A) PTEP group, except assign previously taxed earnings and profits to the section 245A(d) PTEP group to the extent section 245A(d) applies to the inclusion giving rise to the previously taxed earnings and profits (including by reason of section 245A(e)(3)). If applicable, further assign previously taxed earnings and profits to a PTEP subgroup in accordance with paragraph (c)(2) of this section.

(viii) *Decreases with respect to transferor covered shareholder for transferred previously taxed earnings and profits.* If, during the relevant taxable year, previously taxed earnings and profits of the foreign corporation transfer from the covered shareholder in a general successor transaction (determined under § 1.959–7), then remove such transferred previously taxed earnings and profits from the annual PTEP accounts.

(ix) *Increases with respect to successor covered shareholder for transferred previously taxed earnings and profits.* If, during the relevant taxable year, previously taxed earnings and profits of the foreign corporation transfer to the covered shareholder in a general successor transaction (determined under § 1.959–7), then add such transferred previously taxed earnings and profits to the annual PTEP accounts in accordance with paragraph (c)(3) of this section.

(x) *Reassignments for previously taxed earnings and profits to which a section 956 amount is allocated.* If the foreign corporation is a controlled foreign corporation and a portion of the covered shareholder's section 956 amount with respect to the corporation for the relevant taxable year is allocated to previously taxed earnings and profits (determined under § 1.959–5), then reassign such previously taxed earnings and profits from a section 959(c)(2) PTEP group to the section 959(c)(1) PTEP group in the same row in the table in § 1.959–2(b)(2)(i). If applicable, further assign previously taxed earnings and profits to the PTEP subgroup to which they relate. See paragraph (c)(4) of this section in the case of certain acquisitions of stock to which a section 956 amount of another shareholder is attributable.

(xi) *Increases for amounts included in gross income under section 951(a)(1)(B).* If the foreign corporation is a controlled foreign corporation and the covered shareholder includes in gross income a portion of its section 956 amount with respect to the corporation for the relevant taxable year under section 951(a)(1)(B), then, for each annual PTEP account that relates to the relevant taxable year and a section 904 category to which a portion of the inclusion is assigned (determined at the level of the covered shareholder, thus after the application of § 1.904–4(c)), add an amount of previously taxed earnings and profits equal to such portion to the annual PTEP account. Assign such previously taxed earnings and profits to the general section 959(c)(1) PTEP group. If applicable, further assign previously taxed earnings and profits to a PTEP subgroup in accordance with paragraph (c)(2) of this section. See paragraph (c)(4) of this section in the case of certain acquisitions of stock to which a section 956 amount of another shareholder is attributable.

(2) *Assignment to PTEP subgroups—*

(i) *Taxable section 962 PTEP subgroup.* If the covered shareholder is an individual and an election under § 1.962–2 applies to the covered shareholder's income inclusions under section 951(a) or 951A(a) for the relevant taxable year, then further assign a portion of previously taxed earnings and profits added pursuant to paragraph (c)(1)(i), (ii), or (xi) of this section (section 951(a) or 951A(a) inclusions) to the taxable section 962 PTEP subgroup. The portion of previously taxed earnings and profits assigned to the taxable section 962 PTEP subgroup is equal to the excess of the previously taxed earnings and profits over the income tax paid under this chapter on the income inclusions giving rise to the previously taxed earnings and profits (determined by translating such tax into the foreign corporation's functional currency at the exchange rate at which the income inclusion is translated into U.S. dollars under section 989(b)).

(ii) *Taxable section 1411 PTEP subgroup.* If the covered shareholder is an individual, estate, or trust, then further assign previously taxed earnings and profits added pursuant to paragraph (c)(1)(i), (ii), (vii), and (xi) of this section (section 951(a), 951A(a), or 1248(a) or (f) inclusions) to the taxable section 1411 PTEP subgroup to the extent the income inclusion giving rise to the previously taxed earnings and profits is not taken into account in determining net investment income under § 1.1411–4(a)(1)(i).

(3) *Preserving the character of previously taxed earnings and profits—*
 (i) *In general.* Add previously taxed earnings and profits that are described in paragraph (c)(1)(iii), (iv), or (ix) of this section (previously taxed earnings and profits received in a distribution, resulting from section 961(c) basis, or transferred to the covered shareholder) and that relate to a single section 904 category and single taxable year to the annual PTEP account that relates to such section 904 category and such taxable year or a taxable year (including a deemed taxable year) that ends with, or closest to, the last day of such taxable year, as applicable. Assign the previously taxed earnings and profits to the PTEP group, and if applicable PTEP subgroup, to which they relate. See § 1.959–4, 1.959–7, or 1.961–9 for rules determining the character of previously taxed earnings and profits received, transferred, or resulting from section 961(c) basis, respectively.

(ii) *Recalculate percentages with respect to section 965 previously taxed earnings and profits—*(A) *In general.* If applicable in adding previously taxed earnings and profits described in paragraph (c)(1)(iii), (iv), or (ix) of this section (previously taxed earnings and profits received in a distribution, resulting from section 961(c) basis, or transferred to the covered shareholder) to annual PTEP accounts relating to the same section 904 category, recalculate an adjusted applicable percentage or section 965(c) deduction percentage with respect to relevant previously taxed earnings and profits within such annual PTEP accounts so that the percentage is a weighted average of—

(1) The adjusted applicable percentage or section 965(c) deduction percentage with respect to relevant previously taxed earnings and profits within the annual PTEP accounts immediately before the addition; and

(2) The adjusted applicable percentage or section 965(c) deduction percentage with respect to relevant previously taxed earnings and profits added to the annual PTEP accounts.

(B) *Determining the weighted average.* The weighted average is determined as the sum of the product of each percentage described in paragraph (c)(3)(ii)(A)(1) or (2) of this section and the amount of previously taxed earnings and profits described in that paragraph, divided by the sum of the amounts of previously taxed earnings and profits described in those paragraphs.

(4) *Certain acquisitions of stock to which a section 956 amount is attributable.* If the covered shareholder acquires ownership of stock of the foreign corporation during the relevant

taxable year but on or after the last relevant day of the relevant taxable year (for example, in a general successor transaction), and a portion of a section 956 amount of a United States shareholder is attributable to such stock, then treat such portion of the section 956 amount and any inclusion thereof in gross income of the United States shareholder as being of the covered shareholder for purposes of paragraphs (c)(1)(x) and (xi) of this section.

(5) *Currency rule.* All adjustments to annual PTEP accounts are made in the functional currency of the foreign corporation, determined, as applicable, by translating an inclusion described in paragraph (c)(1)(ii) of this section into functional currency at the average exchange rate for the relevant taxable year (see § 1.951A–5(b)(3)) and by translating previously taxed earnings and profits described in paragraph (c)(1)(iii) of this section into functional currency at the spot rate on the day of the distribution (see section 989(b)). See also § 1.961–9 (determining previously taxed earnings and profits described in paragraph (c)(1)(iv) of this section in functional currency), and § 1.959–6 (determining current year taxes described in paragraph (c)(1)(v) of this section in functional currency).

(d) *Adjustments to dollar basis pools—*(1) *In general—*(i) *Increases for U.S. dollar amount of income inclusions under sections 951(a), 951A(a), and 1248(a) or (f).* For each addition pursuant to paragraph (c)(1)(i), (ii), (vii), or (xi) of this section of previously taxed earnings and profits relating to a single dollar basis pool, add an amount of basis equal to the income inclusion under section 951(a), 951A(a), or 1248(a) or (f) giving rise to such previously taxed earnings and profits to the dollar basis pool.

(ii) *Increases for dollar basis of received or resulting previously taxed earnings and profits.* For each addition pursuant to paragraph (c)(1)(iii) or (iv) of this section of previously taxed earnings and profits relating to a single dollar basis pool, add the dollar basis of such previously taxed earnings and profits (determined under § 1.959–4 or 1.961–9, as applicable) to the dollar basis pool.

(iii) *Decreases for current year taxes.* For each reduction pursuant to paragraph (c)(1)(v) of this section to previously taxed earnings and profits relating to a single dollar basis pool, reduce the basis in the dollar basis pool by the amount of the current year taxes giving rise to the reduction.

(iv) *Decreases for dollar basis of distributed or transferred previously taxed earnings and profits.* For each

removal pursuant to paragraph (c)(1)(vi) or (viii) of this section of previously taxed earnings and profits relating to a single dollar basis pool, remove the dollar basis of such previously taxed earnings and profits (determined under § 1.959–4 or 1.959–7, as applicable) from the dollar basis pool.

(v) *Increases for dollar basis of transferred previously taxed earnings and profits, adjusted for foreign currency gain or loss.* For each addition pursuant to paragraph (c)(1)(ix) of this section of previously taxed earnings and profits relating to a single dollar basis pool, add the dollar basis of such previously taxed earnings and profits (determined under § 1.959–7 and adjusted in accordance with the next sentence) to the dollar basis pool. In applying the preceding sentence, increase (or decrease) the dollar basis of transferred previously taxed earnings and profits by foreign currency gain (or foreign currency loss) that the transferor covered shareholder recognizes with respect to the previously taxed earnings and profits. In addition, determine such foreign currency gain or loss without regard to § 1.986–1(c)(3)(i) and (ii) (limitations for previously taxed earnings and profits resulting from section 965) and by treating the deemed covered shareholder in the same manner as a covered shareholder.

(vi) *Adjustments for dollar basis of previously taxed earnings and profits to which a section 956 amount is allocated.* For each reassignment pursuant to paragraph (c)(1)(x) of this section of previously taxed earnings and profits relating to a single dollar basis pool, remove the dollar basis of such previously taxed earnings and profits (determined under § 1.959–5) from the dollar basis pool relating to the section 959(c)(2) PTEP group from which the previously taxed earnings and profits are reassigned and add such basis to the dollar basis pool relating to the section 959(c)(1) PTEP group to which the previously taxed earnings and profits are reassigned.

(2) *Currency rule.* All adjustments to dollar basis pools are made in U.S. dollars, determined, as applicable, by translating inclusions described in paragraph (d)(1)(i) of this section into U.S. dollars in accordance with section 989(b) and current year taxes described in paragraph (d)(1)(iii) of this section into U.S. dollars in accordance with section 986(a) and § 1.986(a)–1.

(e) *Adjustments to PTEP tax pools—*(1) *In general—*(i) *Increases for foreign income taxes associated with previously taxed earnings and profits received.* For each addition pursuant to paragraph (c)(1)(iii) of this section of previously

taxed earnings and profits relating to a single PTEP tax pool, add the foreign income taxes that are associated with such previously taxed earnings and profits (determined under § 1.959–4(g)) to the PTEP tax pool. Assign such associated foreign income taxes to the creditable PTEP tax group only to the extent the foreign corporation is deemed to pay the taxes under section 960(b)(2) and § 1.960–3(c). *See* paragraph (e)(1)(ii) of this section for increases to PTEP tax pools for current year taxes paid or accrued by the foreign corporation on the receipt of the previously taxed earnings and profits.

(ii) *Increases for current year taxes.* For each reduction pursuant to paragraph (c)(1)(v) of this section to previously taxed earnings and profits relating to a single PTEP tax pool, add to the PTEP tax pool the current year taxes giving rise to the reduction. Assign such current year taxes to the creditable PTEP tax group only if the foreign corporation is a controlled foreign corporation when the taxes are paid or accrued and a credit for the taxes is not disallowed or suspended at the level of the controlled foreign corporation (*see, for example*, section 245A(e)(3) and § 1.245A(d)–1(a)(2) and sections 901(k)(1), (l), and (m), 909, and 6038(c)(1)(B)).

(iii) *Decreases for foreign income taxes associated with distributed or*

transferred previously taxed earnings and profits. For each removal pursuant to paragraph (c)(1)(vi) or (viii) of this section of previously taxed earnings and profits relating to a single PTEP tax pool, remove the foreign income taxes that are associated with such previously taxed earnings and profits (determined under § 1.959–4 or 1.959–7, as applicable) from the PTEP tax pool.

(iv) *Increases for foreign income taxes associated with transferred previously taxed earnings and profits.* For each addition pursuant to paragraph (c)(1)(ix) of this section of previously taxed earnings and profits relating to a single PTEP tax pool, add the foreign income taxes that are associated with such previously taxed earnings and profits (determined under § 1.959–7) to the PTEP tax pool. Assign such associated foreign income taxes to the creditable PTEP tax group only to the extent the taxes relate to the creditable PTEP tax group immediately before the general successor transaction.

(v) *Adjustments for foreign income taxes associated with previously taxed earnings and profits to which a section 956 amount is allocated.* For each reassignment pursuant to paragraph (c)(1)(x) of this section of previously taxed earnings and profits relating to a single PTEP tax pool, remove the foreign income taxes that are associated with such previously taxed earnings and

profits (determined under § 1.959–5) from the PTEP tax pool relating to the section 959(c)(2) PTEP group from which the previously taxed earnings and profits are reassigned and add such foreign income taxes to the PTEP tax pool relating to the section 959(c)(1) PTEP group to which the previously taxed earnings and profits are reassigned. Assign such associated foreign income taxes to the creditable PTEP tax group only to the extent the taxes relate to the creditable PTEP tax group immediately before the reassignment.

(2) *Currency rule.* All adjustments to PTEP tax pools are made in U.S. dollars, determined, as applicable, by translating current year taxes described in paragraph (e)(1)(ii) of this section into U.S. dollars in accordance with section 986(a) and § 1.986(a)–1.

(f) *Timing of adjustments*—(1) *Annual PTEP accounts.* An adjustment to an annual PTEP account is treated as made in accordance with the timing rules in the following table. In the case of adjustments described in paragraphs (c)(1)(iii) through (xi) of this section that are treated as made at the same time, such adjustments are treated as made at that time in sequence (starting with the adjustment in the earliest paragraph).

TABLE 1 TO PARAGRAPH (f)(1) OF THIS SECTION—TIMING OF ANNUAL PTEP ACCOUNT ADJUSTMENTS

Adjustment described in this section	Description	When adjustment is treated as made
Paragraph (c)(1)(i)	Increases for amounts included in gross income under section 951(a)(1)(A).	Beginning of the first day of the relevant taxable year.
Paragraph (c)(1)(ii)	Increases for amounts included in gross income under section 951A(a).	
Paragraph (c)(1)(iii)	Increases for receipt of distributed previously taxed earnings and profits.	
Paragraph (c)(1)(iv)	Increases for previously taxed earnings and profits resulting from section 961(c) basis.	
Paragraph (c)(1)(v)	Decreases for current year taxes.	Concurrently with the covered distribution.
Paragraph (c)(1)(vi)	Decreases for distributed previously taxed earnings and profits.	
Paragraph (c)(1)(vii)	Increases for amounts included in gross income as a dividend under section 1248.	Concurrently with the sale or exchange.
Paragraph (c)(1)(viii)	Decreases for transferred previously taxed earnings and profits.	Concurrently with the general successor transaction.
Paragraph (c)(1)(ix)	Increases for transferred previously taxed earnings and profits.	
Paragraph (c)(1)(x)	Reassignments for previously taxed earnings and profits to which a section 956 amount is allocated.	End of the last day of the relevant taxable year.
Paragraph (c)(1)(xi)	Increases for amounts included in gross income under section 951(a)(1)(B).	

(2) *Dollar basis pools.* An adjustment to a dollar basis pool is treated as made concurrently with the related adjustment described in paragraph (c) of this section.

(3) *PTEP tax pools.* An adjustment to a PTEP tax pool is treated as made concurrently with the related adjustment described in paragraph (c) of this section.

(g) *Bottom-up application to tiered foreign corporations.* For purposes of applying this section to tiered foreign corporations, this section is applied first to the foreign corporation at the lowest

tier, then to the foreign corporation at the next lowest tier, and so on.

■ **Par. 21.** Section 1.959–4 is revised to read as follows:

§ 1.959–4 Exclusion from gross income of previously taxed earnings and profits received in a distribution.

(a) *Scope.* This section provides the rules for distributions of previously taxed earnings and profits under section 959. Paragraph (b) of this section excludes previously taxed earnings and profits received by a covered shareholder or controlled foreign corporation in a distribution from gross income. Paragraph (c) of this section defines a covered distribution. Paragraph (d) of this section describes rules for analyzing a covered distribution, including rules for determining the extent to which a covered distribution is a distribution of previously taxed earnings and profits. Paragraph (e) of this section provides rules for allocating covered distributions to earnings and profits. Paragraph (f) of this section provides a dollar basis rule. Paragraph (g) of this section provides an associated foreign income taxes rule. *See* § 1.959–10(c)(1) and (2) (*Examples 1 and 2*) for examples illustrating the application of this section. *See also* §§ 1.367(b)–2(j)(2)(ii) and 1.367(b)–3(g)(1) for deemed distributions of previously taxed earnings and profits under other provisions of the Code.

(b) *Exclusion from gross income—(1) Distribution by a foreign corporation to a covered shareholder.* Previously taxed earnings and profits that are distributed to a covered shareholder, other than previously taxed earnings and profits relating to the taxable section 962 PTEP subgroup, are excluded from the covered shareholder's gross income.

(2) *Distribution by a controlled foreign corporation to another controlled foreign corporation—(i) In general.* Previously taxed earnings and profits that are distributed by a controlled foreign corporation to another controlled foreign corporation are excluded from the recipient controlled foreign corporation's gross income, solely for purposes of determining the recipient controlled foreign corporation's subpart F income and tested income or tested loss, and provided that the covered shareholder to which the previously taxed earnings and profits relate is a United States shareholder in both controlled foreign corporations.

(ii) *Treatment of a specified foreign corporation as a controlled foreign corporation.* A specified foreign corporation (as defined in § 1.965–1(f)(45)(i)(B)) that is not otherwise a

controlled foreign corporation is treated as a controlled foreign corporation for purposes of applying paragraph (b)(2)(i) of this section to previously taxed earnings and profits resulting from the application of section 965 that are distributed by the specified foreign corporation.

(3) *Additional consequences.* Upon a distribution of previously taxed earnings and profits, *see* paragraph (d)(5) of this section for adjustments to previously taxed earnings and profits, § 1.961–4 for basis adjustments, § 1.986(c)–1 for recognition of foreign currency gain or loss if the distribution is to a covered shareholder, and § 1.960–3 for deemed paid foreign income taxes if the distribution is to a United States shareholder that is a corporation or to a controlled foreign corporation. *See also* section 962(d) (previously taxed earnings and profits distributed to a covered shareholder and relating to the taxable section 962 PTEP subgroup are included in gross income); § 1.1411–10(c)(1)(i)(A)(1) (previously taxed earnings and profits distributed to a covered shareholder and relating to the taxable section 1411 subgroup are included in net investment income).

(c) *Covered distribution—(1) In general.* A covered distribution is a distribution of property made by a foreign corporation to its shareholders with respect to its stock, to the extent that the distribution is a dividend (as defined in section 316), determined without regard to section 959(d), and not including an amount treated as a dividend by reason of section 78, 367(b), 964(e)(1), or 1248. In a covered distribution, previously taxed earnings and profits are distributed in accordance with the rules described in paragraph (d) of this section.

(2) [Reserved]

(3) *Treatment of a partner's distributive share of a covered distribution.* For purposes of the section 959 regulations, if a portion of a covered distribution is made or is treated as made under this paragraph (c)(3) to a partnership, a partner's distributive share of such portion is treated as a portion of the covered distribution made to the partner.

(d) *Rules for analyzing a covered distribution—(1) Determine each covered shareholder's share of the covered distribution.* First, determine each covered shareholder's share of the covered distribution, computed as the sum of—

(i) Any portion of the covered distribution that is made to the covered shareholder, and

(ii) Any portions of the covered distribution that are made to upper-tier

foreign corporations and assigned to the covered shareholder under § 1.951–2.

(2) *Determine distributed previously taxed earnings and profits.* Second, determine the extent to which each covered shareholder's share of the covered distribution is a distribution of previously taxed earnings and profits in accordance with paragraph (e) of this section.

(3) *Determine dollar basis and associated foreign income taxes.* Third, determine the dollar basis of, and foreign income taxes associated with, distributed previously taxed earnings and profits in accordance with paragraphs (f) and (g) of this section.

(4) *Treat distributed previously taxed earnings and profits as distributed pro rata with respect to shares of stock of the foreign corporation.* Fourth, treat a pro rata portion of all previously taxed earnings and profits distributed in each covered shareholder's share of the covered distribution as distributed with respect to each share of stock of the foreign corporation owned by the covered shareholder, determined by multiplying all such previously taxed earnings and profits by a fraction. The numerator of the fraction is the sum of any portion of the covered distribution that is made with respect to the share of stock to the covered shareholder and any portions of the covered distribution that are made with respect to the share of stock to upper-tier foreign corporations and assigned to the covered shareholder under § 1.951–2. The denominator of the fraction is the amount of the covered shareholder's share of the covered distribution.

(5) *Adjust previously taxed earnings and profits and make related account adjustments.* Fifth, decrease the distributing foreign corporation's previously taxed earnings and profits, and if applicable increase a recipient foreign corporation's previously taxed earnings and profits, to reflect the covered distribution and make the related adjustments described in § 1.959–3 to each covered shareholder's accounts.

(e) *Allocation of distributions—(1) In general.* A covered shareholder's share of a covered distribution (determined under paragraph (d)(1) of this section) is first allocated to previously taxed earnings and profits of the foreign corporation that are with respect to the covered shareholder immediately before the covered distribution (as reflected in the covered shareholder's annual PTEP accounts with respect to the foreign corporation), to the extent thereof and in accordance with paragraphs (e)(2) through (5) of this section. Any remaining portion of such share is

allocated to the foreign corporation's earnings and profits described in section 959(c)(3).

(2) *Priority rules*—(i) *Section 959(c)(1) rule*. Allocate the covered shareholder's share of the covered distribution first to previously taxed earnings and profits assigned to a section 959(c)(1) PTEP group and then to previously taxed earnings and profits assigned to a section 959(c)(2) PTEP group.

(ii) *Rules within section 959(c)(1) PTEP groups*. In allocating the covered shareholder's share of the covered distribution to previously taxed earnings and profits assigned to section 959(c)(1) PTEP groups, allocate first to previously taxed earnings and profits assigned to the reclassified section 965(a) PTEP group, then to previously taxed earnings and profits assigned to the reclassified section 965(b) PTEP group, and finally to previously taxed earnings and profits assigned to the remaining section 959(c)(1) PTEP groups.

(iii) *Rules within section 959(c)(2) PTEP groups*. In allocating the covered shareholder's share of the covered distribution to previously taxed earnings and profits assigned to section 959(c)(2) PTEP groups, allocate first to previously taxed earnings and profits assigned to the section 965(a) PTEP group, then to previously taxed earnings and profits assigned to the section 965(b) PTEP group, and finally to previously taxed earnings and profits assigned to the remaining section 959(c)(2) PTEP groups.

(3) *Last-in, first-out rule*. In allocating the covered shareholder's share of the covered distribution to previously taxed earnings and profits assigned to a single PTEP group or PTEP groups with the same priority (for example, the section 951(a)(1)(A) PTEP group, section 951A PTEP group, and section 245A(d) PTEP group), allocate first to previously taxed earnings and profits that relate to the most recent taxable year, then to previously taxed earnings and profits that relate to the next most recent taxable year, and so on.

(4) *Section 962 ordering rule*. In allocating the covered shareholder's share of the covered distribution to previously taxed earnings and profits that are assigned to a single PTEP group or PTEP groups with the same priority and that relate to the same taxable year, allocate first to previously taxed earnings and profits that are not assigned to the taxable section 962 PTEP subgroup, and then to previously taxed earnings and profits that are assigned to such subgroup.

(5) *Pro rata rule*. In allocating the covered shareholder's share of the

covered distribution to previously taxed earnings and profits that are assigned to a single PTEP group or PTEP groups with the same priority and that relate to the same taxable year and have the same classification for section 962 purposes (*same priority PTEP*), allocate to a pro rata portion of same priority PTEP, determined by multiplying all same priority PTEP by a fraction, the numerator of which is the amount to be allocated to same priority PTEP, and the denominator of which is the amount of same priority PTEP.

(f) *Dollar basis rule*. The dollar basis of previously taxed earnings and profits distributed in a covered shareholder's share of a covered distribution (determined under paragraph (d)(2) of this section) is computed separately with respect to previously taxed earnings and profits relating to a single dollar basis pool, and in each case is equal to a pro rata portion of the dollar basis pool immediately before the covered distribution. The pro rata portion is determined by multiplying all basis in the dollar basis pool by a fraction, the numerator of which is previously taxed earnings and profits distributed in the covered shareholder's share of the covered distribution and relating to the dollar basis pool, and the denominator of which is all previously taxed earnings and profits relating to the dollar basis pool.

(g) *Associated foreign income taxes rule*. The foreign income taxes that are associated with previously taxed earnings and profits distributed in a covered shareholder's share of a covered distribution (determined under paragraph (d)(2) of this section) are computed separately with respect to previously taxed earnings and profits relating to a single PTEP tax pool, and in each case are equal to a pro rata portion of the PTEP tax pool immediately before the covered distribution. The pro rata portion is determined by multiplying all foreign income taxes in the PTEP tax pool by a fraction, the numerator of which is previously taxed earnings and profits distributed in the covered shareholder's share of the covered distribution and relating to the PTEP tax pool, and the denominator of which is all previously taxed earnings and profits relating to the PTEP tax pool. Thus, associated foreign income taxes are sourced pro rata from foreign income taxes assigned to the creditable PTEP tax group in the PTEP tax pool and other foreign income taxes in the PTEP tax pool.

■ **Par. 22.** Sections 1.959–5 through 1.959–12 are added to read as follows:

Sec.

* * * * *

1.959–5 Exclusion of a section 956 amount from gross income to the extent allocated to previously taxed earnings and profits.

1.959–6 Allocating and apportioning current year taxes to previously taxed earnings and profits of a foreign corporation.

1.959–7 General successor transactions.

1.959–8 and 1.959–9 [Reserved]

1.959–10 Examples.

1.959–11 Transition rules.

1.959–12 Applicability dates.

* * * * *

§ 1.959–5 Exclusion of a section 956 amount from gross income to the extent allocated to previously taxed earnings and profits.

(a) *Scope*. This section provides rules for previously taxed earnings and profits to which a section 956 amount is allocated. Paragraph (b) of this section defines a section 956 amount. Paragraph (c) of this section describes rules for analyzing a section 956 amount, including rules for determining the extent to which a section 956 amount is excluded from gross income under section 959(a)(2). Paragraph (d) of this section provides rules for allocating a section 956 amount to previously taxed earnings and profits. Paragraph (e) of this section provides a dollar basis rule. Paragraph (f) of this section provides an associated foreign income taxes rule. See § 1.959–10(c)(4) (*Example 4*) for an example illustrating the application of this section.

(b) *Section 956 amount*. A *section 956 amount* is the amount determined under section 956 and § 1.956–1 with respect to a covered shareholder and a controlled foreign corporation. A section 956 amount is excluded from gross income in accordance with the rules described in paragraph (c) of this section.

(c) *Rules for analyzing a section 956 amount*—(1) *Determine the portion of the section 956 amount excluded from gross income under section 959(a)(2)*. First, the portion of the section 956 amount that it is allocated to section 959(c)(2) previously taxed earnings and profits, which is determined in accordance with paragraph (d) of this section, is excluded from the covered shareholder's gross income.

(2) *Determine dollar basis and associated foreign income taxes*. Second, determine the dollar basis of, and foreign income taxes associated with, previously taxed earnings and profits to which the section 956 amount is allocated in accordance with paragraphs (e) and (f) of this section.

(3) *Adjust previously taxed earnings and profits and make related account*

adjustments. Third, reassign the controlled foreign corporation's previously taxed earnings and profits to which the section 956 amount is allocated from section 959(c)(2) PTEP groups to section 959(c)(1) PTEP groups, and if applicable increase the controlled foreign corporation's previously taxed earnings and profits assigned to the general section 959(c)(1) PTEP group by reason of section 951(a)(1)(B), to reflect the section 956 amount and make the related adjustments described in § 1.959-3.

(d) *Allocation of section 956 amounts*—(1) *In general.* A covered shareholder's section 956 amount is first allocated to previously taxed earnings and profits of the controlled foreign corporation that are with respect to the covered shareholder and assigned to section 959(c)(2) PTEP groups (determined as described in paragraph (d)(2) of this section)), to the extent thereof and in accordance with the principles of § 1.959-4(e)(2)(iii) through (5). Any remaining portion of the section 956 amount is allocated to the controlled foreign corporation's earnings and profits described in section 959(c)(3).

(2) *Determination of previously taxed earnings and profits.* In applying paragraph (d)(1) of this section, previously taxed earnings and profits are determined on the last relevant day of the controlled foreign corporation's taxable year to which the section 956 amount relates, but are reduced to the extent distributed during the taxable year, and are determined without regard to any transfer of previously taxed earnings and profits from the covered shareholder on (or after) the last relevant day of the taxable year.

(e) *Dollar basis rule.* The dollar basis of previously taxed earnings and profits to which a covered shareholder's section 956 amount is allocated (determined under paragraph (d)(1) of this section) is computed separately with respect to previously taxed earnings and profits relating to a single dollar basis pool, and in each case is equal to a pro rata portion of the dollar basis pool determined in the same manner as previously taxed earnings and profits are determined in paragraph (d)(2) of this section. The pro rata portion is determined by multiplying all basis in the dollar basis pool by a fraction, the numerator of which is previously taxed earnings and profits to which the section 956 amount is allocated and relating to the dollar basis pool, and the denominator of the which is all previously taxed earnings and profits relating to the dollar basis pool.

(f) *Associated foreign income taxes rule.* The foreign income taxes that are associated with previously taxed earnings and profits to which a covered shareholder's section 956 amount is allocated (determined under paragraph (d)(1) of this section) are computed separately with respect to previously taxed earnings and profits relating to a single PTEP tax pool, and in each case are equal to a pro rata portion of the PTEP tax pool determined in the same manner as previously taxed earnings and profits are determined in paragraph (d)(2) of this section. The pro rata portion is determined by multiplying all foreign income taxes in the PTEP tax pool by a fraction, the numerator of which is previously taxed earnings and profits to which the section 956 amount is allocated and relating to the PTEP tax pool, and the denominator of which is all previously taxed earnings and profits relating to the PTEP tax pool. Thus, associated foreign income taxes are sourced pro rata from foreign income taxes assigned to the creditable PTEP tax group in the PTEP tax pool and other foreign income taxes in the PTEP tax pool.

§ 1.959-6 Allocating and apportioning current year taxes to previously taxed earnings and profits of a foreign corporation.

(a) *Scope.* This section provides rules for allocating and apportioning current year taxes for purposes of sections 959 and 960(b). Paragraph (b) of this section provides the general rule for determining which foreign income taxes paid or accrued by a foreign corporation may be allocated and apportioned to previously taxed earnings and profits. Paragraph (c) of this section provides rules for the application of § 1.861-20 to allocate and apportion current year taxes among corporate PTEP accounts. Paragraph (d) of this section provides additional rules regarding the allocation and apportionment of deductions to previously taxed earnings and profits and a currency translation rule. *See* § 1.959-10(c)(3) (*Example 3*) for an example illustrating the application of this section.

(b) *In general.* Current year taxes that a foreign corporation pays or accrues during its taxable year by reason of a PTEP realization event that occurs during the same taxable year are allocated and apportioned to the statutory groupings (as generally described in § 1.861-8(a)(4)) of previously taxed earnings and profits of the foreign corporation and to the residual grouping in accordance with the rules of paragraph (c) of this section. For purposes of this section, the

statutory groupings are the corporate PTEP accounts of the foreign corporation described in § 1.959-2(d)(1). A *PTEP realization event* is an increase to the previously taxed earnings and profits of a foreign corporation by reason of its receipt of a covered distribution (as determined under § 1.959-4) or the application of section 961(c) basis of the foreign corporation to covered gain (as determined under § 1.961-9) during the taxable year, as determined under § 1.959-2(d)(1). Current year taxes that are paid or accrued with respect to a PTEP realization event that occurs in a different taxable year may not be allocated and apportioned to the corporate PTEP accounts of a foreign corporation. *See* § 1.960-1(d)(3)(ii)(B) for rules regarding the assignment of foreign gross income to the statutory and residual groupings of income of a controlled foreign corporation when the controlled foreign corporation pays or accrues current year taxes with respect to a PTEP realization event that occurs in a different taxable year.

(c) *Rules for allocating and apportioning current year taxes to previously taxed earnings and profits.* Allocate and apportion current year taxes that a foreign corporation pays or accrues during its taxable year by reason of a PTEP realization event that occurs during the same taxable year (translated, if applicable, into the foreign corporation's functional currency as described in paragraph (d)(3) of this section) to its statutory groupings of previously taxed earnings and profits and to the residual grouping in accordance with the rules of § 1.861-20. For this purpose, foreign gross income that a foreign corporation includes under foreign law by reason of a distribution that it receives, or by reason of its disposition of stock, is assigned to its statutory groupings of previously taxed earnings and profits by treating previously taxed earnings and profits arising from the distribution or disposition as included in the U.S. dividend amount or the U.S. capital gain amount, respectively, for purposes of applying § 1.861-20(d)(1). For the definitions of U.S. dividend amount and U.S. capital gain amount, *see* § 1.861-20(b).

(d) *Additional rules*—(1) *No deductions other than deductions for current year taxes paid or accrued with respect to a PTEP realization event that occurs in the same taxable year are allocated or apportioned to the statutory groupings of previously taxed earnings and profits of a foreign corporation.* No deductions of a foreign corporation, other than deductions for current year

taxes that the foreign corporation pays or accrues during its taxable year with respect to a PTEP realization event that occurs in the same taxable year, may be allocated or apportioned under section 861 to the statutory groupings of previously taxed earnings and profits of the foreign corporation.

(2) *Currency rule.* For purposes of this section, if current year taxes that a foreign corporation pays or accrues are denominated in a currency other than the foreign corporation's functional currency, then the current year taxes are translated into the foreign corporation's functional currency at the spot rate on the day on which the current year taxes are paid or accrued. See section 986(a) and § 1.986(a)–1 for rules translating current year taxes into U.S. dollars.

§ 1.959–7 General successor transactions.

(a) *Scope.* This section identifies certain transactions in which a foreign corporation's previously taxed earnings and profits with respect to a covered shareholder transfer to (and thus become previously taxed earnings and profits with respect to) another covered shareholder under section 959 (defined as general successor transactions) and provides rules for determining the previously taxed earnings and profits that transfer. Paragraph (b) of this section provides definitions. Paragraph (c) of this section describes rules for analyzing a general successor transaction, including rules for determining previously taxed earnings and profits that transfer in the general successor transaction. Paragraph (d) of this section describes a fraction determining the pro rata portion of certain previously taxed earnings and profits that transfer. Paragraph (e) of this section provides a dollar basis rule. Paragraph (f) of this section provides an associated foreign income taxes rule. Paragraph (g) of this section provides rules regarding the deemed covered shareholder. See § 1.959–10(c)(5) (Example 5) for an example illustrating the application of this section. See also §§ 1.959–8 and 1.959–9, regarding the extent to which previously taxed earnings and profits transfer under section 959 in a transaction other than a general successor transaction.

(b) *General successor transaction*—(1) *In general.* A general successor transaction is any transaction in which a covered shareholder (the *successor covered shareholder*) acquires ownership of stock of one or more foreign corporations (each, an *acquired foreign corporation*) that, immediately before the transaction, is owned by another covered shareholder (the *transferor covered shareholder*),

determined without regard to any portion of an acquisition of ownership of stock that results from a transaction described in paragraph (b)(2) of this section. In a general successor transaction, previously taxed earnings and profits of each acquired foreign corporation transfer from the transferor covered shareholder to the successor covered shareholder (and thus become with respect to the successor covered shareholder) in accordance with the rules described in paragraph (c) of this section.

(2) *Certain transactions.* A transaction is described in this paragraph (b)(2) if the transaction is—

(i) An issuance of stock or a partnership interest,

(ii) A redemption of stock (within the meaning of section 317(b)) or a liquidating distribution in redemption of a partnership interest, or

(iii) A transfer of stock of a foreign corporation, or any property through which stock of a foreign corporation is owned, if such stock or property is substituted basis property.

(3) *Additional consequences.* Upon a general successor transaction, see § 1.961–5 for basis adjustments and § 1.986(c)–1 for recognition of foreign currency gain or loss by the transferor covered shareholder.

(c) *Rules for analyzing a general successor transaction*—(1) *Determine general successor PTEP*—(i) *In general.* First, determine *general successor PTEP*, which for each acquired foreign corporation is computed by multiplying all previously taxed earnings and profits of the acquired foreign corporation that are with respect to the transferor covered shareholder immediately before the general successor transaction by the fraction computed in accordance with paragraph (d) of this section.

(ii) *Previously taxed earnings and profits not eligible to transfer if the general successor transaction is before the last relevant day.* In applying paragraph (c)(1)(i) of this section, if the general successor transaction is before the last relevant day of the acquired foreign corporation's taxable year that includes the general successor transaction, then do not take into account (and thus do not transfer to the successor covered shareholder) any previously taxed earnings and profits that result from an income inclusion of the transferor covered shareholder under section 951(a)(1)(A) or 951A(a) for such taxable year (as accounted for in adjusting annual PTEP accounts pursuant to § 1.959–3(c)(1)(i) and (ii)). For example, if the successor covered shareholder acquires less than all of the transferor covered shareholder's stock of

the acquired foreign corporation, and the transferor covered shareholder continues to own the retained stock on the last relevant day, then any previously taxed earnings and profits resulting from the transferor covered shareholder's income inclusions under section 951(a)(1)(A) and 951A for the acquired foreign corporation's taxable year do not transfer in the general successor transaction.

(2) *Determine section 959(e) successor PTEP.* Second, determine *section 959(e) successor PTEP*, which for each acquired foreign corporation is all the previously taxed earnings and profits of the acquired foreign corporation that, under section 959(e), result from the application of section 1248 to gain recognized by the transferor covered shareholder in the general successor transaction (as accounted for in adjusting annual PTEP accounts pursuant to § 1.959–3(c)(1)(vii)).

(3) *Determine dollar basis and associated foreign income taxes.* Third, determine the dollar basis of, and foreign income taxes associated with, general successor PTEP and section 959(e) successor PTEP in accordance with paragraph (e) of this section.

(4) *Transfer previously taxed earnings and profits and make related account adjustments.* Fourth, transfer general successor PTEP and section 959(e) successor PTEP from the transferor covered shareholder to the successor covered shareholder and make the related adjustments described in § 1.959–3.

(d) *Fraction in determining general successor PTEP*—(1) *In general.* In determining general successor PTEP of an acquired foreign corporation, the fraction described in paragraph (c)(1)(i) of this section is computed as follows. The numerator of the fraction is the portion of the acquired foreign corporation's hypothetical distribution described in paragraph (d)(2) of this section that, under the principles of § 1.951–1(e)(2) through (6), would be distributed with respect to the stock of the acquired foreign corporation the ownership of which is acquired by the successor covered shareholder in the general successor transaction. The denominator of the fraction is the amount of such hypothetical distribution. However, if the denominator of the fraction would be zero, then the fraction is considered to be zero.

(2) *Hypothetical distribution.* The hypothetical distribution described in this paragraph (d)(2) is a hypothetical distribution treated as made by the acquired foreign corporation with respect to stock of the acquired foreign

corporation, immediately before the general successor transaction and in an amount equal to the acquired foreign corporation's previously taxed earnings and profits with respect to the transferor covered shareholder (determined as described in paragraph (c)(1) of this section). In the hypothetical distribution, stock of the acquired foreign corporation is taken into account only to the extent owned by the transferor covered shareholder immediately before the general successor transaction, and the earnings and profits of the acquired foreign corporation are treated as equal to the amount of the hypothetical distribution.

(e) *Dollar basis rule*—(1) *General successor PTEP*. The dollar basis of previously taxed earnings and profits composing general successor PTEP (determined under paragraph (c)(1) of this section) is computed separately with respect to previously taxed earnings and profits relating to a single dollar basis pool, and in each case is equal to a pro rata portion of the dollar basis pool immediately before the general successor transaction. The pro rata portion is determined by multiplying all basis in the dollar basis pool by a fraction, the numerator of which is previously taxed earnings and profits composing general successor PTEP and relating to the dollar basis pool, and the denominator of which is all previously taxed earnings and profits relating to the dollar basis pool.

(2) *Section 959(e) successor PTEP*. The dollar basis of previously taxed earnings and profits composing section 959(e) successor PTEP (determined under paragraph (c)(2) of this section) is equal to the U.S. dollar amount of the income inclusion giving rise to the previously taxed earnings and profits (as accounted for in increasing dollar basis pools pursuant to § 1.959–3(d)(1)(i)).

(f) *Associated foreign income taxes rule*—(1) *General successor PTEP*. The foreign income taxes that are associated with previously taxed earnings and profits composing general successor PTEP (determined under paragraph (c)(1) of this section) are computed separately with respect to previously taxed earnings and profits relating to a single PTEP tax pool, and in each case are equal to a pro rata portion of the PTEP tax pool immediately before the general successor transaction. The pro rata portion is determined by multiplying all foreign income taxes in the PTEP tax pool by a fraction, the numerator of which is previously taxed earnings and profits composing general successor PTEP and relating to the PTEP tax pool, and the denominator of which is all previously taxed earnings and

profits relating to the PTEP tax pool. Thus, associated foreign income taxes are sourced pro rata from foreign income taxes assigned to the creditable PTEP tax group in the PTEP tax pool and other foreign income taxes in the PTEP tax pool.

(2) *Section 959(e) successor PTEP*. The foreign income taxes associated with previously taxed earnings and profits composing section 959(e) successor PTEP (determined under paragraph (c)(2) of this section) are zero.

(g) *Deemed covered shareholder*—(1) *In general*. The *deemed covered shareholder* is a hypothetical person that is treated as owning all the stock of any foreign corporation that is not owned by a covered shareholder. For purposes of transferring previously taxed earnings and profits under section 959, the deemed covered shareholder is treated in the same manner as a covered shareholder and a reference to a covered shareholder includes the deemed covered shareholder. Thus, for example, if a covered shareholder sells stock of a foreign corporation to a nonresident alien individual, then the sale is a general successor transaction and previously taxed earnings and profits of the foreign corporation transfer from the seller covered shareholder to the deemed covered shareholder under this section. Moreover, if the individual subsequently sells stock of the foreign corporation to a covered shareholder, then previously taxed earnings and profits of the foreign corporation (adjusted consistent with § 1.959–3, including to reflect distributions from the foreign corporation to the individual) transfer from the deemed covered shareholder to the buyer covered shareholder under this section.

(2) *Determining previously taxed earnings and profits that transfer from the deemed covered shareholder*. In a transaction in which previously taxed earnings and profits of a foreign corporation transfer from the deemed covered shareholder to a covered shareholder, the covered shareholder must use a reasonable method in determining the amount and character of the transferred previously taxed earnings and profits and in determining the foreign income taxes associated with the transferred previously taxed earnings and profits. Such method must take into account adjustments to previously taxed earnings and profits with respect to the deemed covered shareholder that would have been made under § 1.959–3 if the previously taxed earnings and profits were respect to a covered shareholder.

§§ 1.959–8 and 1.959–9 [Reserved]

§ 1.959–10 Examples.

(a) *In general*. This section provides examples that illustrate the application of §§ 1.959–1 through 1.959–9.

(b) *Assumed facts*. For purposes of the examples in this section, unless otherwise indicated, the following facts are assumed:

(1) US1 and US2 are unrelated domestic corporations that are covered shareholders, each of which uses the U.S. dollar as its functional currency and has a combined pool election in effect under § 1.959–2(c). Neither US1 nor US2 is a member of a consolidated group (as defined in § 1.1502–1(h)).

(2) F1 and F2 are foreign corporations, each of which is a controlled foreign corporation and uses the British pound (£) as its functional currency.

(3) PRS is a partnership.

(4) Each entity uses the calendar year as its taxable year, and no entity has a short taxable year.

(5) Tables depicting annual PTEP accounts, dollar basis pools, or PTEP tax pools do not depict accounts or PTEP groups with a balance of zero.

(c) *Examples*—(1) *Example 1: Exclusion from gross income of previously taxed earnings and profits distributed in a covered distribution*—(i) *Facts*. US1 directly owns all 100 shares of the single class of outstanding stock of F1. In year 3, F1 makes a £300x distribution of money with respect to its stock (£3x with respect to each share), and the entirety of this £300x is a covered distribution (a dividend as defined in section 316, determined without regard to section 959(d)). Immediately before the covered distribution, F1 has £180x of previously taxed earnings and profits with respect to US1, none of which is assigned to the taxable section 962 PTEP group. This example only analyzes the extent to which previously taxed earnings and profits are distributed and excluded from gross income under section 959. See paragraph (c)(2) of this section (*Example 2*) for an illustration of composition, dollar basis, and associated foreign income taxes of distributed previously taxed earnings and profits, along with foreign currency gain or loss under section 986(c) and deemed paid taxes under section 960(b). See also § 1.961–4 (basis reductions and gain recognition for distributions of previously taxed earnings and profits).

(ii) *Analysis*. For purposes of analyzing the covered distribution, US1's share of the covered distribution is the entire £300x because that amount of the covered distribution is made to US1. See § 1.959–4(d)(1). Such share is

allocated first to F1's previously taxed earnings and profits that are with respect to US1 immediately before the covered distribution (£180x) and then to F1's earnings and profits described in section 959(c)(3) and, therefore, is a distribution of £180x of previously taxed earnings and profits and £120x of earnings and profits described in section 959(c)(3). See § 1.959-4(d)(2) and (e)(1). These previously taxed earnings and profits are treated as distributed pro rata with respect to the stock of F1 on which US1's share of the covered distribution is made. See § 1.959-4(d)(4).

Accordingly, £1.8x of previously taxed earnings and profits is treated as distributed with respect to each share of F1 stock, computed by multiplying the £180x distributed previously taxed earnings and profits by a fraction, the numerator of which is the portion of US1's share of the covered distribution that is made with respect to the share of F1 stock (£3x), and the denominator of which is the amount of US1's share of the covered distribution (£300x). See *id.* US1 excludes the £180x of previously taxed earnings and profits distributed to it from its gross income. See § 1.959-4(b)(1); see also § 1.312-8(c) (US1's receipt of previously taxed earnings and profits does not increase its earnings and profits).

(iii) *Alternative facts: split-ownership—(A) Facts.* The facts are the same as in paragraph (c)(1)(i) of this section (*Example 1*), except as follows. US1 owns all the outstanding stock of F2, and US1 directly owns 80%, and F2 directly owns 20%, of the stock of F1. Thus, US1 receives a £240x portion, and F2 receives a £60x portion, of the £300x covered distribution made by F1. Under § 1.951-2, US1 is assigned the entirety of the £60x portion of the covered distribution received by F2.

(B) *Analysis.* For purposes of analyzing the covered distribution, US1's share of the covered distribution is the entire £300x, the sum of the portion of the covered distribution that is made to US1 (£240x) and the portion of the covered distribution that is made to F2 and assigned to US1 under § 1.951-2 (£60x). See § 1.959-4(d)(1). As is the case in paragraph (c)(1)(ii) of this section, such share is treated as a

distribution of £1.8x of previously taxed earnings and profits with respect to each share of F1 stock (and F1's previously taxed earnings and profits with respect to US1 are reduced by the £180x of distributed previously taxed earnings and profits). Accordingly, US1 is treated as receiving £144x of previously taxed earnings and profits (£1.8x × 80 shares of F1 stock directly owned by US1) and F2 is treated as receiving £36x of previously taxed earnings and profits (£1.8x × 20 shares of F1 stock directly owned by F2). US1 excludes the £144x of previously taxed earnings and profits distributed to it from its gross income. See § 1.959-4(b)(1). F2 excludes the £36x of previously taxed earnings distributed to it from its gross income, solely for purposes of determining its subpart F income and tested income or tested loss. See § 1.959-4(b)(2)(i).

(iv) *Alternative facts: partnership-structure—(A) Facts.* The facts are the same as in paragraph (c)(1)(i) of this section (*Example 1*), except as follows. PRS directly owns all the stock of F1. US1 and US2, in the aggregate, directly own all the interests in PRS, and PRS's partnership agreement provides that US1 has a 60% share, and US2 has a 40% share, of any of PRS's items of income, gain, deduction, or loss. The covered distribution made by F1 is equal to £500x (£5x with respect to each share) and thus gives rise to £500x of dividend income to PRS, of which US1 has a £300x distributive share (£500x × 60%) and US2 has a £200x distributive share (£500x × 40%). Immediately before the covered distribution, F1 has no previously taxed earnings and profits with respect to US2.

(B) *Analysis—(1) US1's share of the covered distribution.* US1 is treated as receiving £300x of the covered distribution, equal to its distributive share of the covered distribution. See § 1.959-4(c)(3). Therefore, for purposes of analyzing the covered distribution, US1's share of the covered distribution is £300x (the amount of the covered distribution treated as made to US1). See § 1.959-4(d)(1). For such share, the results are the same as in paragraph (c)(1)(ii) of this section.

(2) *US2's share of the covered distribution.* US2 is treated as receiving

£200x of the covered distribution, equal to its distributive share of the covered distribution. See § 1.959-4(c)(3). Therefore, for purposes of analyzing the covered distribution, US2's share of the covered distribution is £200x (the amount of the covered distribution treated as made to US2). See § 1.959-4(d)(1). The entirety of such share is a distribution of earnings and profits described in section 959(c)(3) because F1 has no previously taxed earnings and profits with respect to US2. See § 1.959-4(d)(2) and (e)(1). US2 excludes none of its £200x distributive share of the covered distribution from its gross income under section 959 because none of the covered distribution received by US2 is previously taxed earnings and profits.

(2) *Example 2: Composition, dollar basis, and associated foreign income taxes of distributed previously taxed earnings and profits—(i) Facts.* US1 directly owns all 100 shares of the single class of outstanding stock of F1. In year 8, F1 makes a £225x distribution of money with respect to its stock (£2.25x with respect to each share), and the entirety of this £225x is a covered distribution. On the day of the covered distribution, the spot rate is \$1:£0.4. Tables 1 through 3 in this paragraph (c)(2)(i) provide F1's previously taxed earnings and profits with respect to US1, determined immediately before the covered distribution and thus reflecting adjustments pursuant to § 1.959-3 for US1's income inclusions under sections 951(a)(1)(A) and 951A (£80x and £70x, respectively) for F1's taxable year ending on December 31 of year 8. Some of the previously taxed earnings and profits are previously taxed earnings and profits that were distributed to F1 by other foreign corporations in earlier years. The adjusted applicable percentage with respect to previously taxed earnings and profits that resulted from section 965(a) or (b) and relate to the general category is 60%, and the section 965(c) deduction percentage with respect to previously taxed earnings and profits that resulted from 965(a) and relate to the general category is 60%.

TABLE 1 TO PARAGRAPH (c)(2)(i) OF THIS SECTION—US1'S ANNUAL PTEP ACCOUNTS WITH RESPECT TO F1

Taxable year	§ 904 category						Total
	General category			Passive category	§ 951A category		
					Reclassified § 951A PTEP group	§ 951A PTEP group	
	§ 965(a) PTEP group	§ 965(b) PTEP group	§ 951(a)(1)(A) PTEP group	§ 951(a)(1)(A) PTEP group			
Year 8			£50x	£30x	.....	£70x	£150x
Year 3					£65x	10x	75x

TABLE 1 TO PARAGRAPH (c)(2)(i) OF THIS SECTION—US1'S ANNUAL PTEP ACCOUNTS WITH RESPECT TO F1—
Continued

Taxable year	§ 904 category						Total
	General category			Passive category	§ 951A category		
	§ 965(a) PTEP group	§ 965(b) PTEP group	§ 951(a)(1)(A) PTEP group	§ 951(a)(1)(A) PTEP group	Reclassified § 951A PTEP group	§ 951A PTEP group	
Year 1	£20x	£20x	.....	20x	.....	.....	60x

TABLE 2 TO PARAGRAPH (c)(2)(i) OF THIS SECTION—US1'S DOLLAR BASIS POOLS WITH RESPECT TO F1
[Combined pool election]

§ 904 category						
General category				Passive category	§ 951A category	
§ 965(a) PTEP group	§ 965(b) PTEP group	§ 951(a)(1)(A) PTEP group	§ 951(a)(1)(A) PTEP group	§ 951(a)(1)(A) PTEP group	Reclassified § 951A PTEP group	§ 951A PTEP group
\$40x	\$40x	\$125x	\$115x	\$188.5x	\$204x	

TABLE 3 TO PARAGRAPH (c)(2)(i) OF THIS SECTION—US1'S PTEP TAX POOLS WITH RESPECT TO F1
[Combined pool election]

	§ 904 category					
	General category			Passive category	§ 951A category	
	§ 965(a) PTEP group	§ 965(b) PTEP group	§ 951(a)(1)(A) PTEP group	§ 951(a)(1)(A) PTEP group	Reclassified § 951A PTEP group	§ 951A PTEP group
Creditable PTEP tax group	\$10x	\$10x	.....	\$6x	\$26x	\$4x
Other taxes .....	.....	.....	.....	4x	.....	.....

(ii) *Analysis*—(A) *Distributed previously taxed earnings and profits*. The entirety of US1's share of the covered distribution (£225x) is allocated to F1's previously taxed earnings and profits that are with respect to US1 immediately before the covered distribution because such previously taxed earnings and profits (£285x, computed as £150x + £75x + £60x, as set forth in table 1 in paragraph (c)(2)(i) of this section), are at least equal to such share. See § 1.959–4(d)(2) and (e)(1). Specifically, US1's share of the covered distribution is allocated first to the £65x of previously taxed earnings and profits assigned to the reclassified section 951A PTEP group, second to the £20x of previously taxed earnings and profits assigned to the section 965(a) PTEP group, and third to the £20x of previously taxed earnings and profits assigned to the section 965(b) PTEP group. See § 1.959–4(e)(2). The remaining portion of US1's share of the covered distribution (£120x, computed as £225x – £65x – £20x – £20x) is allocated pro rata to previously taxed earnings and profits that relate to year 8 and, therefore, is allocated to £40x of previously taxed earnings and profits assigned to the section 951(a)(1)(A)

PTEP group and relating to year 8 and the general category (computed as £50x × £120x/£150x), £24x of previously taxed earnings and profits assigned to the section 951(a)(1)(A) PTEP group and relating to year 8 and the passive category (computed as £30x × £120x/£150x), and £56x of previously taxed earnings and profits assigned to the section 951A PTEP group and relating to year 8 and the section 951A category (computed as £70x × £120x/£150x). See § 1.959–4(e)(3) and (e)(5). US1 excludes the £225x of previously taxed earnings and profits distributed to it from its gross income. See § 1.959–4(b)(1); see also § 1.961–4 (basis reductions and gain recognition for distributions of previously taxed earnings and profits).

(B) *Dollar basis and foreign currency gain or loss*. The dollar basis of previously taxed earnings and profits distributed in US1's share of the covered distribution (described in paragraph (c)(2)(ii)(A) of this section) is computed separately with respect to previously taxed earnings and profits relating to a single dollar basis pool, and in each case is equal to a pro rata portion of the dollar basis pool immediately before the covered distribution (determined by multiplying all basis in the dollar basis pool by a

fraction, the numerator of which is previously taxed earnings and profits distributed in the US1's share of the covered distribution and relating to the dollar basis pool, and the denominator of which is all previously taxed earnings and profits relating to the dollar basis pool). See § 1.959–4(f). Under § 1.986(c)–1, US1 recognizes foreign currency gain or loss with respect to previously taxed earnings and profits distributed to it, determined by translating the previously taxed earnings and profits into U.S. dollars using the spot rate on the day of the covered distribution and then subtracting from that U.S. dollar amount the dollar basis of the previously taxed earnings and profits. US1 does not recognize 60% (the section 965(c) deduction percentage) of the foreign currency gain or loss with respect to the previously taxed earnings and profits relating to the section 965(a) PTEP group. Table 1 in this paragraph (c)(2)(ii)(B) provides computations for dollar basis and foreign currency gain or loss with respect to each group of distributed previously taxed earnings and profits. Thus, US1 recognizes a total of \$8.8x of foreign currency gain and \$28.8x of foreign currency loss.

TABLE 1 TO PARAGRAPH (c)(2)(ii)(B) OF THIS SECTION—DOLLAR BASIS AND FOREIGN CURRENCY (FX) GAIN OR LOSS OF DISTRIBUTED PTEP

Taxable year	§ 904 category					
	General category			Passive category	§ 951A category	
	§ 965(a) PTEP group	§ 965(b) PTEP group	§ 951(a)(1)(A) PTEP group	§ 951(a)(1)(A) PTEP group	Reclassified § 951A PTEP group	§ 951A PTEP group
Year 8: Distributed PTEP. Dollar basis ... FX gain or loss.	..... ..... .....	..... ..... .....	£40x \$100x (\$125x × £40x/ £50x). \$0 (£40x × \$1/ *£0.4 – \$100x).	£24x \$55.2x (\$115x × £24x/ £50x). \$4.8x gain (£24x × \$1 £0.4 – \$55.2x).	..... ..... .....	£56x \$142.8x (\$204x × £56x/ £80x) \$2.8x loss (£56x × \$1/ £0.4 – \$142.8x)
Year 3: Distributed PTEP. Dollar basis ... FX gain or loss.	..... ..... .....	..... ..... .....	..... ..... .....	..... ..... .....	£56x. \$188.5x (\$188.5x × £65x/£65x). \$26x loss (£65x × \$1/ £0.4 – \$188.5x).	..... ..... .....
Year 1: Distributed PTEP. Dollar basis ... FX gain or loss.	£20x \$40x (\$40x × £20x/£20x). \$4x gain ((£20x × \$1/£0.4 – \$40x) × (100% – 60%)).	£20x. \$40x (\$40x × £20x/£20x). Not applicable.	..... ..... .....	..... ..... .....	..... ..... .....	..... ..... .....

(C) *Associated foreign income taxes.* The foreign income taxes that are associated with previously taxed earnings and profits distributed in US1's share of the covered distribution (described in paragraph (c)(2)(ii)(A) of this section) are computed separately with respect to previously taxed earnings and profits relating to a single PTEP tax pool, and in each case are

equal to a pro rata portion of the PTEP tax pool immediately before the covered distribution (determined by multiplying all foreign income taxes in the PTEP tax pool by a fraction, the numerator of which is previously taxed earnings and profits distributed in US1's share of the covered distribution and relating to the PTEP tax pool, and the denominator of which is all previously taxed earnings

and profits relating to the PTEP tax pool). See § 1.959–4(g). Table 1 in this paragraph (c)(2)(ii)(C) provides these computations (and refers to associated foreign income taxes sourced from the creditable PTEP tax group as “creditable taxes” and associated foreign income taxes not sourced from the creditable PTEP tax group as “other taxes”).

TABLE 1 TO PARAGRAPH (c)(2)(ii)(C) OF THIS SECTION—ASSOCIATED FOREIGN INCOME TAXES OF DISTRIBUTED PTEP

Taxable year	§ 904 category					
	General category			Passive category	§ 951A category	
	§ 965(a) PTEP group	§ 965(b) PTEP group	§ 951(a)(1)(A) PTEP group	§ 951(a)(1)(A) PTEP group	Reclassified § 951A PTEP group	§ 951A PTEP group
Year 8: Distributed PTEP Creditable Taxes Other Taxes .....	..... ..... .....	..... ..... .....	£40x \$0	£24x \$2.9x (\$6x × £24x/ £50x). \$1.9x (\$4x × £24x/ £50x).	..... ..... .....	£56x. \$2.8x (\$4x × £56x/ £80x).
Year 3: Distributed PTEP Creditable Taxes Other Taxes.	..... ..... .....	..... ..... .....	..... ..... .....	..... ..... .....	£65x. \$26x (\$26x × £65x/ £65x).	..... ..... .....
Year 1: Distributed PTEP Creditable Taxes Other Taxes.	£20x \$10x (\$10x × £20x/ £20x).	£20x. \$10x (\$10x × £20x/ £20x).	..... ..... .....	..... ..... .....	..... ..... .....	..... ..... .....

(D) *Deemed paid taxes.* Under section 960(b), because F1 is a controlled foreign corporation in which US1 is a United States shareholder, US1 is deemed to pay the foreign income taxes properly attributable to previously taxed earnings and profits distributed to it,

which are the foreign income taxes that are both associated with the previously taxed earnings and profits and sourced from the creditable PTEP tax group. See § 1.960–3(b). Thus, US1 is deemed to pay \$51.7x of foreign income taxes (\$2.9x + \$2.8x + \$26x + \$10x + \$10x).

Under § 1.965–5(c), US1 is disallowed a credit for 60% (the adjusted applicable percentage) of the foreign income taxes deemed paid with respect to the previously taxed earnings and profits relating to the section 965(a) PTEP group or section 965(b) PTEP group,

with the result that in each case US1 is disallowed a credit for \$6x of the foreign income taxes deemed paid with respect to each of those groups of previously taxed earnings and profits (\$10x × 60%).

(E) *Account adjustments.* To reflect the covered distribution, the distributed previously taxed earnings and profits, the dollar basis of the distributed previously taxed earnings and profits, and the foreign income taxes associated with the distributed previously taxed earnings and profits are removed from US1's annual PTEP accounts, dollar basis pools, and PTEP tax pools with respect to F1. See § 1.959–3(c)(1)(vi), (d)(1)(iv), and (e)(1)(iii). These adjustments are treated as made concurrently with the covered distribution. See § 1.959–3(f). In addition, the distributed previously taxed earnings and profits, and the foreign income taxes associated with distributed previously taxed earnings and profits, are removed from F1's corporate PTEP accounts and corporate PTEP tax pools for US1, and these adjustments are also treated as made concurrently with the covered distribution. See § 1.959–2(d).

(iii) *Alternative facts: distribution of built-in loss property—(A) Facts.* The facts are the same as in paragraph (c)(2)(i) of this section (*Example 2*), except that, in the covered distribution (which continues to be £225x), F1 distributes property other than money. At the time of the covered distribution, the fair market value of the property is £225x and F1's adjusted basis of the property is £250x. Thus, the covered distribution decreases F1's earnings and profits by £250x. See sections 301(b)(1) and 312(a)(3).

(B) *Analysis.* The results are the same as in paragraph (c)(2)(ii) of this section and thus the covered distribution decreases F1's previously taxed earnings and profits by £225x. The remainder of the £250x decrease to F1's earnings and profits under section 312(a)(3) is accounted for by decreasing (including below zero, if applicable) F1's earnings and profits described in section 959(c)(3) by £25x.

(iv) *Alternative facts: distribution to a foreign corporation—(A) Facts.* The facts are the same as in paragraph (c)(2)(i) of this section (*Example 2*),

except as follows. US1 directly owns all the stock of F2, and F2 directly owns all 100 shares of the single class of stock of F1. Thus, F2 receives the entirety of the £225x covered distribution made by F1. Under § 1.951–2, US1 is assigned the entirety of the £225x covered distribution received by F2.

(B) *Analysis.* The results are the same as described in paragraph (c)(2)(ii) of this section, except that F2 excludes the £225x of distributed previously taxed earnings and profits from its gross income in accordance with § 1.959–4(b)(2), US1 does not recognize foreign currency gain or loss with respect to the distributed previously taxed earnings and profits in accordance with § 1.986(c)–1(c), and F2 is deemed to pay the \$51.7x of foreign income taxes that are both associated with the distributed previously taxed earnings and profits and sourced from the creditable PTEP tax group in accordance with § 1.960–3(c). In addition, the distributed previously taxed earnings and profits (£225x), the dollar basis of the distributed previously taxed earnings and profits (\$566.5x), and the foreign income taxes associated with the distributed previously taxed earnings and profits (\$51.7x + \$1.9x = \$53.6x) are added to US1's annual PTEP accounts, dollar basis pools, and PTEP tax pools with respect to F2. See § 1.959–3(c)(1)(iii), (d)(1)(ii), and (e)(1)(i). Only the \$51.7x portion of the associated foreign income taxes that F2 is deemed to pay are assigned to the creditable PTEP tax group within US1's PTEP tax pools with respect to F2. See § 1.959–3(e)(1)(i). These adjustments are treated as made at the beginning of F2's taxable year ending on December 31 of year 8. See § 1.959–3(f). In addition, the distributed previously taxed earnings and profits, and the foreign income taxes associated with the distributed previously taxed earnings and profits, are added to F2's corporate PTEP accounts and corporate PTEP tax pools for US1, and these adjustments are also treated as made at the beginning of F2's taxable year ending on December 31 of year 8. See § 1.959–2(d).

(3) *Example 3: Current year taxes imposed on a covered distribution—(i) Facts.* US1 directly owns 60%, and US2 directly owns 40%, of the single class of

outstanding stock of F2. F2 owns all the outstanding stock of F1. In year 3, F1 makes a £500x covered distribution to F2. Foreign withholding taxes of £75x (£500x × 15%) are paid on the covered distribution. F2 takes foreign income taxes into account when paid, the withholding taxes meet the definition of current year taxes for F2's taxable year ending on December 31 of year 3, and, other than pursuant to section 245A(d), no credits for taxes are disallowed or suspended at the level of F2. On the day of the covered distribution, the spot rate is \$1:£0.5. Under § 1.959–4, the entirety of US1's £300x share of the covered distribution (£500x × 60%) is a distribution of F1's previously taxed earnings and profits with respect to US1, and none of US2's £200x share of the covered distribution (£500x × 40%) is a distribution of previously taxed earnings and profits. The distributed previously taxed earnings and profits consist of £120x of previously taxed earnings and profits assigned to the section 951(a)(1)(A) PTEP group and relating to year 2 and the passive category (*Character A PTEP*), £80x of previously taxed earnings and profits assigned to the section 245A(d) PTEP group and relating to year 2 and the passive category (*Character B PTEP*), £70x of previously taxed earnings and profits assigned to the section 951(a)(1)(A) PTEP group and relating to year 1 and the general category (*Character C PTEP*), and £30x of previously taxed earnings and profits assigned to the section 951(a)(1)(A) PTEP group and relating to year 1 and the passive category (*Character D PTEP*), as summarized in table 1 in this paragraph (c)(3)(i). This example only analyzes the allocation and apportionment of the current year taxes and related adjustments to previously taxed earnings and profits accounts. See also § 1.959–4 (exclusion from gross income of previously taxed earnings and profits received in a distribution); § 1.986(c)–1(c) (no foreign currency gain or loss recognized in distributions of previously taxed earnings and profits to a foreign corporation); § 1.961–4 (basis reductions and gain recognition for distributions of previously taxed earnings and profits).

TABLE 1 TO PARAGRAPH (c)(3)(i) OF THIS SECTION—DISTRIBUTED PTEP

Taxable year	§ 904 category		
	General category	Passive category	
	§ 951(a)(1)(A) PTEP group	§ 951(a)(1)(A) PTEP group	§ 245A(d) PTEP group
Year 2		£120x (Character A)	£80x (Character B).

TABLE 1 TO PARAGRAPH (c)(3)(i) OF THIS SECTION—DISTRIBUTED PTEP—Continued

Taxable year	§ 904 category		
	General category	Passive category	
	§ 951(a)(1)(A) PTEP group	§ 951(a)(1)(A) PTEP group	§ 245A(d) PTEP group
Year 1	£70x (Character C)	£30x (Character D).	

(ii) *Analysis*—(A) *In general.* As a result of the covered distribution, which is a PTEP realization event, F2 has £300x of previously taxed earnings and profits with respect to US1 and £0 of previously taxed earnings and profits with respect to US2. The foreign gross income that F2 includes by reason of its receipt of the covered distribution is assigned to the statutory groupings, which are described in § 1.959–2(d)(1), and residual grouping by treating the previously taxed earnings and profits arising from such distribution as included in the U.S. dividend amount for purposes of § 1.861–20(d)(1). *See* § 1.959–6(c). The relevant statutory groupings are F2’s corporate PTEP accounts that were increased by reason of its receipt of a covered distribution which was previously taxed earnings and profits with respect to US1 and the remaining portion of the covered distribution is assigned to the residual income grouping. *See id.* The £75x of current year taxes imposed on the covered distribution is allocated and apportioned to the previously taxed earnings and profits (US1’s share of the covered distribution) and the residual income grouping (US2’s share of the covered distribution) pro rata, with the

result that £45x (£75x × £300x/£500x) is allocated and apportioned to previously taxed earnings and profits arising from the covered distribution and the remaining £30 (£75x × £200x/£500x) is assigned to the residual income grouping. *See id.*

(B) *Allocation and apportionment of current year taxes among PTEP groups.* The £45x of current year taxes allocated and apportioned to the previously taxed earnings and profits arising from the PTEP realization event with respect to US1 is further allocated and apportioned among the section 904 categories and PTEP groups within each corporate PTEP account that is increased by reason of F2’s PTEP realization event. *See* § 1.959–6(b) and (c). Accordingly, £18x of current year taxes is allocated and apportioned to Character A PTEP (£45x × £120x/£300x), £12x of current year taxes is allocated and apportioned to Character B PTEP (£45x × £80x/£300x), £10.5x of current year taxes is allocated and apportioned to Character C PTEP (£45x × £70x/£300x), and £4.5x of current year taxes is allocated and apportioned to Character D PTEP (£45x × £30x/£300x), each within F2’s corporate PTEP account with respect to US1.

(C) *Account adjustments*—(1) *Shareholder-level accounts.* After the current year taxes are allocated and apportioned to the corporate PTEP accounts of F2 with respect to US1, the previously taxed earnings and profits in US1’s PTEP groups within its annual PTEP accounts are reduced to reflect the current year taxes allocated and apportioned to the corresponding PTEP groups of F2. *See* § 1.959–3(c)(1)(v). These adjustments are treated as made at the beginning of F2’s taxable year ending on December 31 of year 3. *See* § 1.959–3(f). Concurrently with this reduction, US1’s dollar basis pools with respect to F2 are reduced by \$90x, the U.S. dollar amount of the reduction that reflects the current year taxes allocated and apportioned to the distributed previously taxed earnings and profits (£45x × \$1/£0.5), and \$90x of current year taxes is added to US1’s PTEP tax pools with respect to F2. *See* § 1.959–3(d)(1)(iii) and (d)(2), (e)(1)(ii) and (e)(2); *see also* section 986(a) and § 1.986(a)–1 (translation of foreign income taxes into U.S. dollars). Tables 1 through 3 in this paragraph (c)(3)(ii)(C) summarize the adjustments to US1’s accounts to reflect the current year taxes.

TABLE 1 TO PARAGRAPH (c)(3)(ii)(C)(1) OF THIS SECTION—US1’S ANNUAL PTEP ACCOUNTS WITH RESPECT TO F2—ADJUSTMENTS FOR CURRENT YEAR TAXES

Taxable year	§ 904 category		
	General category	Passive category	
	§ 951(a)(1)(A) PTEP group	§ 951(a)(1)(A) PTEP group	§ 245A(d) PTEP group
Year 2		£18x reduction	£12x reduction.
Year 1	£10.5x reduction	£4.5x reduction.	

TABLE 2 TO PARAGRAPH (c)(3)(ii)(C)(1) OF THIS SECTION—US1’S DOLLAR BASIS POOLS WITH RESPECT TO F2 (COMBINED POOL ELECTION)—ADJUSTMENTS FOR CURRENT YEAR TAXES

§ 904 category		
General category	Passive category	
§ 951(a)(1)(A) PTEP group	§ 951(a)(1)(A) PTEP group	§ 245A(d) PTEP group
\$21x reduction (£10.5x × \$1/£0.5)	\$45x reduction ((£18x + £4.5x) × \$1/£0.5)	\$24x reduction (£12x × \$1/£0.5).

TABLE 3 TO PARAGRAPH (c)(3)(ii)(C)(1) OF THIS SECTION—US1'S PTEP TAX POOLS WITH RESPECT TO F2 (COMBINED POOL ELECTION)—ADJUSTMENTS FOR CURRENT YEAR TAXES

	§ 904 category		
	General category	Passive category	
	§ 951(a)(1)(A) PTEP group	§ 951(a)(1)(A) PTEP group	§ 245A(d) PTEP group
Creditable PTEP tax group	\$21x increase (£10.5x × \$1/£0.5)	\$45x increase ((£18x + £4.5x) × \$1/£0.5).	
Other taxes .....	.....	.....	\$24x increase (£12x × \$1/£0.5).

(2) *Corporate-level accounts.*

Concurrently with the adjustments described in paragraph (c)(3)(ii)(C)(1) of this section, the previously taxed earnings and profits in F2's corporate PTEP accounts for US1 are reduced by £45x and the foreign income taxes in F2's corporate PTEP tax pools for US1 are increased by \$90x. See § 1.959–2(d).

(4) *Example 4: Section 956 amount—(i) Facts.* Individual A, a citizen of the United States, owns all the outstanding stock of F1 and does not make an election to apply the provisions of section 962 for any taxable year. For F1's taxable year ending on December 31 of year 3, the last relevant day is December 31 and Individual A's section 956 amount (amount determined under section 956 and § 1.956–1) is £200x. At the beginning of the last relevant day, F1 has £125x of previously taxed earnings and profits with respect to Individual A, all of which relate to F1's taxable year ending on December 31 of year 1 and are assigned to section 959(c)(2) PTEP groups. On the last relevant day, F1 makes a £75x covered distribution to Individual A, the entirety of which is allocated to (and thus is a distribution of) F1's previously taxed earnings and profits with respect to Individual A under § 1.959–4. This example only analyzes the extent to which the section 956 amount is allocated to previously taxed earnings and profits and excluded from gross income under section 959, along with related adjustments to annual PTEP accounts. See also § 1.959–3(d) and (e) (related adjustments to dollar basis pools and PTEP tax pools).

(ii) *Analysis—(A) Allocation to previously taxed earnings and profits.* Individual A's section 956 amount is first allocated to F1's previously taxed earnings and profits that are with respect to Individual A and assigned to section 959(c)(2) PTEP groups on the last relevant day, but reduced to reflect the covered distribution (£50x, computed as £125x – £75x). See § 1.959–5(c)(1) and (d). The £50x portion of the section 956 amount allocated to previously taxed earnings and profits is excluded from Individual

A's gross income. See § 1.959–5(c)(1). Under section 951(a)(1)(B), Individual A includes the remaining £150x of the section 956 amount (translated into U.S. dollars in accordance with section 989(b)) in its gross income.

(B) *Annual PTEP account adjustments.* To reflect the section 956 amount, the £50x of previously taxed earnings and profits to which the section 956 amount is allocated are reassigned from section 959(c)(2) PTEP groups to section 959(c)(1) PTEP groups within Individual A's annual PTEP accounts relating to F1's taxable year ending on December 31 of year 1, and then £150x of previously taxed earnings and profits are added to Individual A's annual PTEP accounts relating to F1's taxable year ending on December 31 of year 3, where they are assigned to the general section 959(c)(1) PTEP group. See § 1.959–3(c)(1)(x) and (xi). These adjustments are treated as made at the end of the last day of F1's taxable year ending on December 31 of year 3. See § 1.959–3(f)(1).

(5) *Example 5: General successor transaction—(i) Facts.* US1 directly owns all 100 shares of the single class of outstanding stock of F1. On June 30 of year 3, US1 sells 40 shares of stock of F1 to US2 for money equal to the fair market value of the shares. Section 304 does not apply to the sale. Immediately before the sale, F1 has £180x of previously taxed earnings and profits with respect to US1, none of which resulted from an income inclusion of US1 for F1's taxable year ending on December 31 of year 3 under section 951(a)(1)(A) or 951A(a) because F1 has no subpart F income or tested income for such taxable year. As a result of gain that US1 recognizes on the sale and includes in gross income as a dividend under section 1248(a) by reason of F1's earnings and profits described in section 959(c)(3), F1's previously taxed earnings and profits with respect to US1 are increased by £20x under section 959(e) and § 1.959–3(c)(1)(vii), concurrently with the sale. This example only discusses the extent to which previously taxed earnings and profits transfer under section 959. See also § 1.959–3

(related adjustments to annual PTEP accounts, dollar basis pools, and PTEP tax pools); § 1.986(c)–1 (recognition of foreign currency gain or loss with respect to transferred previously taxed earnings and profits).

(ii) *Analysis—(A) In general.* The sale is a general successor transaction in which F1 is an acquired foreign corporation, US1 is the transferor covered shareholder, and US2 is the successor covered shareholder. See § 1.959–7(b)(1). As described in paragraphs (c)(5)(ii)(B) and (C) of this section, there is £72x of general successor PTEP and £20x of section 959(e) successor PTEP. Such previously taxed earnings and profits transfer from US1 to US2, concurrently with the general successor transaction. See § 1.959–3(f)(1).

(B) *General successor PTEP.* General successor PTEP is a pro rata portion of F1's previously taxed earnings and profits that are with respect to US1 immediately before the general successor transaction (£180x), determined by multiplying all such previously taxed earnings and profits by 40%, which is the percentage of a £180x hypothetical distribution treated as made by F1 immediately before the general successor transaction that would be distributed with respect to stock of F1 that US2 acquires in the general successor transaction. See § 1.959–7(c)(1)(i) and (d). Thus, there is £72x of general successor PTEP, sourced pro rata from each PTEP group within each of US1's annual PTEP accounts with respect to F1. See also § 1.959–7(e)(1) and (f)(1) (rules for determining the dollar basis and associated foreign income taxes of general successor PTEP).

(C) *Section 959(e) successor PTEP.* Section 959(e) successor PTEP is all £20x of F1's previously taxed earnings and profits with respect to US1 that, under section 959(e), result from the application of section 1248 to gain recognized by US1 in the general successor transaction. See § 1.959–7(c)(2); see also § 1.959–7(e)(2) and (f)(2) (providing the dollar basis of section 959(e) successor PTEP, and providing

that the foreign income taxes associated with section 959(e) successor PTEP is zero).

(iii) *Alternative facts: previously taxed earnings and profits not eligible to transfer—(A) Facts.* The facts are the same as in paragraph (c)(5)(i) of this section (*Example 5*), except as follows. F1 has £10x of subpart F income for its taxable year ending on December 31 of year 3 and thus US1 includes £6x (£10x × 60% of stock of F1 retained by US1) in its gross income for such taxable year under section 951(a)(1)(A). Consequently, F1 has an additional £6x of previously taxed earnings and profits with respect to US1 immediately before the sale.

(B) *Analysis.* The results are the same as described in paragraph (c)(5)(ii) of this section. None of the additional £6x of previously taxed earnings and profits transfer to US2 because the general successor transaction is before December 31 of year 3, the last relevant day of F1's taxable year that includes the general successor transaction. See § 1.959–7(c)(1)(ii).

(iv) *Alternative facts: deemed covered shareholder—(A) Facts.* The facts are the same as in paragraph (c)(5)(i) of this section (*Example 5*), except that the purchaser of the shares of stock of F1 is a nonresident alien individual (Individual B).

(B) *Analysis.* The results are the same as described in paragraph (c)(5)(ii) of this section, applied by substituting *the deemed covered shareholder* (who is a hypothetical person treated as owning all the stock of F1 owned by Individual B) for *US2*. See § 1.959–7(g). Thus, if a covered shareholder subsequently acquires a portion of Individual B's stock of F1, then a portion of F1's previously taxed earnings and profits with respect to the deemed covered shareholder (adjusted consistent with § 1.959–3, including to reflect any distributions from F1 to Individual B) transfer from the deemed covered shareholder to the acquirer covered shareholder.

§ 1.959–11 Transition rules.

(a) *Scope.* This section sets forth transition rules for the section 959 regulations. Paragraph (b) of this section addresses the establishment of annual PTEP accounts, dollar basis pools, and corporate PTEP accounts and provides for adjustments to reflect the transition tax under section 965. Paragraph (c) of this section addresses the establishment of PTEP tax pools, corporate PTEP tax pools, adjusted applicable percentages, and section 965(c) deduction percentages. Paragraph (d) of this section treats a domestic partnership

(including an S corporation) as a covered shareholder for periods in which § 1.958–1(d)(1) does not apply. Paragraph (e) converts accounts of a domestic partnership (including an S corporation) to accounts of covered shareholders owning interests in the domestic partnership when both § 1.958–1(d)(1) and the section 959 regulations apply.

(b) *Establishing annual PTEP accounts, dollar basis pools, and corporate PTEP accounts and adjustments for section 965 transition tax—(1) In general.* When applying the 2019 notice provisions pursuant to § 1.959–12(c) (interim application of 2019 notice provisions), or the section 959 regulations (other than §§ 1.959–8 and 1.959–9) pursuant to § 1.959–12(d) (optional early application), to a taxable year of a foreign corporation, annual PTEP accounts, dollar basis pools, and corporate PTEP accounts are established and adjusted in accordance with the rules described in paragraphs (b)(2) and (3) of this section.

(2) *Establishment of accounts—(i) In general.* As of the beginning of the first taxable year of the foreign corporation to which the 2019 notice provisions apply, or, if earlier, the first taxable year of the foreign corporation to which the section 959 regulations (other than §§ 1.959–8 and 1.959–9) apply, a reasonable method (consistently applied) must be used to establish annual PTEP accounts, dollar basis pools, and corporate PTEP accounts reflecting the foreign corporation's previously taxed earnings and profits, including to reflect adjustments to previously taxed earnings and profits that would have been made if the principles of §§ 1.959–2 through 1.959–5 and 1.959–7 were to have previously applied. Establishing accounts in accordance with the preceding sentence includes conforming any of a covered shareholder's existing previously taxed earnings and profits accounts with respect to the foreign corporation, or dollar basis accounts with respect to the previously taxed earnings and profits, to the requirements of § 1.959–2. In addition, a covered shareholder is treated as consistently applying a reasonable method only if the covered shareholder and any covered shareholders with which the covered shareholder joins in filing a Federal income tax return apply that method with respect to all foreign corporations in which the covered shareholders own stock.

(ii) *Multi-year accounts—(A) Previously taxed earnings and profits.* To the extent a covered shareholder has an account reflecting previously taxed earnings and profits of the foreign

corporation that relate to two or more taxable years and are described in the next sentence (*multi-year PTEP account*), a reasonable method to conforming the multi-year PTEP account to the requirements of § 1.959–2 includes treating such previously taxed earnings and profits as assigned to the general section 959(c)(1) PTEP group or the section 951(a)(1)(A) PTEP group (as applicable) within an annual PTEP account that relates to the last taxable year of the foreign corporation ending on or before December 31, 2017, and the section 904 category to which the multi-year PTEP account relates. Previously taxed earnings and profits are described in this sentence to the extent they are described in section 959(c)(1)(A) by reason of section 951(a)(1)(B) and not by reason of section 959(a)(2); described in section 959(c)(1)(B), including by reason of section 959(a)(3) (before its repeal); or described in section 959(c)(2) by reason of section 951(a)(1)(A) and without regard to section 965(a), 965(b)(4)(A), 951A(f)(2), 245A(e)(2), 959(e), or 964(e)(4).

(B) *Dollar basis.* To the extent a covered shareholder has an account reflecting the dollar basis of previously taxed earnings and profits of the foreign corporation that relate to two or more taxable years (*multi-year dollar basis account*), a reasonable method for conforming the multi-year dollar basis account to the requirements of § 1.959–2 includes treating previously taxed earnings and profits to which the multi-year dollar basis account relates as having a dollar basis equal to a pro rata portion of the multi-year dollar basis account, and placing that dollar basis into the related dollar basis pool. The pro rata portion is determined by multiplying the multi-year dollar basis account by a fraction, the numerator of which is previously taxed earnings and profits to which the multi-year dollar basis account relates, and the denominator of which is all previously taxed earnings and profits to which the multi-year dollar basis account relates.

(3) *Adjustments for section 965 transition tax—(i) Increases for amounts included in gross income under section 951(a)(1)(A) by reason of section 965(a).* When adding previously taxed earnings and profits to annual PTEP accounts to reflect an amount a covered shareholder includes in gross income under section 951(a)(1)(A) with respect to the foreign corporation by reason of section 965(a), assign such previously taxed earnings and profits to the section 965(a) PTEP group (rather than the section 951(a)(1)(A) PTEP group).

(ii) *Increases for section 965(b) reductions.* For purposes of adjusting

annual PTEP accounts and dollar basis pools, treat an amount that a covered shareholder would have included in gross income under section 951(a)(1)(A) with respect to the foreign corporation but for section 965(b) and § 1.965–1(b)(2) or 1.965–8(b), as applicable, as included in the covered shareholder's gross income under section 951(a)(1)(A) with respect to the foreign corporation, and assign previously taxed earnings and profits resulting from such treatment to the section 965(b) PTEP group (rather than the section 951(a)(1)(A) PTEP group).

(c) *Establishing PTEP tax pools, corporate PTEP tax pools, adjusted applicable percentages, and section 965(c) deduction percentages*—(1) *In general.* As of the beginning of the first taxable year of a foreign corporation to which the section 959 regulations (other than §§ 1.959–8 and 1.959–9) apply pursuant to § 1.959–12(b) (general applicability date) or, if applicable, § 1.959–12(d) (optional early application), PTEP tax pools, corporate PTEP tax pools, adjusted applicable percentages, and section 965(c) deduction percentages reflecting the foreign corporation's previously taxed earnings and profits must be established in accordance with the rules described in paragraphs (c)(2) through (4) of this section.

(2) *PTEP tax pools and corporate PTEP tax pools.* PTEP tax pools and corporate PTEP tax pools are established by adding a pro rata portion of the foreign corporation's prior-law PTEP group taxes with respect to a prior-law PTEP group (defined in this paragraph (c)(2)) to each PTEP tax pool with respect to the foreign corporation, determined by multiplying such prior-law PTEP group taxes by a fraction. The numerator of the fraction is the balance of the prior-law PTEP group that is previously taxed earnings and profits relating to the PTEP tax pool, and the denominator of the fraction is the balance of the prior-law PTEP group. For purposes of this paragraph (c)(2), *prior-law PTEP group taxes and prior-law PTEP groups* mean PTEP group taxes and PTEP groups, respectively, as defined in § 1.960–3 as contained in 26 CFR part 1 revised as of April 1, 2024.

(3) *Adjusted applicable percentage.* An adjusted applicable percentage is established with respect to all of the foreign corporation's previously taxed earnings and profits assigned to the reclassified section 965(a) PTEP group, reclassified section 965(b) PTEP group, section 965(a) PTEP group, and section 965(b) PTEP group within a covered shareholder's annual PTEP accounts relating to the same section 904 category

by calculating a weighted average of the applicable percentages (as defined in § 1.965–5(d)) with respect to the previously taxed earnings and profits. The weighted average is determined as the sum of the product of each such applicable percentage and the amount of previously taxed earnings and profits to which the applicable percentage relates, divided by the sum of the amount of previously taxed earnings and profits described in the preceding sentence. For purposes of this paragraph (c)(3), applicable percentages and previously taxed earnings and profits are determined as of the beginning of the taxable year.

(4) *Section 965(c) deduction percentage.* A section 965(c) deduction percentage is established with respect to all of the foreign corporation's previously taxed earnings and profits assigned to the reclassified section 965(a) PTEP group and section 965(a) PTEP group within a covered shareholder's annual PTEP accounts relating to the same section 904 category by calculating a weighted average of the percentages for which foreign currency gain or loss recognized under section 986(c) with respect to distributions of the previously taxed earnings and profits would be reduced under § 1.986(c)–1 as contained in 26 CFR part 1 revised as of April 1, 2024. The weighted average is determined as the sum of the product of each such percentage and the amount of previously taxed earnings and profits to which the percentage relates, divided by the sum of the amount of previously taxed earnings and profits described in the preceding sentence. For purposes of this paragraph (c)(4), percentages for which foreign currency gain or loss would be reduced under § 1.986(c)–1 and previously taxed earnings and profits are determined as of the beginning of the taxable year.

(d) *Treatment of domestic partnerships (including S corporations) before application of § 1.958–1(d)(1).*

For purposes of the section 959 regulations, a domestic partnership (including an S corporation) is treated as a covered shareholder for any taxable year of the domestic partnership to which § 1.958–1(d)(1) does not apply. If a domestic partnership is treated as a covered shareholder, then rules regarding distributions of previously taxed earnings and profits apply to the domestic partnership in its capacity as a covered shareholder before those rules apply to covered shareholders that own interests in the domestic partnership. In such a case, for example, a covered distribution made to the domestic partnership is first a distribution of the

distributing foreign corporation's previously taxed earnings and profits with respect to the partnership and then, to the extent remaining, a distribution of the distributing foreign corporation's previously taxed earnings and profits with respect to covered shareholders owning interests in the partnership.

(e) *Converting domestic partnership-level (including S corporation-level) accounts to partner-level accounts after the application of § 1.958–1(d)(1)—(1) In general.* As of the beginning of the first taxable year of a domestic partnership (including an S corporation) to which both § 1.958–1(d)(1) and the section 959 regulations (other than §§ 1.959–8 and 1.959–9) apply (pursuant to § 1.959–12(c) (general applicability date) or (d) (optional early application)), the domestic partnership's accounts described in § 1.959–2 with respect to a foreign corporation are converted to accounts of covered shareholders owning interests in the partnership in accordance with the rules described in paragraphs (e)(2) through (4) of this section.

(2) *Rules for converting accounts*—(i) *Allocate previously taxed earnings and profits to each covered shareholder*—(A) *In general.* First, allocate a pro rata portion of the foreign corporation's previously taxed earnings and profits with respect to the domestic partnership to each covered shareholder owning an interest in the partnership at the beginning of the taxable year, determined by multiplying all the foreign corporation's previously taxed earnings and profits with respect to the partnership by a fraction. The numerator of the fraction is the liquidation value of the covered shareholder's interest in the partnership, and the denominator of the fraction is the aggregate liquidation value of all partners' interests in the partnership (determined in each case under paragraph (e)(2)(i)(B) of this section).

(B) *Liquidation value.* For purposes of this paragraph (e)(2)(i), the liquidation value of a partner's interest in the partnership is the amount of cash the partner would receive with respect to the interest if, at the beginning of the taxable year, the partnership (and any partnership through which the partner indirectly owns an interest in the partnership) sold all of its property for an amount of cash equal to the fair market value of the property (taking into account section 7701(g)), satisfied all of its liabilities (other than those described in § 1.752–7), paid an unrelated third party to assume all of its § 1.752–7 liabilities in a fully taxable transaction,

and then the partnership (and any partnership through which the partner indirectly owns an interest in the partnership) liquidated. Moreover, any change to a partnership agreement made with a principal purpose of altering the allocation of previously taxed earnings and profits under this paragraph (e)(2)(i) is disregarded.

(ii) *Compute dollar basis and associated foreign income taxes.* Second, treat the dollar basis of, or foreign income taxes associated with, previously taxed earnings and profits allocated to each covered shareholder as the same as what would be the dollar basis of, or foreign income taxes associated with, the previously taxed earnings and profits under § 1.959–4 if the previously taxed earnings and profits were distributed at the beginning of the taxable year.

(iii) *Eliminate the domestic partnership's accounts and increase covered shareholders' accounts.* Third, eliminate the domestic partnership's annual PTEP accounts, dollar basis pools, and PTEP tax pools with respect to the foreign corporation. Concurrently with such eliminations, increase each covered shareholder's annual PTEP accounts, dollar basis pools, and PTEP tax pools with respect to the foreign corporation to reflect the foreign corporation's previously taxed earnings and profits that are allocated to the covered shareholder or the dollar basis of, or foreign income taxes associated with, the previously taxed earnings and profits, as applicable.

(3) *Coordination with section 986(c).* No foreign currency gain or loss is recognized with respect to previously

taxed earnings and profits under section 986(c) as a result of previously taxed earnings and profits ceasing to be with respect to the domestic partnership pursuant to this paragraph (e) (notwithstanding § 1.986(c)–1).

(4) *Coordination with deemed covered shareholder rules.* The portion, if any, of the foreign corporation's previously taxed earnings and profits with respect to the domestic partnership that does not give rise to an increase to a covered shareholder's annual PTEP accounts with respect to the foreign corporation under paragraph (e)(1) of this section becomes previously taxed earnings and profits of the foreign corporation with respect to the deemed covered shareholder for purposes of subsequently transferring the previously taxed earnings and profits under section 959. See § 1.959–7(g) for rules regarding the deemed covered shareholder.

§ 1.959–12 Applicability dates.

(a) *Scope.* This section sets forth applicability dates for the section 959 regulations. Paragraph (b) of this section provides the general applicability dates. Paragraph (c) of this section provides interim application for certain provisions. Paragraph (d) of this section allows early application.

(b) *In general.* Sections 1.959–1 through 1.959–7 and 1.959–10 and 1.959–11 apply to taxable years of foreign corporations beginning on or after [date of publication of final regulations in the **Federal Register**] and to taxable years of persons for which such taxable years of those foreign corporations are relevant.

(c) *Interim application of 2019 notice provisions—*(1) *In general.* For taxable

years of United States shareholders (and successors in interest) ending after December 14, 2018, and to which §§ 1.959–1 through 1.959–7 and 1.959–10 and 1.959–11 do not apply pursuant to paragraph (b) or (d) of this section, and taxable years of foreign corporations ending with or within such taxable years, the 2019 notice provisions (defined in paragraph (c)(2) of this section) and § 1.959–11 apply.

(2) *2019 notice provisions.* The 2019 notice provisions means §§ 1.959–1(c) (treatment of an S corporation), 1.959–2 (accounting of previously taxed earnings and profits), 1.959–3 (adjustments to shareholder-level accounts and, consequently, foreign corporation-level accounts), 1.959–4(e) and 1.959–5(d) (allocation of distributions and section 956 amounts), and the relevant definitions in § 1.959–1(b), along with treating previously taxed earnings and profits as distributed under section 959 only to the extent that the distribution is a dividend (as defined in section 316), determined without regard to section 959(d). For purposes of applying the 2019 notice provisions, the PTEP groups listed in the following table may be used in lieu of the PTEP groups listed in § 1.959–2, the portions of §§ 1.959–2 and 1.959–3 relating to PTEP tax pools, corporate PTEP tax pools, adjusted applicable percentages, and section 965(c) deduction percentages do not apply, and the portions of §§ 1.959–3 through 1.959–5 and 1.959–7 relating to the timing of adjustments and determinations do not apply.

TABLE 1 TO PARAGRAPH (C)(2) OF THIS SECTION—2019 NOTICE PTEP GROUPS

Section 959(c)(1) PTEP groups		Section 959(c)(2) PTEP groups	
Group	Description	Group	Description
<i>Reclassified section 965(a) PTEP group.</i>	Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 965(a).	<i>Section 965(a) PTEP group.</i>	Earnings and profits described in section 959(c)(2) by reason of section 965(a).
<i>Reclassified section 965(b) PTEP group.</i>	Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 965(b)(4)(A).	<i>Section 965(b) PTEP group.</i>	Earnings and profits described in section 959(c)(2) by reason of section 965(b)(4)(A).
<i>Section 951(a)(1)(B) PTEP group.</i>	Earnings and profits described in section 959(c)(1)(A) by reason of section 951(a)(1)(B) and not by reason of section 959(a)(2).		
<i>Reclassified section 951A PTEP group.</i>	Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 951A(f)(2).	<i>Section 951A PTEP group.</i>	Earnings and profits described in section 959(c)(2) by reason of section 951A(f)(2).
<i>Reclassified section 245A(e)(2) PTEP group.</i>	Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 245A(e)(2).	<i>Section 245A(e)(2) PTEP group.</i>	Earnings and profits described in section 959(c)(2) by reason of section 245A(e)(2).
<i>Reclassified section 959(e) PTEP group.</i>	Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 959(e).	<i>Section 959(e) PTEP group.</i>	Earnings and profits described in section 959(c)(2) by reason of section 959(e).
<i>Reclassified section 964(e)(4) PTEP group.</i>	Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 964(e)(4).	<i>Section 964(e) PTEP group.</i>	Earnings and profits described in section 959(c)(2) by reason of section 964(e)(4).

TABLE 1 TO PARAGRAPH (c)(2) OF THIS SECTION—2019 NOTICE PTEP GROUPS—Continued

Section 959(c)(1) PTEP groups		Section 959(c)(2) PTEP groups	
Group	Description	Group	Description
<i>Reclassified section 951(a)(1)(A) PTEP group.</i>	Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 951(a)(1)(A) and not described in another PTEP group.	<i>Section 951(a)(1)(A) PTEP group.</i>	Earnings and profits described in section 959(c)(2) by reason of section 951(a)(1)(A) and not described in another PTEP group.
<i>Section 956A PTEP group</i>	Earnings and profits described in section 959(c)(1)(B), including by reason of section 959(a)(3) (before its repeal).		

(d) *Early application*—(1) *In general.* Sections 1.959–1 through 1.959–7 and 1.959–10 and 1.959–11 may be applied to a taxable year of a foreign corporation not described in paragraph (b) of this section, and then must be applied to all succeeding taxable years of the foreign corporation not described in paragraph (b) of this section, if the conditions described in paragraphs (d)(2) through (4) of this section are satisfied. The foreign corporation described in the preceding sentence is the *early application corporation* and any taxable years to which the early application corporation applies §§ 1.959–1 through 1.959–7, 1.959–10, and 1.959–11 pursuant to the preceding sentence are the *early application years*.

(2) *Consistent application condition*—(i) *In general.* The provisions described in paragraph (d)(2)(ii) of this section are applied in their entirety to the early application years and all taxable years of covered shareholders for which the early application years are relevant. In addition, §§ 1.959–1 through 1.959–7, 1.959–10, and 1.959–11 are applied in their entirety pursuant to paragraph (d) of this section to all taxable years that both are of foreign corporations that are related to the early application corporation and end on or after the later of the last day of the first early application year and the first day on which the foreign corporations are related to the early application corporation. For purposes of the preceding sentence, foreign corporations are related if the foreign corporations bear a relationship to each other described in section 267(b).

(ii) *Provisions.* The provisions described in this paragraph (d)(2)(ii) are §§ 1.163(j)–7(g)(2)(ii), 1.245A(d)–1(d), 1.312–6(f), 1.312–8(c), 1.861–20, 1.904–6(e), 1.905–3, 1.905–4(c)(6), 1.951–1, 1.951–2, 1.951A–1(d), 1.951A–2(c)(1)(vi), 1.952–1(c)(4), 1.954–1(c)(1)(iii)(C), 1.959–1 through 1.959–7, 1.959–10, 1.959–11, 1.960–1, 1.960–3, 1.961–1 through 1.961–5, 1.961–8 through 1.961–13, 1.965–5(d)(5), 1.986(a)–1, 1.986(c)–1, and 1.1502–59.

(3) *Open period of limitations condition.* The period of limitations on

assessment for each taxable year described in paragraph (d)(2) of this section is open under section 6501.

(4) *Written consent condition.* Each covered shareholder described in paragraph (d)(2) of this section provides to the early application corporation a written statement in which the covered shareholder consents to apply the rules described in paragraph (d)(2) of this section to the taxable years of the covered shareholder described in paragraph (d)(2) of this section and affirms that the period of limitations on assessment for each such taxable year is open under section 6501.

■ **Par. 23.** Section 1.960–1 is amended by:

- 1. Revising paragraph (a)(1);
- 2. Revising paragraphs (b)(1) and (b)(3);
- 3. Removing paragraph (b)(12);
- 4. Redesignating paragraphs (b)(13) through (b)(16) as paragraphs (b)(12) through (b)(15), respectively;
- 5. Revising newly redesignated paragraph (b)(15);
- 6. Redesignating paragraph (b)(17) as paragraph (b)(16), and revising newly redesignated paragraph (b)(16);
- 7. Adding a new paragraph (b)(17);
- 8. Removing paragraphs (b)(18) through (b)(21);
- 9. Redesignating paragraphs (b)(22) through (b)(24) as paragraphs (b)(18) through (b)(20), respectively;
- 10. Removing paragraph (b)(25);
- 11. Redesignating paragraphs (b)(26) and (b)(27) as paragraphs (b)(21) and (b)(22), respectively, and revising newly redesignated paragraphs (b)(21) and (b)(22);
- 12. Removing paragraph (b)(28);
- 13. Redesignating paragraphs (b)(29) through (b)(38) as paragraphs (b)(23) through (b)(32), respectively;
- 14. Revising paragraphs (c)(1)(i) through (iii);
- 15. In paragraph (c)(1)(iv), removing the language “§ 1.960–3(b)” and adding the language “§ 1.960–3” in its place;
- 16. Removing paragraph (c)(1)(v);
- 17. Redesignating paragraphs (c)(1)(vi) and (vii) as paragraphs (c)(1)(v) and (c)(1)(vi), respectively;
- 18. Revising newly redesignated paragraphs (c)(1)(v) and (vi);

- 19. Revising paragraph (c)(2);
- 20. Revising paragraph (d)(1);
- 21. Revising paragraphs (d)(2)(i) and (d)(2)(ii)(A) and (D);
- 22. Revising the heading of paragraph (d)(3) and the introductory text of paragraph (d)(3)(i);
- 23. Revising the last sentence of paragraph (d)(3)(i)(A) and the last two sentences of paragraph (d)(3)(ii)(A);
- 24. Revising paragraph (d)(3)(ii)(B); and
- 25. Revising paragraphs (e) and (f).

The additions and revisions read as follows:

§ 1.960–1 Overview, definitions, and computational rules for determining foreign income taxes deemed paid under section 960(a), (b), and (d).

(a) *Overview*—(1) *Scope of §§ 1.960–1 through 1.960–3.* This section and § 1.960–2 provide rules for attributing foreign income taxes paid or accrued by a controlled foreign corporation to its income that a corporate United States shareholder of the controlled foreign corporation takes into account in determining its subpart F inclusion or GILTI inclusion amount. This section provides definitions, identifies the statutory and residual groupings for purposes of section 960(a) and (d), and sets forth computational rules for determining the amount of income and taxes assigned to each grouping. Section 1.960–2 provides rules for computing the amount of foreign income taxes deemed paid by a corporate United States shareholder of a controlled foreign corporation under section 960(a) and (d). Section 1.960–3 provides rules for determining the foreign income taxes that are deemed paid by a corporate United States shareholder in a controlled foreign corporation, or by a controlled foreign corporation that is a shareholder in another controlled foreign corporation, under section 960(b). This section, § 1.960–2, and § 1.960–3 provide the exclusive rules for determining the foreign income taxes deemed paid by a domestic corporation or controlled foreign corporation under section 960. Only foreign income taxes paid or accrued by a controlled foreign

corporation that are properly attributable under these rules to an item of income that a corporate United States shareholder of the controlled foreign corporation includes as a subpart F inclusion or GILTI inclusion amount may be deemed paid by the domestic corporation under section 960(a) or (d). Only foreign income taxes that are properly attributable under § 1.960–3 to previously taxed earnings and profits that are distributed by a controlled foreign corporation may be deemed paid by a domestic corporation or a controlled foreign corporation under section 960(b). This section, § 1.960–2, and § 1.960–3 also apply for purposes of any provision that treats a taxpayer as a domestic corporation that is deemed to pay foreign income taxes or treats a foreign corporation as a controlled foreign corporation for purposes of section 960. *See, for example,* sections 962(a)(2) and 1293(f).

* * * * *

(b) * * *

(1) *Annual PTEP account.* The term *annual PTEP account* has the meaning provided in § 1.959–1(b).

* * * * *

(3) *Current taxable year.* The term *current taxable year* means the U.S. taxable year of a controlled foreign corporation which ends with or within the U.S. taxable year of a United States shareholder of the controlled foreign corporation.

* * * * *

(15) *Previously taxed earnings and profits.* The term *previously taxed earnings and profits* has the meaning provided in § 1.959–1(b).

(16) *PTEP group.* The term *PTEP group* has the meaning provided in § 1.959–1(b).

(17) *PTEP realization event.* The term *PTEP realization event* has the meaning provided in § 1.959–1(b).

* * * * *

(21) *Specified section 959(a) distribution.* The term *specified section 959(a) distribution* means a distribution of previously taxed earnings and profits, as determined under § 1.959–4, that a domestic corporation that is a United States shareholder in a controlled foreign corporation receives (or is treated as receiving pursuant to § 1.959–4(c)(3)) from the controlled foreign corporation and that is excluded from the income of the recipient domestic corporation under § 1.959–4(b)(1).

(22) *Section 959(b) distribution.* The term *section 959(b) distribution* means a distribution of previously taxed earnings and profits, as determined under § 1.959–4, that a controlled foreign corporation receives from

another controlled foreign corporation and that is excluded from the income of the recipient controlled foreign corporation for purposes of determining the recipient controlled foreign corporation's subpart F income and tested income or tested loss under § 1.959–4(b)(2).

* * * * *

(c) * * *

(1) * * *

(i) First, items of gross income of a controlled foreign corporation for the current taxable year are assigned to section 904 categories and included in income groups within those section 904 categories under the rules in paragraph (d)(2) of this section. *See* section 959 and the regulations thereunder for rules regarding the receipt of a section 959(b) distribution by a controlled foreign corporation.

(ii) Second, deductions (other than for current year taxes) of a controlled foreign corporation for the current taxable year are allocated and apportioned to reduce gross income in the section 904 categories and the income groups within a section 904 category. *See* paragraph (d)(3)(i) of this section. Additionally, the functional currency amounts of current year taxes are allocated and apportioned to reduce gross income in the section 904 categories and the income groups within a section 904 category. *See* paragraph (d)(3)(ii) of this section. For rules regarding the allocation and apportionment of foreign income taxes paid or accrued by a foreign corporation to previously taxed earnings and profits, *see* § 1.959–6.

(iii) Third, for purposes of computing foreign income taxes deemed paid under section 960(a) and (d), eligible current year taxes that were allocated and apportioned to income groups in the section 904 categories are translated into U.S. dollars in accordance with section 986(a) and § 1.986(a)–1.

* * * * *

(v) Fifth, paragraphs (c)(1)(i) through (iv) of this section are repeated for each next higher-tier controlled foreign corporation in the chain.

(vi) Sixth, with respect to the highest-tier controlled foreign corporation in a chain that is owned directly (or indirectly through one or more partnerships) by the domestic corporation, foreign income taxes that are deemed paid under section 960(b)(1) in connection with the receipt of a specified section 959(a) distribution by the domestic corporation are computed under the rules of § 1.960–3.

(2) *Current taxable year items.* For a current taxable year, the items of

income and deductions (including for taxes), and the U.S. dollar amounts of current year taxes, that are included in the computations described in this section are the items that a controlled foreign corporation accrues and takes into account during the current taxable year. An item of income with respect to a current taxable year does not include an amount included as subpart F income of a controlled foreign corporation by reason of the recharacterization of a recapture account established in a prior U.S. taxable year (and the corresponding earnings and profits) of the controlled foreign corporation under section 952(c)(2) and § 1.952–1(f).

* * * * *

(d) * * *

(1) *Scope.* This paragraph (d) provides rules for assigning gross income (including gains) of a controlled foreign corporation for the current taxable year to a section 904 category and income group within a section 904 category, and for allocating and apportioning deductions (including losses and current year taxes) and the U.S. dollar amount of eligible current year taxes of the controlled foreign corporation for the current taxable year among the section 904 categories and income groups within a section 904 category. *See* § 1.959–6 for rules for allocating and apportioning foreign income taxes paid or accrued by a foreign corporation to previously taxed earnings and profits.

(2) * * *

(i) *Assigning items of gross income to section 904 categories.* Items of gross income of a controlled foreign corporation for the current taxable year are first assigned to a section 904 category of the controlled foreign corporation under §§ 1.904–4 and 1.904–5. Income of a controlled foreign corporation cannot be assigned to the section 951A category. *See* § 1.904–4(g). *But see* § 1.959–2(b)(2)(i) for rules relating to the assignment of previously taxed earnings and profits to PTEP groups within an annual PTEP account, which may assign previously taxed earnings and profits to the section 951A PTEP group.

(ii) * * *

(A) *In general.* Gross income within a section 904 category is assigned to a subpart F income group, tested income group, or residual income group under the rules of this paragraph (d)(2)(ii). *See* § 1.959–2(d) for rules regarding the accounting of previously taxed earnings and profits by a foreign corporation.

* * * * *

(D) *Residual income group.* The term *residual income group* means the

income group within a section 904 category that is not in a subpart F income group or tested income group. For purposes of this paragraph (d)(2)(ii)(D), treat items of gross income that give rise to previously taxed earnings and profits described in § 1.959–6(b) as gross income in a residual income group. *See* paragraph (d)(3)(ii)(B) of this section for rules regarding the assignment of foreign gross income to the statutory and residual groupings of income of a controlled foreign corporation when the controlled foreign corporation pays or accrues current year taxes with respect to a PTEP realization event that occurs in a different taxable year.

* * * * *

(3) *Allocation and apportionment of deductions among section 904 categories and income groups within a section 904 category*—(i) *In general.* Gross income of a controlled foreign corporation in each income group within each section 904 category is reduced by deductions (including losses and current year taxes) of the controlled foreign corporation for the current taxable year under the rules in this paragraph (d)(3)(i). For purposes of this paragraph (d)(3), allocate and apportion current year taxes arising by reason of a PTEP realization event that occurs in the same taxable year to the residual income group within a section 904 category under § 1.959–6(c). For additional rules regarding the allocation and apportionment of deductions (including foreign income taxes) paid or accrued by a foreign corporation to previously taxed earnings and profits, *see* § 1.959–6.

(A) * * * *See* paragraph (d)(3)(ii) of this section for special rules for allocating and apportioning current year taxes to section 904 categories and income groups.

* * * * *

(ii) * * *

(A) * * * For special rules regarding current year taxes paid or accrued with respect to a PTEP realization event that occurs in a different taxable year, *see* paragraph (d)(3)(ii)(B) of this section. For purposes of determining foreign income taxes deemed paid under section 960(a) and (d) and § 1.960–2, the U.S. dollar amount of eligible current year taxes is assigned to the section 904 categories and income groups to which the eligible current year taxes are allocated and apportioned.

(B) *Current year taxes that a controlled foreign corporation pays or accrues that relate to a PTEP realization event that occurs in a different U.S. taxable year.* If a current year tax is

allocated and apportioned by reference to foreign gross income that includes previously taxed earnings and profits with respect to a PTEP realization event that occurs in a different taxable year, the foreign gross income is assigned to the subpart F income group, tested income group, or residual income group to which the income that gave rise to the previously taxed earnings and profits would be assigned if that income were recognized by that controlled foreign corporation under Federal income tax principles in the current taxable year. For example, a net basis tax paid or accrued with respect to a section 959(b) distribution that occurred in the preceding taxable year would be assigned to a section 904 category and to a subpart F income group, tested income group, or residual income group by reference to the income that gave rise to the previously taxed earnings and profits.

(e) *Current year taxes related to a residual income group are not deemed paid.* Current year taxes paid or accrued by a controlled foreign corporation that are allocated and apportioned under paragraph (d)(3)(ii) of this section to a residual income group cannot be deemed paid under section 960 for any taxable year, except to the extent such taxes are allocated and apportioned to previously taxed earnings and profits under § 1.959–6 and deemed paid by a domestic corporation under § 1.960–3.

(f) *Example.* The following example illustrates the application of this section and § 1.960–3.

(1) *Facts*—(i) *CFC1 and CFC2.* CFC1, a controlled foreign corporation, conducts business in Country X. CFC1 uses the “u” as its functional currency. At all relevant times, 1u = \$1. CFC1 owns all the stock of CFC2, a controlled foreign corporation. All the stock of CFC1 and CFC2 is owned (within the meaning of section 958(a)) by corporate United States shareholders that use the calendar year as their U.S. taxable year. CFC1 and CFC2 both use the calendar year as their U.S. and foreign taxable years.

(ii) *Income of CFC1 and CFC2.* In Year 3, CFC1 earns 2,000,000u of gross income that is foreign base company sales income, and 1,000,000u of interest income from unrelated persons, for both U.S. and Country X tax law purposes. Under Country X tax law, CFC1’s interest income is exempt from tax. In Year 3, CFC1 also receives a section 959(b) distribution from CFC2 of 4,000,000u of previously taxed earnings and profits, in the general category and relating to a single PTEP group and taxable year. There are no foreign income taxes associated with the

previously taxed earnings and profits distributed by CFC2 at the level of CFC2 under § 1.959–4. The section 959(b) distribution is treated as a dividend taxable to CFC1 under Country X tax law. In Year 3, CFC2 earns no gross income and receives no distributions.

(iii) *Deductions of CFC1 and CFC2 other than taxes.* For both U.S. and Country X tax purposes, in Year 3, CFC1 incurs 1,500,000u of deductible expenses other than current year taxes that are allocable to all gross income. For U.S. tax purposes, under §§ 1.861–8 through 1.861–14T, 1,000,000u of the deductions are apportioned to CFC1’s foreign base company sales income and 500,000u of the deductions are apportioned to CFC1’s interest income. Under Country X tax law, 1,000,000u of deductions are apportioned to the 4,000,000u treated as a dividend, and 500,000u of deductions are apportioned to the 2,000,000u of foreign base company sales income. Under Country X tax law, no deductions are apportioned to the interest income. Under Country X tax law, CFC1 pays eligible current year taxes of 900,000u on a base of 4,500,000u (7,000,000u gross income – 1,000,000u exemption and 1,500,000u deductions) consisting of 3,000,000u (4,000,000u – 1,000,000u) of previously taxed earnings and profits, 1,000,000u of interest income (exempt from tax under Country X law), and 1,500,000u (2,000,000u – 500,000u) of foreign base company sales income. In Year 3, CFC2 has no expenses (including current year taxes).

(2) *Analysis*—(i) *CFC2.* Under paragraph (c)(1) of this section, the computational rules of paragraph (c)(1) of this section are applied beginning with CFC2. However, CFC2 has no gross income or expenses in Year 3. Accordingly, the computational rules in paragraphs (c)(1)(i) through (iv) of this section are not relevant with respect to CFC2. Under paragraph (c)(1)(v) of this section, the rules in paragraph (c)(1)(i) through (iv) of this section are then applied to CFC1.

(ii) *CFC1*—(A) *Step 1.* Under paragraph (c)(1)(i) of this section, CFC1’s items of gross income for the current taxable year are assigned to section 904 categories and included in income groups within those section 904 categories. Under paragraph (d)(2)(i) of this section and § 1.904–4, the interest income is passive category income and the foreign base company sales income is general category income. Under paragraph (d)(2)(ii) of this section, the 1,000,000u of interest income is assigned to a subpart F income group (the “FPHCI income group”) within the passive category because it is foreign

personal holding company income described in § 1.954–1(c)(1)(iii)(A)(1)(i) that falls within a single group of income under § 1.904–4(c)(3)(iii) for passive income that is subject to no withholding tax or other foreign tax. The 2,000,000u of foreign base company sales income is assigned to a subpart F income group within the general category (the “FBCSI income group”), because it is foreign base company income described in § 1.954–1(c)(1)(iii)(A)(2)(i). Under paragraph (d)(2) of this section, the 4,000,000u of previously taxed earnings and profits is treated as a U.S. dividend amount (as defined in § 1.861–20(b)(21)) and is assigned to the residual income group within the general category for purposes of applying section 960(a) and (d) and §§ 1.960–1 and 1.960–2.

(B) *Step 2—(1) Allocation and apportionment of deductions other than taxes.* Under paragraph (c)(1)(ii) of this section, CFC1’s deductions for the current taxable year are allocated and apportioned among the section 904 categories and income groups within a section 904 category that were increased as provided in paragraph (c)(1)(i) of this section. Under paragraph (d)(3)(i) of this section and §§ 1.861–8 through 1.861–14T, 1,000,000u of deductions are allocated and apportioned to the FBCSI income group within the general category, and 500,000u of deductions are allocated and apportioned to the FPHCI income group within the passive category. Therefore, CFC1 has 1,000,000u (2,000,000u – 1,000,000u) of pre-tax income attributable to the FBCSI income group within the general category and 500,000u (1,000,000u – 500,000u) of pre-tax income attributable to the FPHCI income group within the passive category. For U.S. tax purposes, no deductions other than eligible current year taxes are allocated and apportioned to the 4,000,000u of previously taxed earnings and profits in CFC1’s residual income group within the general category because no deductions of CFC1 other than deductions for current year taxes are allocated and apportioned to previously taxed earnings and profits under section 861. See paragraph (d)(3)(i) of this section and § 1.959–6(d)(1).

(2) *Allocation and apportionment of current year taxes.* Under paragraph (c)(1)(ii) of this section, CFC1’s current year taxes are allocated and apportioned among the section 904 categories and income groups within a section 904 category that were increased as provided in paragraph (c)(1)(i) of this section. Under paragraphs (d)(3)(i) and (ii) of this section, for purposes of allocating and apportioning taxes to

reduce the income in a section 904 category or an income group, § 1.861–20 (as modified by § 1.904–6(c)) is applied to determine the amount of foreign taxable income, computed under Country X tax law but characterized under Federal income tax law, in each section 904 category and income group that is included in the Country X tax base. For Country X tax purposes, 1,000,000u of deductions are allocated and apportioned to CFC1’s 4,000,000u of previously taxed earnings and profits, which is assigned to the residual income grouping within the general category, 500,000u of deductions are allocated and apportioned to the FBCSI income group within the general category, and no deductions are allocated and apportioned to the FPHCI income group in the passive category. Therefore, for Country X tax purposes, CFC1 has 3,000,000u of foreign taxable income assigned to the residual income group within the general category, 1,500,000u of foreign taxable income assigned to the FBCSI income group within the general category, and no taxable income assigned to the FPHCI income group within the passive category. Under paragraphs (d)(3)(i) and (ii) of this section and § 1.959–6, 600,000u (3,000,000u/4,500,000u × 900,000u) of the 900,000u eligible current year taxes paid by CFC1 are related to the residual income group within the general category, and 300,000u (1,500,000u/4,500,000u × 900,000u) are related to the FBCSI income group within the general category. No current year taxes are allocated or apportioned to the FPHCI income group within the passive category because the interest expense is exempt from Country X tax. See § 1.959–6 for rules allocating and apportioning the 600,000u of current year taxes among the corporate PTEP accounts, section 904 categories, and PTEP groups. Thus, for U.S. tax purposes, CFC1 has 3,400,000u of previously taxed earnings and profits (4,000,000u – 600,000u) in the residual income group within the general category (see §§ 1.959–2 and 1.959–3 for rules relating to accounting for previously taxed earnings and profits), 500,000u of income in the FPHCI income group within the passive category, and 700,000u of income (1,000,000u – 300,000u) in the FBCSI income group within the general category.

(C) *Step 3.* Under paragraph (c)(1)(iii) of this section, for purposes of computing foreign income taxes deemed paid under section 960(a), CFC1 has \$300,000 of current year taxes in the

FBCSI income group within the general category. Under paragraph (e) of this section, the United States shareholders of CFC1 cannot claim a credit with respect to the \$600,000 of taxes on CFC1’s income in the residual income group under section 960, except to the extent the taxes are allocated and apportioned to previously taxed earnings and profits under § 1.959–6 and deemed paid by a domestic corporation under section 960(b) and § 1.960–3.

(D) *Step 4.* Under paragraph (c)(1)(iv) of this section, the United States shareholders of CFC1 compute current year taxes deemed paid under section 960(a) and (d) and the rules of § 1.960–2. None of the Country X tax is allocated to CFC1’s FPHCI income group. Therefore, there are no current year taxes deemed paid by CFC1’s United States shareholders with respect to their passive category subpart F inclusions. Country X tax equal to \$300,000 is allocated and apportioned to CFC1’s FBCSI income group. Therefore, \$300,000 of the current year taxes are deemed paid by CFC1’s United States shareholders with respect to their general category subpart F inclusions. See § 1.960–2(b)(5) and (c)(7) for examples of the application of section 960(a) and (d) and the rules in § 1.960–2. The remaining \$600,000 of Country X tax is allocated and apportioned to the residual income group within the general category with respect to the previously taxed earnings and profits and will generally be allocated and apportioned to previously taxed earnings and profits under the rules in § 1.959–6.

(E) *Step 5.* Paragraph (c)(1)(v) of this section does not apply because CFC1 is the highest-tier controlled foreign corporation in the chain.

(F) *Step 6.* Paragraph (c)(1)(vi) of this section does not apply because CFC1 did not make a specified section 959(a) distribution.

■ **Par. 24.** Section 1.960–3 is revised to read as follows:

§ 1.960–3 Foreign income taxes deemed paid under section 960(b).

(a) *Scope.* This section provides rules for determining foreign income taxes that are deemed paid under section 960(b) with respect to the receipt of distributions of previously taxed earnings and profits. Paragraph (b) of this section describes the foreign income taxes that a domestic corporation is deemed to pay with respect to its receipt of a specified section 959(a) distribution. Paragraph (c) of this section describes the foreign income taxes that a controlled foreign

corporation is deemed to pay with respect to its receipt of a section 959(b) distribution. For rules regarding the maintenance and adjustment by a foreign corporation of corporate PTEP accounts and corporate PTEP tax pools with respect to each of its covered shareholders, *see* § 1.959–2(d). For rules regarding the maintenance and adjustment by a covered shareholder of annual PTEP accounts and PTEP tax pools with respect to a foreign corporation in which it owns stock, *see* §§ 1.959–2(b) and 1.959–3(c) and (e).

(b) *Foreign income taxes deemed paid under section 960(b)(1)—(1) In general.* A domestic corporation that is a United States shareholder of a controlled foreign corporation is deemed to have paid the foreign income taxes that are properly attributable to a specified section 959(a) distribution that it receives from the controlled foreign corporation and that have not been deemed to have been paid by a domestic corporation under section 960 for the current taxable year or any prior taxable year. A credit for foreign income taxes deemed paid under this section may be subject to disallowance under other provisions of the Code or regulations in this title that apply at the level of the United States shareholder.

(2) *Properly attributable.* The foreign income taxes that are properly attributable to a specified section 959(a) distribution are the foreign income taxes that are removed under §§ 1.959–2(d)(2) and 1.959–3(e)(1)(iii) from each creditable PTEP tax group (as defined in § 1.959–2(b)(4)(ii)) by reason of the specified section 959(a) distribution.

(c) *Foreign income taxes deemed paid under section 960(b)(2)—(1) In general.* A controlled foreign corporation is deemed to have paid the foreign income taxes that are properly attributable to a section 959(b) distribution that it receives from another controlled foreign corporation and that have not been deemed to have been paid by a domestic corporation under section 960 for the current taxable year or any prior taxable year.

(2) *Properly attributable.* The foreign income taxes that are properly attributable to a section 959(b) distribution received by a controlled foreign corporation are the foreign income taxes that are removed under §§ 1.959–2(d)(2) and 1.959–3(e)(1)(iii) from each creditable PTEP tax group (as defined in § 1.959–1(b)) by reason of the section 959(b) distribution.

■ **Par. 25.** Section 1.960–7 is amended by:

■ 1. In the first sentence of paragraph (a), removing the language “paragraph (b)” and adding the language

“paragraphs (b) and (c)” in its place; and

■ 2. Adding a new paragraph (c).

The addition reads as follows:

§ 1.960–7 Applicability dates.

* * * * *

(c) Sections 1.960–1 and 1.960–3 apply to taxable years of a foreign corporation that begin on or after [date of publication of final regulations in the **Federal Register**] or are early application years (as described in § 1.959–12(d)), and to taxable years of a domestic corporation that is a United States shareholder of the foreign corporation in which or with which such taxable years of such foreign corporation end. *See* §§ 1.960–1 and 1.960–3 as contained in 26 CFR part 1 revised as of April 1, 2024, for a version of these sections applicable to prior taxable years.

■ **Par. 26.** Section 1.961–1 is revised to read as follows:

§ 1.961–1 Overview, definitions, and rules of general applicability.

(a) *Overview—(1) In general.* The section 961 regulations provide rules for basis adjustments related to previously taxed earnings and profits. Section 1.961–1 sets forth definitions and rules of general applicability. Section 1.961–2 describes the types of property units and types of basis for purposes of applying section 961. Section 1.961–3 provides basis increases for income inclusions. Section 1.961–4 provides reductions to basis and gain recognition for distributions of previously taxed earnings and profits. Section 1.961–5 provides basis adjustments for foreign currency gain or loss and for general successor transactions. Sections 1.961–6 and 1.961–7 are reserved. Section 1.961–8 describes the consequences of positive derived basis. Section 1.961–9 describes the consequences of positive section 961(c) basis. Section 1.961–10 describes the consequences of negative derived basis and negative section 961(c) basis. Section 1.961–11 provides for the inclusion by United States shareholders in a controlled foreign corporation of the controlled foreign corporation’s income arising under section 961(c). Section 1.961–12 provides examples illustrating the application of the section 961 regulations. Section 1.961–13 sets forth transition rules. Section 1.961–14 sets forth applicability dates. *See* § 1.1502–59 for additional rules for a consolidated group.

(2) *Scope.* This section sets forth definitions and rules of general applicability for purposes of the section 961 regulations. Paragraph (b) of this

section provides definitions. Paragraph (c) of this section provides rules relating to S corporations. Paragraph (d) of this section provides an anti-avoidance rule.

(b) *Definitions.* The definitions in § 1.959–1(b) apply for purposes of the section 961 regulations, with the following additions.

Acquired partnership. The term *acquired partnership* has the meaning provided in § 1.961–5(c)(1).

Common basis. The term *common basis* means a partnership’s adjusted basis of an item of property, excluding any basis that is solely with respect to a specific partner (for example, a section 743(b) basis adjustment or derived basis).

Covered gain. The term *covered gain* has the meaning provided in § 1.961–9(c)(1).

Derived basis. The term *derived basis* means basis described in § 1.961–2(d)(2).

Derivative ownership unit. The term *derivative ownership unit* has the meaning provided in § 1.961–2(d)(1).

Lookback PTEP. The term *lookback PTEP* has the meaning provided in § 1.961–9(f)(3)(ii).

Lower-tier partnership interest. The term *lower-tier partnership interest* has the meaning provided in § 1.961–8(d).

Midyear transaction. The term *midyear transaction* has the meaning provided in § 1.961–3(c)(2).

Mirrored PTEP. The term *mirrored PTEP* has the meaning provided in § 1.961–9(f)(2)(ii).

Negative derived basis. The term *negative derived basis* means the amount by which derived basis with respect to a covered shareholder of a derivative ownership unit is less than zero.

Negative section 961(c) basis. The term *negative section 961(c) basis* means the amount by which section 961(c) basis with respect to a covered shareholder of a section 961(c) ownership unit is less than zero.

Net foreign currency gain. The term *net foreign currency gain* has the meaning provided in § 1.961–5(b)(2).

Net foreign currency loss. The term *net foreign currency loss* has the meaning provided in § 1.961–5(b)(2).

Nonrecognition transaction. The term *nonrecognition transaction* has the meaning provided in section 7701(a)(45).

Positive derived basis. The term *positive derived basis* means the amount by which derived basis with respect to a covered shareholder of a derivative ownership unit is greater than zero.

Positive section 961(c) basis. The term *positive section 961(c) basis* means the amount by which section 961(c) basis

with respect to a covered shareholder of a section 961(c) ownership unit is greater than zero.

Property unit. The term *property unit* has the meaning provided in § 1.961–2(b).

Relevant taxable year. The term *relevant taxable year* has the meaning provided in § 1.961–3(b).

Section 951(a)(1)(A) inclusion amount. The term *section 951(a)(1)(A) inclusion amount* has the meaning provided in § 1.961–3(c)(1)(ii).

Section 951(a)(1)(B) inclusion amount. The term *section 951(a)(1)(B) inclusion amount* has the meaning provided in § 1.961–3(c)(1)(iii).

Section 961 regulations. The term *section 961 regulations* means the regulations in this part issued under section 961.

Section 961(a) ownership unit. The term *section 961(a) ownership unit* has the meaning provided in § 1.961–2(c).

Section 961(c) basis. The term *section 961(c) basis* means basis described in § 1.961–2(e)(2).

Section 961(c) income. The term *section 961(c) income* has the meaning provided in § 1.961–11(b).

Section 961(c) ownership unit. The term *section 961(c) ownership unit* has the meaning provided in § 1.961–2(e)(1).

Section 961(c) PTEP. The term *section 961(c) PTEP* has the meaning provided in § 1.961–9(f)(1).

Transferred units. The term *transferred units* has the meaning provided in § 1.961–8(b)(1) or § 1.961–9(c)(1), as applicable.

Transferring partnership. The term *transferring partnership* has the meaning provided in § 1.961–8(b)(1).

Upper-tier partnership. The term *upper-tier partnership* has the meaning provided in § 1.961–8(d).

(c) *Treatment of an S corporation—(1) In general.* Except as provided in paragraph (c)(2) of this section, for purposes of the section 961 regulations, an S corporation is treated in the same manner as a domestic partnership, a reference to a domestic partnership includes an S corporation, and shareholders of an S corporation are treated as partners of such partnership. See section 1373(a). As applicable, the treatment of an S corporation and its shareholders under the preceding sentence is determined by replacing any partnership-specific provision with the equivalent provision for S corporations (for example, a reference to an adjustment under section 705 to a partner's basis in its partnership interest refers to the adjustment under section 1367 to a shareholder's basis in its stock of an S corporation).

(2) *Treatment as a covered shareholder for taxable years for which elective entity treatment applies for § 1.958–1(d)(1) purposes.* See § 1.961–13(c) for a rule treating an S corporation as a covered shareholder for any taxable year of the S corporation for which § 1.958–1(d)(1) does not apply and § 1.961–13(d) for a transition rule converting basis with respect to an S corporation to basis with respect to covered shareholders owning interests in the S corporation once the S corporation is no longer treated as a covered shareholder.

(d) *Anti-avoidance rule.* If a transaction, series of transactions, plan, or arrangement is engaged in with a principal purpose of avoiding the purposes of section 961 and the section 961 regulations, then appropriate adjustments are made, which may include adjustments to disregard the transaction, series of transactions, plan, or arrangement.

■ **Par. 27.** Section 1.961–2 is revised to read as follows:

§ 1.961–2 Types of property units and basis.

(a) *Scope.* This section describes the types of property units and types of basis for purposes of applying section 961. Paragraph (b) of this section defines a property unit and provides the general rule for basis of a property unit. Paragraphs (c) through (e) of this section provide definitions and rules for section 961(a) ownership units, derivative ownership units, and section 961(c) ownership units, respectively. See §§ 1.961–3 through 1.961–11 for basis adjustments and the effects of basis and § 1.961–12(c)(1) (*Example 1*) for an example illustrating the application of this section.

(b) *Property unit.* A *property unit* is a section 961(a) ownership unit, derivative ownership unit, or section 961(c) ownership unit, as applicable (defined in paragraphs (c) through (e) of this section). Basis in a property unit must be established and maintained in U.S. dollars in accordance with this section and the adjustments prescribed in the section 961 regulations.

(c) *Section 961(a) ownership unit.* A *section 961(a) ownership unit* is a share of stock of a foreign corporation directly owned by a covered shareholder, or an interest in a partnership directly owned by a covered shareholder and through which the covered shareholder owns stock of a foreign corporation. A covered shareholder is provided adjusted basis in a section 961(a) ownership unit.

(d) *Derivative ownership unit—(1) In general.* A *derivative ownership unit* is a share of stock of a foreign corporation

directly owned by a partnership and owned (indirectly) by one or more covered shareholders through only one or more partnerships, or an interest in a partnership directly owned by another partnership and through which one or more covered shareholders own stock of a foreign corporation through only partnerships. A partnership is provided derived basis in a derivative ownership unit in accordance with paragraph (d)(2) of this section.

(2) *Derived basis.* *Derived basis* is basis of a derivative ownership unit that must be established and maintained separately with respect to each covered shareholder that owns the derivative ownership unit through only one or more partnerships. Derived basis with respect to a covered shareholder may be a positive or negative amount and is treated as an attribute of the partnership that directly owns the derivative ownership unit.

(e) *Section 961(c) ownership unit—(1) In general.* A *section 961(c) ownership unit* is a share of stock of a foreign corporation directly owned by a controlled foreign corporation and owned (indirectly) by one or more covered shareholders. A controlled foreign corporation is provided section 961(c) basis in a section 961(c) ownership unit in accordance with paragraph (e)(2) of this section.

(2) *Section 961(c) basis.* *Section 961(c) basis* is basis of a section 961(c) ownership unit that must be established and maintained separately with respect to each covered shareholder that owns the section 961(c) ownership unit. Section 961(c) basis with respect to a covered shareholder may be a positive or negative amount and is treated as an attribute of the controlled foreign corporation that directly owns the section 961(c) ownership unit. Section 961(c) basis applies only for the purposes prescribed in the section 961 regulations and, therefore, for example does not affect the amount of the controlled foreign corporation's gross income or the amount of its earnings and profits.

■ **Par. 28.** Sections 1.961–3 through 1.961–14 are added to read as follows:

Sec.	*	*	*	*	*
1.961–3	Basis increases for certain income inclusions.				
1.961–4	Basis reductions and gain recognition for distributions.				
1.961–5	Basis adjustments for foreign currency gain or loss and for general successor transactions.				
1.961–6 and 1.961–7	[Reserved]				
1.961–8	Application of positive derived basis to covered shareholders' distributive shares of gain or loss.				

1.961–9 Exclusion from gross income of previously taxed earnings and profits resulting from positive section 961(c) basis.

1.961–10 Gain recognition for negative basis.

1.961–11 Amounts included in gross income of United States shareholders.

1.961–12 Examples.

1.961–13 Transition rules.

1.961–14 Applicability dates.

* * * * *

§ 1.961–3 Basis increases for certain income inclusions.

(a) *Scope.* This section provides the increases to basis under section 961 for inclusions under sections 951(a) and 951A(a) and § 1.961–11. Paragraph (b) of this section provides the general rule, pursuant to which, to reflect a covered shareholder's income inclusions for a controlled foreign corporation's taxable year, basis of certain property units (shares of stock of the controlled foreign corporation directly owned by the covered shareholder, property through which the covered shareholder owns (indirectly) stock of the controlled foreign corporation, and shares of stock of the controlled foreign corporation owned (indirectly) by the covered shareholder), is increased. Paragraph (c) of this section describes the specific rules for increasing basis pursuant to paragraph (b) of this section. Paragraph (d) of this section determines certain basis increases based on distributions of previously taxed earnings and profits by the controlled foreign corporation during the taxable year. Paragraph (e) of this section determines certain basis increases based on a hypothetical distribution, to the extent paragraph (d) of this section does not increase basis. Paragraph (f) of this section provides limitations on basis increases in certain cases. See § 1.961–12(c)(2) (*Example 2*) for an example illustrating the application of this section.

(b) *In general.* To reflect a covered shareholder's income inclusions for a taxable year of a controlled foreign corporation (such taxable year for which this section is being applied, the *relevant taxable year*), basis of property units that are shares of stock of the controlled foreign corporation owned by the covered shareholder, and basis of any property units through which the covered shareholder owns stock of the controlled foreign corporation, is in each case increased in accordance with the rules described in paragraph (c) of this section. Generally, under those rules, basis increases begin at the level of stock of the controlled foreign corporation and then tier through property units through which the covered shareholder owns such stock,

with at each level basis increases allocated among property units based on how previously taxed earnings and profits resulting from the income inclusions are, or likely will be, distributed on the property units (thus, the allocations may differ from the extent to which the income inclusions are attributable to the property units). Solely for purposes of this section, a reference to the basis of a property unit means adjusted basis in the case of a section 961(a) ownership unit, derived basis with respect to the covered shareholder in the case of a derivative ownership unit, or section 961(c) basis with respect to the covered shareholder in the case of a section 961(c) ownership unit.

(c) *Rules for increasing basis—(1) Determine amount of income inclusions giving rise to increases to basis—(i) In general.* First, determine the amount of the covered shareholder's income inclusions with respect to the controlled foreign corporation for the relevant taxable year that give rise to increases to basis under section 961, computed as the sum of the section 951(a)(1)(A) inclusion amount and section 951(a)(1)(B) inclusion amount (defined in paragraphs (c)(1)(ii) and (iii) of this section).

(ii) *Section 951(a)(1)(A) inclusion amount.* The *section 951(a)(1)(A) inclusion amount* is the sum of any amount (in U.S. dollars) that the covered shareholder includes in gross income with respect to the controlled foreign corporation for the relevant taxable year under section 951(a)(1)(A) or 951A(a) or § 1.961–11.

(iii) *Section 951(a)(1)(B) inclusion amount.* The *section 951(a)(1)(B) inclusion amount* is the amount (in U.S. dollars) that the covered shareholder includes in gross income with respect to the controlled foreign corporation for the relevant taxable year under section 951(a)(1)(B).

(2) *Determine if any midyear transactions occur.* Second, determine if any midyear transactions (which affect the timing of certain basis adjustments under paragraphs (d) and (e) of this section) occur within the relevant taxable year. A *midyear transaction* is any sale, exchange, or other disposition (including an issuance or redemption) occurring before the last relevant day of the relevant taxable year and involving one or more items of property that, immediately before or after the sale, exchange, or other disposition are stock of the controlled foreign corporation owned by the covered shareholder or property through which the covered shareholder owns stock of the controlled foreign corporation.

(3) *Apply actual distribution rule.*

Third, if, before the last relevant day of the relevant taxable year, the controlled foreign corporation distributes previously taxed earnings and profits with respect to the covered shareholder in a covered distribution (determined under § 1.959–4), then increase basis for a portion of the section 951(a)(1)(A) inclusion amount in accordance with paragraph (d) of this section.

(4) *Apply hypothetical distribution rule.* Fourth, increase basis for any remaining portion of the section 951(a)(1)(A) inclusion amount and the section 951(a)(1)(B) inclusion amount in accordance with paragraph (e) of this section.

(d) *Actual distribution rule—(1) In general.* For each distribution described in paragraph (c)(3) of this section (starting with the earliest distribution), increase basis of property units that are shares of stock of the controlled foreign corporation and, if applicable, property units through which the covered shareholder owns such shares, in accordance with paragraphs (d)(2) and (3) of this section. Treat each such increase to basis as made at the beginning of the first day of the relevant taxable year, unless the distribution is made after any midyear transactions, in which case treat each such increase as made immediately after the midyear transaction that most recently precedes the distribution.

(2) *Increases to basis of shares of stock of the controlled foreign corporation.* Increase the basis of each property unit that is a share of stock of the controlled foreign corporation that the covered shareholder owns on the last relevant day of the relevant taxable year by the amount of the adjustment required under § 1.961–4 (basis reductions and gain recognition for distributions) to such basis by reason of the distribution, subject to the following limitation. Do not increase the basis of the share by an amount greater than the product of the section 951(a)(1)(A) inclusion amount, reduced by all increases to basis under this paragraph (d)(2) by reason of earlier distributions, and a fraction, the numerator of which is the portion of the distribution that is made with respect to the share, and the denominator of which is the amount of the distribution.

(3) *Increases to basis of property units through which the covered shareholder owns stock of the controlled foreign corporation.* If, when the distribution is made, the covered shareholder owns stock of the controlled foreign corporation through one or more property units, then increase the basis of each such property unit by the portion

of the hypothetical distribution described in paragraph (e)(2) of this section (modified as described in the next sentence) that would be distributed with respect to the property unit in accordance with paragraph (e)(3) of this section, subject to the limitations in paragraph (f) of this section. For purposes of this paragraph (d)(3), the hypothetical distribution is treated as made when the distribution of previously taxed earnings and profits is made, the amount of the hypothetical distribution is equal to the increase to basis under paragraph (d)(2) of this section by reason of the distribution of previously taxed earnings and profits, and, at the level of the controlled foreign corporation, the hypothetical distribution is made in the same manner as the distribution of previously taxed earnings and profits.

(e) *Hypothetical distribution rule*—(1) *In general.* Increase the basis of each property unit that the covered shareholder owns on the last relevant day of the relevant taxable year by the portion of the hypothetical distribution described in paragraph (e)(2) of this section that would be distributed with respect to the property unit in accordance with paragraph (e)(3) of this section, subject to the limitations in paragraph (f) of this section. Except as provided in paragraph (e)(4) of this section, treat a portion of each such increase to basis as made at the end of the last day of the relevant taxable year, determined by multiplying the amount of the increase to basis by a fraction, the numerator of which is the section 951(a)(1)(B) inclusion amount, and the denominator of which is the amount of the hypothetical distribution. Treat the remaining portion of each such increase to basis as made at the beginning of the first day of the relevant taxable year on which the covered shareholder owns the property unit, unless there are any midyear transactions, in which case treat each such remaining portion as made immediately after the last midyear transaction occurring during the relevant taxable year.

(2) *Hypothetical distribution.* The hypothetical distribution described in this paragraph (e)(2) is a hypothetical distribution treated as made by the controlled foreign corporation, through all property (if any) through which the covered shareholder owns stock of the controlled foreign corporation, to the covered shareholder on the last relevant day of the relevant taxable year. The amount of the hypothetical distribution is equal to the section 951(a)(1)(A) inclusion amount, reduced by any increases to basis under paragraph (d)(2) of this section, plus the section

951(a)(1)(B) inclusion amount. In the hypothetical distribution, stock of the controlled foreign corporation and other property is taken into account only to the extent owned by the covered shareholder on the last relevant day, and the earnings and profits of the controlled foreign corporation and any foreign corporations through which the hypothetical distribution is treated as made are in each case treated as equal to the amount of the hypothetical distribution.

(3) *Distribution rights.* The portion of the hypothetical distribution that would be distributed with respect to a property unit is determined under the principles of § 1.951–1(e)(2) through (6). However, an earlier distribution affects property units' distribution rights for purposes of the hypothetical distribution to the extent such earlier distribution results in the section 951(a)(1)(A) inclusion amount increasing basis under paragraph (d) of this section.

(4) *Certain increase to basis for section 951(a)(1)(B) inclusion amount.* If basis of a property unit is increased pursuant to the second sentence of paragraph (e)(1) of this section, and at the end of the last day of the relevant taxable year the covered shareholder either does not own the property unit or owns the property unit in a manner different than how the covered shareholder owns the property unit at the time of the hypothetical distribution described in paragraph (e)(2) of this section, then treat such increase to basis as made immediately before the transaction in which the covered shareholder ceases to own the property unit in the same manner as it owns the property unit at the time of such hypothetical distribution. In addition, treat such increase to basis as made after the determination of any amount that must be included in gross income as a dividend (for example, under section 1248 or § 1.367(b)–4) as a result of such transaction.

(f) *Limitations*—(1) *Section 961(c) ownership units that are not stock of a controlled foreign corporation.* Section 961(c) basis of a section 961(c) ownership unit is increased only if the section 961(c) ownership unit is a share of stock of a controlled foreign corporation.

(2) *Taxable section 962 previously taxed earnings and profits.* The portion of an income inclusion that gives rise to previously taxed earnings and profits relating to the taxable section 962 PTEP subgroup does not increase adjusted basis of a section 961(a) ownership unit or derived basis of a derivative ownership unit.

(3) *Derivative ownership units that are partially owned by foreign corporations.* If a derivative ownership unit is owned (indirectly) by one or more foreign corporations, then an increase to derived basis of the derivative ownership unit resulting from a hypothetical distribution described in paragraph (d)(3) or (e)(2) of this section cannot exceed the portion of the hypothetical distribution that would be distributed to the covered shareholder through only the derivative ownership unit and any interests in partnerships.

§ 1.961–4 Basis reductions and gain recognition for distributions.

(a) *Scope.* This section sets forth the rules for reducing basis and recognizing gain under section 961 for distributions of previously taxed earnings and profits. Paragraph (b) of this section describes adjustments to section 961(a) ownership units in the case of distributions of previously taxed earnings and profits to a covered shareholder. Paragraph (c) of this section describes adjustments to derivative ownership units in the case of distributions of previously taxed earnings and profits through one or more partnerships to one or more covered shareholders. Paragraph (d) of this section describes adjustments to section 961(c) ownership units in the case of distributions of previously taxed earnings and profits to a controlled foreign corporation. Paragraph (e) of this section provides timing rules for when adjustments are treated as made. Paragraph (f) of this section provides rules regarding the treatment of gain recognized under this section. See § 1.961–12(c)(3) (*Example 3*) for an example illustrating the application of this section.

(b) *Adjustments to section 961(a) ownership units*—(1) *In general.* If a covered shareholder receives previously taxed earnings and profits that are excluded from its gross income under section 959(a) and § 1.959–4, then the resulting adjustments under section 961 to the covered shareholder's adjusted basis of section 961(a) ownership units are determined in accordance with the rules described in paragraph (b)(2) of this section.

(2) *Rules for adjusting basis*—(i) *Determine amounts of adjustments.* First, determine the amount of the adjustment to the covered shareholder's adjusted basis of each section 961(a) ownership unit, which is equal to the dollar basis of, and foreign income taxes associated with, previously taxed earnings and profits that are received with respect to such section 961(a) ownership unit (determined under § 1.959–4), but only including foreign

income taxes for which the covered shareholder is allowed a credit under section 901.

(ii) *Reduce basis.* Second, reduce the covered shareholder's adjusted basis of each section 961(a) ownership unit by the amount of the adjustment to such adjusted basis (determined under paragraph (b)(2)(i) of this section), but not below zero.

(iii) *Recognize gain.* Third, to the extent that the amount of an adjustment to the covered shareholder's adjusted basis of a section 961(a) ownership unit (determined under paragraph (b)(2)(i) of this section) exceeds such adjusted basis, treat the covered shareholder as recognizing gain with respect to such section 961(a) ownership unit in accordance with paragraph (f) of this section.

(c) *Adjustments to derivative ownership units—(1) In general.* If, through a partnership, one or more covered shareholders receive previously taxed earnings and profits that are excluded from the covered shareholders' gross income under section 959(a) and § 1.959–4, then the resulting adjustments under section 961 to the partnership's derived basis of derivative ownership units are determined in accordance with the rules described in paragraph (c)(2) of this section. In the case of tiered partnerships, each tiered partnership's derived basis of derivative ownership units is adjusted as described in paragraph (c)(2) of this section, starting with the partnership at the lowest tier.

(2) *Rules for adjusting basis—(i) Determine amounts of adjustments.* First, determine the amount of the adjustment to the partnership's derived basis with respect to each covered shareholder of each derivative ownership unit, which is equal to the dollar basis of, and foreign income taxes associated with, previously taxed earnings and profits that are both with respect to such covered shareholder and received with respect to such derivative ownership unit (determined under § 1.959–4).

(ii) *Reduce positive derived basis.* Second, reduce the partnership's derived basis with respect to each covered shareholder of each derivative ownership unit by the amount of the adjustment to such derived basis (determined under paragraph (c)(2)(i) of this section), but not below zero.

(iii) *Reduce positive section 743(b) basis (if applicable) and increase negative derived basis.* Third, to the extent that the amount of an adjustment to the partnership's derived basis with respect to a covered shareholder of a derivative ownership unit (determined

under paragraph (c)(2)(i) of this section) exceeds the related reduction to positive derived basis (determined under paragraph (c)(2)(ii) of this section), reduce the covered shareholder's positive section 743(b) basis adjustment of such derivative ownership unit (if applicable), but not below zero, and then, if applicable, reduce such derived basis below zero, but only to the extent permitted under paragraph (c)(3) of this section.

(iv) *Recognize and allocate gain.* Fourth, to the extent that the amount of an adjustment to the partnership's derived basis with respect to a covered shareholder of a derivative ownership unit (determined under paragraph (c)(2)(i) of this section) exceeds the aggregate of the related reductions to derived basis (determined under paragraphs (c)(2)(ii) and (iii) of this section) and positive section 743(b) basis (determined under paragraph (c)(2)(iii) of this section), treat the partnership as recognizing gain with respect to such derivative ownership unit in accordance with paragraph (f) of this section, and allocate the gain solely to the covered shareholder.

(3) *Limitation on reducing derived basis—(i) In general.* An adjustment to a partnership's derived basis with respect to a covered shareholder of a derivative ownership unit can reduce (or further reduce) such derived basis below zero only to the extent of the amount of common basis of such derivative ownership unit available with respect to the covered shareholder (determined under paragraph (c)(3)(ii) of this section), less, if applicable, the covered shareholder's negative section 743(b) basis adjustment of the derivative ownership unit (expressed as a positive amount).

(ii) *Determining common basis available with respect to the covered shareholder.* In applying paragraph (c)(3)(i) of this section, the amount of common basis of the derivative ownership unit available with respect to the covered shareholder is equal to the product of the following amounts—

(A) The partnership's common basis of the derivative ownership unit (translated, if applicable, into U.S. dollars at the spot rate on the day on which the adjustment described in paragraph (c)(3)(i) of this section would be treated as reducing basis), reduced by all negative derived basis of the derivative ownership unit (determined immediately before the adjustment described in paragraph (c)(3)(i) of this section would be treated as made); and

(B) A fraction, the numerator of which is the amount by which the adjustment described in paragraph (c)(3)(i) of this

section would reduce derived basis with respect to the covered shareholder below zero if derived basis could be reduced without limitation, and the denominator of which is the sum of the amounts by which the adjustment described in paragraph (c)(3)(i) of this section and any concurrent adjustments to derived basis with respect to other covered shareholders would reduce derived basis of the derivative ownership unit below zero if derived basis could be reduced without limitation.

(d) *Adjustments to section 961(c) ownership units—(1) In general.* If a controlled foreign corporation receives previously taxed earnings and profits that are excluded from its gross income under section 959(b) and § 1.959–4, then the resulting adjustments under section 961 to the controlled foreign corporation's section 961(c) basis of section 961(c) ownership units are determined in accordance with the rules described in paragraph (d)(2) of this section.

(2) *Rules for adjusting basis—(i) Determine amounts of adjustments.* First, determine the amount of the adjustment to the controlled foreign corporation's section 961(c) basis with respect to each covered shareholder of each section 961(c) ownership unit, which is equal to the dollar basis of, and foreign income taxes associated with, previously taxed earnings and profits that are both with respect to such covered shareholder and received with respect to such section 961(c) ownership unit (determined under § 1.959–4).

(ii) *Reduce basis.* Second, reduce the controlled foreign corporation's section 961(c) basis with respect to each covered shareholder of each section 961(c) ownership unit by the amount of the adjustment to such section 961(c) basis, including below zero, but only to the extent permitted under paragraph (d)(3) of this section.

(iii) *Recognize and assign gain.* Third, to the extent that the amount of an adjustment to the controlled foreign corporation's section 961(c) basis with respect to a covered shareholder of a section 961(c) ownership unit (determined under paragraph (d)(2)(i) of this section) exceeds the related reduction to section 961(c) basis (determined under paragraph (d)(2)(ii) of this section), treat the controlled foreign corporation as recognizing gain with respect to such section 961(c) ownership unit in accordance with paragraph (f) of this section, and assign the gain solely to the covered shareholder.

(3) *Limitation on reducing section 961(c) basis*—(i) *In general.* An adjustment to a controlled foreign corporation's section 961(c) basis with respect to a covered shareholder of a section 961(c) ownership unit can reduce (or further reduce) such section 961(c) basis below zero only to the extent of the amount of adjusted basis of such section 961(c) ownership unit available with respect to the covered shareholder (determined under paragraph (d)(3)(ii) of this section).

(ii) *Determining adjusted basis available with respect to the covered shareholder.* In applying paragraph (d)(3)(i) of this section, the amount of adjusted basis of the section 961(c) ownership unit available with respect to the covered shareholder is equal to the product of the following amounts—

(A) The controlled foreign corporation's adjusted basis of the section 961(c) ownership unit (translated, if applicable, into U.S. dollars at the spot rate on the day on which the adjustment described in paragraph (d)(3)(i) of this section would be treated as reducing basis), reduced by all negative section 961(c) basis of the section 961(c) ownership unit (determined immediately before the adjustment described in paragraph (d)(3)(i) of this section would be treated as made); and

(B) A fraction, the numerator of which is the amount by which the adjustment described in paragraph (d)(3)(i) of this section would reduce section 961(c) basis with respect to the covered shareholder below zero if section 961(c) basis could be reduced without limitation, and the denominator of which is the sum of the amounts by which the adjustment described in paragraph (d)(3)(i) of this section and any concurrent adjustments to section 961(c) basis with respect to other covered shareholders would reduce section 961(c) basis of the section 961(c) ownership unit below zero if section 961(c) basis could be reduced below zero without limitation.

(e) *Timing of basis reductions*—(1) *Basis of stock.* A reduction to basis of stock of a foreign corporation under paragraph (b), (c), or (d) of this section is treated as made concurrently with the distribution giving rise to the basis reduction (and before any other adjustment to basis by reason of the distribution, for example, under section 301(c)(2)).

(2) *Basis of partnership interests.* A reduction to basis of an interest in a partnership under paragraph (b) or (c) of this section is treated as made concurrently with the adjustment under section 705 to such interest in the

partnership by reason of the distribution giving rise to the basis reduction.

(f) *Treatment of gain*—(1) *In general.* Gain treated as recognized with respect to a section 961(a) ownership unit, derivative ownership unit, or section 961(c) ownership unit under paragraph (b), (c), or (d) of this section is treated as gain from a sale or exchange of such ownership unit occurring concurrent with when the adjustment described in that paragraph would be treated as reducing basis.

(2) *Gain recognized by a partnership.* Gain treated as recognized by a partnership under paragraph (c) of this section constitutes an item of gain solely with respect to the covered shareholder to which it is allocated and has no effect on any partnership's computation or allocation of any other item under section 703 or 704 or on the covered shareholder's capital account. The gain is treated as the covered shareholder's distributive share of gain of the partnership (derived through each partnership through which the covered shareholder owns the partnership recognizing the gain, if applicable) and is taken into account in adjusting basis under section 705.

(3) *Gain recognized by a controlled foreign corporation.* Gain treated as recognized by a controlled foreign corporation under paragraph (d) of this section is gain recognized pursuant to section 961(c). Such gain applies only for purposes of determining amounts included in gross income of United States shareholders of the controlled foreign corporation under § 1.961–11 and, therefore, for example does not affect the controlled foreign corporation's items of gross income for purposes of section 952 or 951A or its earnings and profits.

(4) *Translation rule.* If applicable, gain treated as recognized by a partnership or controlled foreign corporation under paragraph (c) or (d) of this section is translated into functional currency at the spot rate on the day on which the gain is treated as recognized.

§ 1.961–5 Basis adjustments for foreign currency gain or loss and for general successor transactions.

(a) *Scope.* This section sets forth the rules for adjusting basis under section 961 for foreign currency gain or loss recognized with respect to previously taxed earnings and profits under section 986(c) and for general successor transactions. Paragraph (b) of this section provides the adjustments for foreign currency gain or loss. Paragraph (c) of this section provides the adjustments for general successor

transactions. Paragraph (d) of this section coordinates with section 743(b).

(b) *Adjustments for foreign currency gain or loss*—(1) *In general.* If a covered shareholder recognizes foreign currency gain or loss with respect to a foreign corporation's previously taxed earnings and profits under § 1.986(c)–1 in a transaction other than a distribution of the previously taxed earnings and profits, then basis of property units that are shares of stock of the foreign corporation owned by the covered shareholder, and basis of any property units through which the covered shareholder owns stock of the foreign corporation, is in each case adjusted in accordance with the rules described in paragraphs (b)(2) through (4) of this section. Generally, under those rules, basis adjustments begin at the level of stock of the foreign corporation and then tier through property units through which the covered shareholder owns such stock, with at each level basis adjustments allocated among property units based on proportionate shares of foreign currency gain or loss. Solely for purposes of this paragraph (b), a reference to the basis of a property unit means adjusted basis in the case of a section 961(a) ownership unit, derived basis with respect to the covered shareholder in the case of a derivative ownership unit, or section 961(c) basis with respect to the covered shareholder in the case of a section 961(c) ownership unit.

(2) *Determine net foreign currency gain or loss.* First, determine the amount of foreign currency gain or loss that gives rise to adjustments to basis, computed by comparing the sum of all foreign currency gain and the sum of all foreign currency loss that the covered shareholder recognizes with respect to the foreign corporation's previously taxed earnings and profits in the transaction under § 1.986(c)–1(b), without regard to § 1.986(c)–1(b)(3)(i) and (ii) (limitations for previously taxed earnings and profits resulting from section 965). The excess of the sum of foreign currency gain over the sum of foreign currency loss is *net foreign currency gain*, and the excess of the sum of foreign currency loss over the sum of foreign currency gain is *net foreign currency loss*.

(3) *Determine each property unit's share of net foreign currency gain or loss*—(i) *In general.* Second, determine each property unit's share of net foreign currency gain or net foreign currency loss by multiplying the net foreign currency gain or net foreign currency loss, as applicable, by a fraction (which is based on a hypothetical distribution by the foreign corporation of previously

taxed earnings and profits with respect to which the covered shareholder recognizes, or would recognize, foreign currency gain or loss in the transaction). The numerator of the fraction is the portion of the hypothetical distribution described in paragraph (b)(3)(ii) of this section that, under the principles of § 1.951–1(e)(2) through (6), would be distributed with respect to the property unit, and the denominator of the fraction is the amount of such hypothetical distribution.

(ii) *Hypothetical distribution.* The hypothetical distribution described in this paragraph (b)(3)(ii) is a hypothetical distribution treated as made by the foreign corporation, through all property (if any) through which the covered shareholder owns stock of the foreign corporation, to the covered shareholder immediately before the transaction. The amount of the hypothetical distribution is equal to all previously taxed earnings and profits of the foreign corporation with respect to which the covered shareholder recognizes (or, but for § 1.986(c)–1(b)(3)(i) and (ii), would recognize) any foreign currency gain or loss in the transaction. In the hypothetical distribution, stock of the foreign corporation is taken into account only to the extent owned by the covered shareholder immediately before but not immediately after the transaction, and other property is taken into account only to the extent owned by the covered shareholder immediately before the transaction. The earnings and profits of the foreign corporation and any foreign corporations through which the hypothetical distribution is treated as made are in each case treated as equal to the amount of the hypothetical distribution.

(4) *Adjust basis*—(i) *In general.* Third, adjust the basis of each property unit in accordance with paragraph (b)(4)(ii) or (iii) of this section, as applicable, starting with property units at the lowest tier and subject to the limitation in paragraph (b)(4)(iv) of this section. Treat each such adjustment to basis as made immediately before the transaction (and therefore take the adjustments into account in determining the Federal income tax consequences of the transaction).

(ii) *Basis increases for net foreign currency gain.* In the case of net foreign currency gain, increase the basis of each property unit by the property unit's share of the net foreign currency gain (determined under paragraph (b)(3) of this section).

(iii) *Basis reductions and gain recognition for net foreign currency loss.* In the case of net foreign currency loss, reduce the basis of each property unit

by the property unit's share of net foreign currency loss (determined under paragraph (b)(3) of this section) or recognize gain in accordance with the principles of § 1.961–4 (applied by treating such share of net foreign currency loss as the amount of the adjustment to basis described in § 1.961–4(b)(2)(i), (c)(2)(i), or (d)(2)(i), as applicable).

(iv) *Limitation for section 961(c) ownership units.* Section 961(c) basis of a section 961(c) ownership unit is adjusted only if the section 961(c) ownership unit is a share of stock of a controlled foreign corporation. A specified foreign corporation (as defined in § 1.965–1(f)(45)(i)(B)) that is not otherwise a controlled foreign corporation is treated as a controlled foreign corporation for purposes of applying this paragraph (b)(4) to foreign currency gain or loss with respect to previously taxed earnings and profits resulting from the application of section 965(a).

(c) *Successor basis*—(1) *In general.* In a general successor transaction, derived basis of each partnership in which the successor covered shareholder acquires ownership of a partnership interest (each an *acquired partnership*), and section 961(c) basis of each acquired foreign corporation, transfers from the transferor covered shareholder to the successor covered shareholder (and thus becomes derived basis or section 961(c) basis with respect to the successor covered shareholder) in accordance with the rules described in paragraph (c)(2) this section. Solely for purposes of this paragraph (c), a reference to the basis of a property unit means derived basis with respect to the transferor covered shareholder in the case of a derivative ownership unit, or section 961(c) basis with respect to the transferor covered shareholder in the case of a section 961(c) ownership unit.

(2) *Rules for transferring basis*—(i) *Allocate basis before adjustment for foreign currency gain or loss.* First, for each property unit directly owned by an acquired partnership or acquired foreign corporation, allocate to the successor covered shareholder a pro rata portion of the basis of the property unit immediately before the adjustments pursuant to paragraph (b) of this section by reason of the general successor transaction, determined by multiplying such basis by a fraction. The numerator of the fraction is the value of the interest in the acquired partnership or stock of the acquired corporation, as applicable, ownership of which is acquired by the successor covered shareholder in the general successor transaction. The denominator of the fraction is the total

value of all the interests of the acquired partnership or all the stock of the acquired foreign corporation, as applicable, that the transferor covered shareholder owns immediately before the general successor transaction.

(ii) *Adjust allocations for foreign currency gain or loss.* Second, adjust the allocation of basis of each property unit as follows. Increase the allocation to the successor covered shareholder by the amount of the increase to basis of the property unit pursuant to paragraph (b) of this section by reason of the general successor transaction. Decrease the allocation to the successor covered shareholder by the amount of the reduction to basis of the property unit pursuant to paragraph (b) of this section by reason of the general successor transaction.

(iii) *Transfer of successor basis.* Third, transfer basis from the transferor covered shareholder to the successor covered shareholder by reducing basis with respect to the transferor covered shareholder, and increasing basis with respect to the successor covered shareholder, of each property unit by the amount of basis of the property unit allocated to the successor covered shareholder under paragraphs (c)(2)(i) and (ii) of this section (if such amount is positive) or, if such amount is negative, by increasing basis with respect to the transferor covered shareholder and reducing basis with respect to the successor covered shareholder by such amount, expressed as a positive number. Treat each such transfer of basis as made concurrently with the general successor transaction.

(3) *Deemed covered shareholder*—(i) *In general.* For purposes of transferring basis under this paragraph (c), the deemed covered shareholder is treated in the same manner as a covered shareholder and a reference to a covered shareholder includes the deemed covered shareholder. Thus, for example, if a covered shareholder sells an interest in a partnership that directly owns stock of a foreign corporation to a nonresident alien individual in a general successor transaction, then derived basis of the partnership transfers from the seller covered shareholder to the deemed covered shareholder under this paragraph (c). Moreover, if the individual subsequently sells the partnership interest to a covered shareholder, then derived basis of the partnership (adjusted consistent with the section 961 regulations, including to reflect distributions from the foreign corporation to the individual) transfers from the deemed covered shareholder to the buyer covered shareholder under this paragraph (c).

(ii) *Treatment as controlled foreign corporation stock.* Solely for purposes of determining section 961(c) basis that transfers to or from the deemed covered shareholder under this paragraph (c), any foreign corporation in which the deemed covered shareholder is treated as owning stock is treated as a controlled foreign corporation (to the extent the foreign corporation is not otherwise a controlled foreign corporation). Thus, for example, if a covered shareholder sells stock of an upper-tier foreign corporation that directly owns stock of a lower-tier foreign corporation to a nonresident alien individual in a general successor transaction, the upper-tier foreign corporation's shares of stock in the lower-tier foreign corporation remain section 961(c) ownership units and section 961(c) basis of the upper-tier foreign corporation transfers from the seller covered shareholder to the deemed covered shareholder under this paragraph (c) even if the upper-tier foreign corporation ceases to be a controlled foreign corporation as a result of the sale. Consequently, if the individual subsequently sells the stock of the upper-tier foreign corporation to a covered shareholder and, as a result, the upper-tier foreign corporation becomes a controlled foreign corporation, then section 961(c) basis of the upper-tier foreign corporation (adjusted consistent with the section 961 regulations, including to reflect distributions from the lower-tier foreign corporation to the upper-tier foreign corporation) transfers from the deemed covered shareholder to the buyer covered shareholder under this paragraph (c).

(iii) *Determining basis that transfers from the deemed covered shareholder.* In a transaction in which basis of a derivative ownership unit or section 961(c) ownership unit transfers from the deemed covered shareholder to a covered shareholder, the covered shareholder must use a reasonable method in determining the amount of transferred basis. Such method must take into account adjustments to basis with respect to the deemed covered shareholder that would have been made under the section 961 regulations if the basis were with respect to a covered shareholder during the time that it was with respect to the deemed covered shareholder.

(d) *Coordination of successor derived basis with section 743(b).* For purposes of a basis adjustment under section 743(b) with respect to a derivative ownership unit directly owned by an acquired partnership, the amount of any basis adjustment with respect to the

successor covered shareholder to the acquired partnership's assets is calculated under § 1.743–1(d) and allocated under § 1.755–1(b) by including any derived basis in the basis of the derivative ownership unit that is transferred to the successor covered shareholder under paragraph (c)(2) of this section for purposes of gain and loss calculations and basis allocations under those provisions.

§§ 1.961–6 and 1.961–7 [Reserved].

§ 1.961–8 Application of positive derived basis to covered shareholders' distributive shares of gain or loss.

(a) *Scope.* This section describes the consequences of a partnership's positive derived basis. Paragraph (b) of this section applies positive derived basis to covered shareholders' distributive shares of gain or loss recognized by a partnership on a sale, exchange, or other disposition of derivative ownership units. Paragraph (c) of this section describes related basis adjustments to certain partnership interests directly owned by a covered shareholder. Paragraph (d) of this section describes related basis adjustments to certain lower-tier partnership interests directly owned by an upper-tier partnership. See § 1.961–12(c)(4) (*Example 4*) for an example illustrating the application of this section.

(b) *Sale, exchange, or other disposition of derivative ownership units with positive derived basis—(1) In general.* In a sale, exchange, or other disposition by a partnership (*transferring partnership*) of one or more derivative ownership units (*transferred units*), each partner's distributive share of gain or loss recognized by the transferring partnership on the sale, exchange, or other disposition is first determined without regard to derived basis (taking into a partner's section 743(b) basis adjustment). Then, positive derived basis is applied to each covered shareholder's distributive share of such gain or loss in accordance with paragraph (b)(2) of this section. Such application of positive derived basis to a covered shareholder's distributive share is treated as an application of positive derived basis by the transferring partnership, unless the covered shareholder owns the transferred units through multiple partnerships, in which case only partnerships in which the covered shareholder directly owns an interest are treated as applying the positive derived basis.

(2) *Application of positive derived basis—(i) In general.* A covered shareholder's distributive share of gain

or loss with respect to transferred units (determined without regard to derived basis, and expressed as a negative amount in the case of a distributive share of loss) is adjusted by subtracting the transferring partnership's positive derived basis with respect to the covered shareholder of the transferred units, subject to the limitations in paragraphs (b)(2)(ii) and (iii) of this section, as applicable.

(ii) *Limitation in nonrecognition transactions.* In a nonrecognition transaction, the amount of positive derived basis that is taken into account in applying paragraph (b)(2)(i) of this section with respect to the covered shareholder is limited to the excess of the amount of positive derived basis that would be taken into account by the covered shareholder but for this paragraph (b)(2)(ii) over the covered shareholder's share of the gain realized but not recognized by the transferring partnership with respect to the transferred units. The covered shareholder's share of such realized-but-not-recognized gain is determined by multiplying the amount of that gain of the transferring partnership by a fraction, the numerator of which is the covered shareholder's distributive share of gain recognized by the transferring partnership with respect to the transferred units (determined without regard to derived basis), and the denominator of which is the amount of gain recognized by the transferring partnership with respect to the transferred units (determined without regard to derived basis).

(iii) *Limitation on loss.* Positive derived basis can create or increase a distributive share of loss only if loss is, or would be if there were a loss, recognized by the transferring partnership on the sale, exchange, or other disposition of the transferred units and a current deduction in respect of the loss is, or would be, allowable.

(iv) *Translation rule.* If applicable, positive derived basis is translated into functional currency at the spot rate on the day on which the sale, exchange, or other disposition occurs.

(c) *Basis adjustment to top-tier partnership interest.* In the case of a partnership interest that is directly owned by a covered shareholder and through which the covered shareholder owns the transferred units described in paragraph (b) of this section, adjusted basis of such interest is adjusted under section 705 after taking into account the partnership's application of positive derived basis to the covered shareholder's distributive share of gain or loss with respect to the transferred

units (determined under paragraph (b)(2) of this section).

(d) *Basis adjustments to lower-tier partnership interests.* In the case of a partnership interest (*lower-tier partnership interest*) that is directly owned by another partnership (*upper-tier partnership*) and through which a covered shareholder owns the transferred units described in paragraph (b) of this section, the upper-tier partnership's basis in such lower-tier partnership interest is adjusted as described in this paragraph (d). Common basis in the lower-tier partnership interest is adjusted under section 705 without regard to the application of positive derived basis to the covered shareholder's distributive share of gain or loss with respect to the transferred units (determined under paragraph (b)(2) of this section). Concurrently with and taking into account the adjustment under section 705, derived basis with respect to the covered shareholder of the lower-tier partnership interest is reduced by the amount of positive derived basis applied to the covered shareholder's distributive share of gain or loss with respect to the transferred units (determined under paragraph (b)(2) of this section) or gain is recognized in accordance with the principles of § 1.961-4 (applied by treating such amount of applied positive derived basis as the amount of the adjustment to basis described in § 1.961-4(c)(2)(i)). If there is more than one lower-tier partnership, adjustments to derived basis under this paragraph (d) are made starting with the partnership at the lowest tier.

§ 1.961-9 Exclusion from gross income of previously taxed earnings and profits resulting from positive section 961(c) basis.

(a) *Scope.* This section describes the consequences of positive section 961(c) basis. Paragraph (b) of this section excludes from gross income previously taxed earnings and profits resulting from the application of section 961(c) basis to covered gain. Paragraph (c) of this section defines covered gain. Paragraph (d) of this section describes rules for analyzing covered gain. Paragraph (e) of this section provides rules for applying positive section 961(c) basis to covered gain. Paragraph (f) of this section provides rules characterizing covered gain as previously taxed earnings and profits. Paragraph (g) of this section provides a dollar basis rule. Paragraph (h) of this section provides a rule allocating previously taxed earnings and profits to shares of stock. See § 1.961-12(c)(5)

(*Example 5*) for an example illustrating the application of this section.

(b) *Exclusion from gross income of previously taxed earnings and profits resulting from section 961(c) basis.* Previously taxed earnings and profits that result from the application of a controlled foreign corporation's section 961(c) basis to covered gain are excluded from the controlled foreign corporation's gross income, solely for purposes of determining the controlled foreign corporation's subpart F income and tested income or tested loss, and provided that the covered shareholder to which the previously taxed earnings and profits relate is a United States shareholder in the controlled foreign corporation.

(c) *Covered gain—(1) In general.* Covered gain is all gain recognized by a controlled foreign corporation on a sale, exchange, or other disposition of one or more section 961(c) ownership units that are shares of stock of a single corporation (*transferred units*), determined without regard to loss recognized on any transferred unit and without regard to section 961(c) basis. Covered gain includes amounts treated as gain from a sale, exchange, or other disposition (for example, under section 301(c)(3)), other than gain recognized pursuant to section 961(c) (for example, for distributions of previously taxed earnings and profits in excess of basis under § 1.961-4(d)). Section 961(c) basis is applied to covered gain, and previously taxed earnings and profits result from such application of section 961(c) basis, in accordance with the rules described in paragraph (d) of this section.

(2) *Coordination with dividend recharacterization provisions.* Section 964(e)(1) (or any provision of the Code or regulations in this title that would treat covered gain as a dividend in whole or in part) does not apply to the portion of covered gain to which section 961(c) basis is applied and that, consequently, is previously taxed earnings and profits.

(d) *Rules for analyzing covered gain—(1) Determine each covered shareholder's share of the covered gain.* First, determine each covered shareholder's share of the covered gain, computed as the portion of the covered gain that is assigned to the covered shareholder under § 1.951-2.

(2) *Apply section 961(c) basis.* Second, apply the controlled foreign corporation's positive section 961(c) basis to each covered shareholder's share of the covered gain in accordance with paragraph (e) of this section.

(3) *Characterize covered gain as previously taxed earnings and profits.*

Third, characterize the portion of each covered shareholder's share of the covered gain to which section 961(c) basis is applied as previously taxed earnings and profits of the controlled foreign corporation in accordance with paragraph (f) of this section. Such characterization does not reduce previously taxed earnings and profits of the foreign corporation in which shares of stock are transferred units or any foreign corporation in which stock is owned through the transferred units.

(4) *Determine dollar basis.* Fourth, determine the dollar basis of previously taxed earnings and profits resulting from section 961(c) basis in accordance with paragraph (g) of this section.

(5) *Treat resulting previously taxed earnings and profits as recognized with respect to particular transferred units.* Fifth, treat previously taxed earnings and profits resulting from section 961(c) basis as recognized with respect to particular transferred units by allocating such previously taxed earnings and profits in accordance with paragraph (h) of this section. Such allocation is taken into account, for example, in applying section 964(e)(1) (taking into account paragraph (c)(2) of this section) to gain recognized with respect to a particular transferred unit.

(6) *Adjust previously taxed earnings and profits and make related account adjustments.* Sixth, increase the controlled foreign corporation's previously taxed earnings and profits to reflect previously taxed earnings and profits resulting from section 961(c) basis and make the related adjustments described in § 1.959-3 to each covered shareholder's accounts.

(e) *Application of positive section 961(c) basis—(1) In general.* In a sale, exchange, or other disposition in which a controlled foreign corporation recognizes covered gain, the controlled foreign corporation's positive section 961(c) basis with respect to a covered shareholder of the transferred units is applied to such covered shareholder's share of the covered gain (determined under paragraph (d)(1) of this section), to the extent thereof and subject to the limitation in paragraph (e)(2) of this section.

(2) *Limitation in nonrecognition transactions.* In a nonrecognition transaction, the amount of positive section 961(c) basis that is taken into account in applying paragraph (e)(1) of this section with respect to the covered shareholder is limited to the excess of the amount of positive section 961(c) basis that would be taken into account by the covered shareholder but for this paragraph (e)(2) over the covered shareholder's share of the gain realized

but not recognized by the controlled foreign corporation with respect to the transferred units. The covered shareholder's share of such realized-but-not-recognized gain is determined by multiplying the amount of that gain of the controlled foreign corporation by a fraction, the numerator of which is the covered shareholder's share of covered gain with respect to the transferred units (determined under paragraph (d)(1) of this section), and the denominator of which is the amount of covered gain with respect to the transferred units (determined under paragraph (c)(1) of this section).

(3) *Translation rule.* If applicable, positive section 961(c) basis is translated into functional currency of the controlled foreign corporation at the spot rate on the day on which the sale, exchange, or other disposition occurs.

(4) *Unused positive section 961(c) basis.* See § 1.961–11(c)(2) and (e) for rules applying positive section 961(c) basis in excess of covered gain to gain recognized pursuant to section 961(c).

(f) *Characterization of covered gain as previously taxed earnings and profits—*

(1) *In general.* The portion of a covered shareholder's share of covered gain to which section 961(c) basis is applied (determined under paragraph (d)(2) of this section) is characterized as previously taxed earnings and profits with respect to the covered shareholder (section 961(c) PTEP) in accordance with the rules described in paragraphs (f)(2) through (4) of this section.

(2) *Mirroring rule—*(i) *In general.* The portion of section 961(c) PTEP that does not exceed the amount of mirrored PTEP (defined in paragraph (f)(2)(ii) of this section) has the same character as a pro rata portion of mirrored PTEP. The pro rata portion is determined by multiplying mirrored PTEP by a fraction, the numerator of which is the portion of section 961(c) PTEP described in the preceding sentence and the denominator of which is the amount of mirrored PTEP.

(ii) *Mirrored PTEP.* For purposes of this paragraph (f)(2), mirrored PTEP is—

(A) All previously taxed earnings and profits that transfer from the covered shareholder under § 1.959–7 in the sale, exchange, or other disposition in which the covered gain is recognized (or that would so transfer if the transferred units were sold in a general successor transaction); and

(B) All previously taxed earnings and profits that would exist if foreign income taxes associated with previously taxed earnings and profits described in paragraph (f)(2)(ii)(A) of this section (determined under § 1.959–7 and, if applicable, translated into the

functional currency of the foreign corporation to which the previously taxed earnings and profits would relate at the spot rate on the day on which the sale, exchange, or other disposition occurs) were treated as an additional amount of such previously taxed earnings and profits.

(iii) *Currency rule.* For purposes of this paragraph (f)(2), if any previously taxed earnings and profits described in paragraph (f)(2)(ii) of this section are denominated in a currency other than the functional currency of the controlled foreign corporation recognizing the covered gain, then such previously taxed earnings and profits are translated into such controlled foreign corporation's functional currency at the spot rate on the day on which the covered gain is recognized.

(3) *Lookback rule—*(i) *In general.* The portion of section 961(c) PTEP that is not characterized under paragraph (f)(2) of this section, if any, and that does not exceed the amount of lookback PTEP (defined in paragraph (f)(3)(ii) of this section) has the same character as a pro rata portion of lookback PTEP. The pro rata portion is determined by multiplying lookback PTEP by a fraction, the numerator of which is the portion of section 961(c) PTEP described in the preceding sentence and the denominator of which is the amount of lookback PTEP.

(ii) *Lookback PTEP.* For purposes of this paragraph (f)(3), lookback PTEP is all previously taxed earnings and profits that both—

(A) Resulted from an income inclusion under section 951(a) or 951A(a) of the covered shareholder attributable to the transferred units (including stock owned through the transferred units); and

(B) Were related to a taxable year of a foreign corporation ending during the 36-month period that ends on the day on which the covered gain is recognized.

(iii) *Currency rule.* For purposes of this paragraph (f)(3), if any previously taxed earnings and profits described in paragraph (f)(3)(ii) of this section are denominated in a currency other than the functional currency of the controlled foreign corporation recognizing the covered gain, then such previously taxed earnings and profits are translated into such controlled foreign corporation's functional currency by translating the U.S. dollar amount of the income inclusion giving rise to the previously taxed earnings and profits at the spot rate on the day on which the covered gain is recognized.

(4) *Section 245A(d) PTEP rule.* The portion of section 961(c) PTEP that is

not characterized under paragraphs (f)(2) and (3) of this section, if any, is characterized as relating to the section 245A(d) PTEP group, the taxable year of the controlled foreign corporation in which the covered gain is recognized, and the general category income under section 904(d)(1)(D).

(g) *Dollar basis rule.* The dollar basis of previously taxed earnings and profits with respect to a covered shareholder that result from section 961(c) basis (determined under paragraph (d)(3) of this section) is equal to the U.S. dollar amount of the section 961(c) basis giving rise to such previously taxed earnings and profits.

(h) *Allocation of previously taxed earnings and profits—*(1) *In general.* Previously taxed earnings and profits with respect to a covered shareholder that result from section 961(c) basis (determined under paragraph (d)(3) of this section) are allocated to transferred units in accordance with the rules of paragraph (h)(2) of this section.

(2) *Rules—*(i) *Stacking rule.* First, allocate to each transferred unit an amount of previously taxed earnings and profits equal to the lesser of the amount of positive section 961(c) basis with respect to the covered shareholder of the transferred unit (to the extent taken into account in applying paragraph (e)(1) of this section) and the portion of the covered shareholder's share of the covered gain that is recognized with respect to the transferred unit.

(ii) *Pro rata rule.* Second, allocate to each transferred unit a pro rata portion of any amount of previously taxed earnings and profits not allocated under paragraph (h)(2)(i) of this section, determined by multiplying such amount by a fraction. The numerator of the fraction is the portion of the covered shareholder's share of the covered gain that is recognized with respect to the transferred unit, less the amount of previously taxed earnings and profits allocated to the transferred unit under paragraph (h)(2)(i) of this section. The denominator of the fraction is the amount of previously taxed earnings and profits not allocated under paragraph (h)(2)(i) of this section.

§ 1.961–10 Gain recognition for negative basis.

(a) *Scope.* This section describes the consequences of negative derived basis and negative section 961(c) basis. Paragraph (b) of this section sets forth a rule requiring gain recognition for negative derived basis. Paragraph (c) of this section sets forth a rule requiring gain recognition for negative section 961(c) basis. See § 1.961–12(c)(6) and (7)

(Examples 6 and 7) for examples illustrating the application of this section.

(b) *Gain recognition for negative derived basis*—(1) *In general.* If a partnership has negative derived basis of a derivative ownership unit, then, in any transaction involving the derivative ownership unit (for example, a sale, exchange, or distribution under section 301(c)(2)), the partnership is treated as recognizing gain with respect to the derivative ownership unit in accordance with the rules described in paragraphs (b)(2) through (5) of this section.

(2) *Amount of gain*—(i) *In general.* The amount of the gain recognized is equal to the additional amount of gain, plus the lesser amount of loss (expressed as a positive amount), that the partnership would have recognized in the transaction if, immediately before the transaction, the partnership's common basis of the derivative ownership unit were reduced by all negative derived basis of the derivative ownership unit. Thus, for example, in a sale of the derivative ownership unit, the amount of the gain recognized is generally equal to the sum of all negative derived basis of the derivative ownership unit and, in a nonrecognition transaction, the amount of the gain recognized may be less than the sum of all negative derived basis of the derivative ownership unit.

(ii) *Special rule if derivative ownership unit ceases to be a derivative ownership unit.* If the derivative ownership unit is not a derivative ownership unit immediately after the transaction (including, for example, because the derivative ownership unit is redeemed, or becomes directly owned by a foreign corporation or covered shareholder, in the transaction), then, notwithstanding paragraph (b)(2)(i) of this section, the amount of the gain recognized is equal to the sum of all negative derived basis of the derivative ownership unit.

(iii) *Translation rule.* If applicable, negative derived basis is translated into functional currency at the spot rate on the day on which the transaction involving the derivative ownership unit occurs.

(3) *Allocation of gain.* A pro rata portion of the gain is allocated to each covered shareholder, determined by multiplying the amount of such gain by a fraction. The numerator of the fraction is the negative derived basis with respect to the covered shareholder of the derivative ownership unit, and the denominator of the fraction is the sum of all negative derived basis of the derivative ownership unit.

(4) *Treatment of gain.* The gain is treated in the same manner as gain recognized under § 1.961–4(c) for distributions of previously taxed earnings and profits in excess of basis (and thus the rules in § 1.961–4(f) apply to the gain), except that the gain is recognized concurrently with, but separate from, the transaction.

(5) *Negative derived basis eliminated to the extent it gives rise to gain.* Negative derived basis is eliminated to the extent it increases the amount of gain recognized under this paragraph (b), concurrent with the transaction.

(c) *Gain recognition for negative section 961(c) basis*—(1) *In general.* If a controlled foreign corporation has negative section 961(c) basis of a section 961(c) ownership unit, then, in any transaction involving the section 961(c) ownership unit (for example, a sale, exchange, or distribution under section 301(c)(2)), the controlled foreign corporation is treated as recognizing gain with respect to the section 961(c) ownership unit in accordance with the rules described in paragraphs (c)(2) through (5) of this section.

(2) *Amount of gain*—(i) *In general.* The amount of the gain recognized is equal to the additional amount of gain, plus the lesser amount of loss (expressed as a positive amount), that the controlled foreign corporation would have recognized in the transaction if, immediately before the transaction, the controlled foreign corporation's adjusted basis of the section 961(c) ownership unit were reduced by all negative section 961(c) basis of the section 961(c) ownership unit. Thus, for example, in a sale of the section 961(c) ownership unit, the amount of the gain recognized is generally equal to the sum of all negative section 961(c) basis of the section 961(c) ownership unit and, in a nonrecognition transaction, the amount of the gain recognized may be less than the sum of all negative section 961(c) basis of the section 961(c) ownership unit.

(ii) *Special rule if section 961(c) ownership unit ceases to be a section 961(c) ownership unit.* If the section 961(c) ownership unit is not a section 961(c) ownership unit immediately after the transaction (including, for example, because the section 961(c) ownership unit is redeemed, or becomes directly owned by a covered shareholder, in the transaction), then, notwithstanding paragraph (c)(2)(i) of this section, the amount of the gain recognized is equal to the sum of all negative section 961(c) basis of the section 961(c) ownership unit.

(iii) *Translation rule.* If applicable, negative section 961(c) basis is translated into functional currency of the controlled foreign corporation at the spot rate on the day on which the transaction involving the section 961(c) ownership unit occurs.

(3) *Assignment of gain.* A pro rata portion of the gain is assigned to each covered shareholder, determined by multiplying the amount of such gain by a fraction. The numerator of the fraction is the negative section 961(c) basis with respect to the covered shareholder of the section 961(c) ownership unit, and the denominator of the fraction is the sum of all negative section 961(c) basis of the section 961(c) ownership unit.

(4) *Treatment of gain.* The gain is treated in the same manner as gain recognized under § 1.961–4(d) for distributions of previously taxed earnings and profits in excess of basis (and thus the rules in § 1.961–4(f) apply to the gain), except that the gain is recognized concurrently with, but separate from, the transaction. Thus, the gain is recognized pursuant to section 961(c) and therefore applies only for purposes of determining amounts included in gross income of United States shareholders of the controlled foreign corporation under § 1.961–11.

(5) *Negative section 961(c) basis eliminated to the extent it gives rise to gain.* Negative section 961(c) basis is eliminated to the extent it increases the amount of gain recognized under this paragraph (c), concurrent with the transaction.

§ 1.961–11 Amounts included in gross income of United States shareholders.

(a) *Scope.* This section sets forth rules regarding amounts that United States shareholders of a controlled foreign corporation must include in gross income under section 961(c) to account for gain recognized by the controlled foreign corporation pursuant to section 961(c) (for distributions of previously taxed earnings and profits in excess of basis under § 1.961–4(d), for foreign currency loss in excess of basis under § 1.961–5(b), or for negative section 961(c) basis under § 1.961–10(c)). Paragraph (b) of this section provides the general rule. Paragraph (c) of this section allocates gain recognized pursuant to section 961(c) to a United States shareholder. Paragraph (d) of this section adjusts allocations of gain to reflect transfers of stock of the controlled foreign corporation. Paragraph (e) of this section determines loss recognized under section 961(c) with respect to a United States shareholder. See § 1.961–12(c)(8) (Example 8) for an example illustrating

the application of this section. *See also* § 1.961–3, regarding basis increases for an inclusion under this section.

(b) *In general.* If a United States shareholder owns stock of a controlled foreign corporation on the last relevant day of a taxable year of the controlled foreign corporation, and the controlled foreign corporation recognizes gain pursuant to section 961(c) within that taxable year (all such gain, *section 961(c) income*), then the United States shareholder includes in gross income the amount of section 961(c) income that is allocated to the United States shareholder (determined under paragraph (c) of this section). The inclusion is for the United States shareholder's taxable year in which or with which the controlled foreign corporation's taxable year ends and is treated in the same manner as an amount included in gross income under section 951(a)(1)(A) solely for purposes of increasing basis under § 1.961–3 and translation into U.S. dollars under 989(b).

(c) *Allocation of section 961(c) income.* For purposes of paragraph (b) of this section, the amount of the controlled foreign corporation's section 961(c) income that is allocated to a United States shareholder is the excess (if any) of—

(1) The sum of any portions of section 961(c) income that are assigned to the United States shareholder under § 1.961–4, 1.961–5, or 1.961–10, adjusted, if applicable, in accordance with paragraph (d) of this section as a result of transfers of stock of the controlled foreign corporation; over

(2) The amount of loss that the controlled foreign corporation is treated as recognizing under section 961(c) with respect to the United shareholder in accordance with paragraph (e) of this section.

(d) *Rules for transfers of stock of the controlled foreign corporation—*(1) *General successor transactions—*(i) *General successor transaction occurring before the last relevant day.* For purposes of paragraph (c)(1) of this section, if the controlled foreign corporation is an acquired foreign corporation in a general successor transaction that occurs before the last relevant day of the controlled foreign corporation's taxable year, then treat a pro rata portion of section 961(c) income that is both recognized before the general successor transaction and assigned to the transferor covered shareholder under § 1.961–4, 1.961–5, or 1.961–10 as instead assigned to the successor covered shareholder, determined by multiplying such section 961(c) income by the fraction described

in § 1.961–5(c)(2)(i) for determining the controlled foreign corporation's section 961(c) basis that transfers in the general successor transaction.

(ii) *General successor transaction occurring on or after the last relevant day.* For purposes of paragraph (c)(1) of this section, if the controlled foreign corporation is an acquired foreign corporation in a general successor transaction that occurs on or after the last relevant day of the controlled foreign corporation's taxable year, then treat a pro rata portion of section 961(c) income that is both recognized after the general successor transaction and assigned to the successor covered shareholder under § 1.961–4, 1.961–5, or 1.961–10 as instead assigned to the transferor covered shareholder, determined by multiplying such section 961(c) income by the fraction described in § 1.961–5(c)(2)(i) for determining the controlled foreign corporation's section 961(c) basis that transfers in the general successor transaction.

(2) *Other transfers.* The principles of paragraph (d)(1) of this section apply to transactions, other than general successor transactions, in which the controlled foreign corporation's 961(c) basis transfers to another covered shareholder.

(e) *Determining loss under section 961(c)—*(1) *In general.* For purposes of paragraph (c)(2) of this section, the amount of loss that the controlled foreign corporation is treated as recognizing under section 961(c) with respect to the United States shareholder is, subject to the limitations in paragraph (e)(2) of this section, equal to the sum of the controlled foreign corporation's positive section 961(c) basis with respect to the United States shareholder of section 961(c) ownership units that are sold, exchanged, or otherwise disposed of by the controlled foreign corporation within the controlled foreign corporation's taxable year, reduced by the amount of such positive section 961(c) basis that is applied to covered gain under § 1.961–9.

(2) *Limitations—*(i) *In general.* Positive section 961(c) basis of section 961(c) ownership units increases the amount of loss that the controlled foreign corporation is treated as recognizing under section 961(c) only if loss is, or would be if there were a loss, recognized by the controlled foreign corporation on the sale, exchange, or other disposition of the section 961(c) ownership units and a current deduction in respect of the loss is, or would be, allowable.

(ii) *Loss recognized only to the extent of certain gain.* Positive section 961(c)

basis of section 961(c) ownership units that are shares of stock of a single foreign corporation increases the amount of loss that the controlled foreign corporation is treated as recognizing under section 961(c) only to the extent of the portion of the amount described in paragraph (c)(1) of this section that is recognized with respect to stock of such foreign corporation.

(3) *Translation rule.* If applicable, positive section 961(c) basis of section 961(c) ownership units is translated into the controlled foreign corporation's functional currency at the spot rate on the day of the sale, exchange, or other disposition of the section 961(c) ownership units.

§ 1.961–12 Examples.

(a) *In general.* This section provides examples that illustrate the application of §§ 1.961–1 through 1.961–11.

(b) *Assumed facts.* For purposes of the examples in this section, unless otherwise indicated, the following facts are assumed for U.S. tax purposes:

(1) US1 and US2 are unrelated domestic corporations that are covered shareholders, each of which uses the U.S. dollar as its functional currency and chooses to claim a credit for foreign income taxes pursuant to section 901. Neither US1 nor US2 is a member of a consolidated group (as defined in § 1.1502–1(h)).

(2) F1, F2, and F3 are foreign corporations, each of which is a controlled foreign corporation and uses the British pound (£) as its functional currency.

(3) PRS1 and PRS2 are partnerships.

(4) Each entity uses the calendar year as its taxable year, and no entity has a short taxable year.

(5) There are no adjustments under section 743(b) to the basis of any partnership property.

(c) *Examples—*(1) *Example 1: Types of property units and basis—*(i) *Facts.* US1 directly owns 60, and US2 directly owns 40, of the 100 shares of the single class of outstanding stock of F1. F1 directly owns all 50 shares of the single class of outstanding stock of F2. This example only analyzes the types of basis provided under section 961 in the items of property.

(ii) *Analysis.* Each of the 60 shares of stock of F1 directly owned by US1 and the 40 shares of stock of F1 directly owned by US2 is a section 961(a) ownership unit in which the covered shareholder (US1 or US2) is provided adjusted basis. *See* § 1.961–2(c). In addition, each of the 50 shares of stock of F2 directly owned by F1, a controlled foreign corporation, is a section 961(c) ownership unit in which F1 is provided

section 961(c) basis. *See* § 1.961–2(e)(1). F1’s section 961(c) basis in each section 961(c) ownership unit is maintained separately with respect to each of US1 and US2. *See* § 1.961–2(e)(2). Further, each of the section 961(a) ownership units and section 961(c) ownership units is a property unit, and adjusted basis or section 961(c) basis in the property unit, as applicable, is maintained in U.S. dollars. *See* § 1.961–2(b).

(iii) *Alternative facts: partnership structure—(A) Facts.* The facts are the same as paragraph (c)(1)(i) of this section (*Example 1*), except that US1 and US2, in the aggregate, directly own all the interests in PRS1, and PRS1 directly owns all 100 of the shares of stock of F1.

(B) *Analysis.* The interest in PRS1 directly owned by each of US1 and US2 is a section 961(a) ownership unit in which the covered shareholder (US1 or US2) is provided adjusted basis. *See* § 1.961–2(c). In addition, each of the 100 shares of stock of F1 directly owned by PRS1 is a derivative ownership unit in which PRS1 is provided derived basis. *See* § 1.961–2(d)(1). PRS1’s derived basis in each derivative ownership unit is established and maintained separately with respect to each of US1 and US2. *See* § 1.961–2(d)(2). Further, as is the case in paragraph (c)(1)(ii) of this section, each of the 50 shares of stock of F2 directly owned by F1, a controlled foreign corporation, is a section 961(c) ownership unit in which F1 is provided section 961(c) basis, and that basis is maintained separately with respect to each of US1 and US2. Moreover, each of the section 961(a) ownership units, derivative ownership units, and section 961(c) ownership units is a property unit, and adjusted basis, derived basis, or section 961(c) basis in the property unit, as applicable, is maintained in U.S. dollars. *See* § 1.961–2(b).

(2) *Example 2: Basis increases for income inclusions—(i) Facts.* US1 directly owns all 100 shares of the single class of outstanding stock of F1, and F1 directly owns all 50 shares of the single class of outstanding stock of F2. Thus, the shares of stock of F1 directly owned by US1 are section 961(a) ownership units, and the shares of stock of F2 directly owned by F1 are section 961(c) ownership units. For F2’s taxable year ending on December 31 of year 3, the last relevant day is December 31 and US1 includes \$80x in gross income under section 951(a)(1)(A) (its pro rata share of F2’s subpart F income, translated into U.S. dollars in accordance with section 989(b)) and \$120x in gross income under section 951A(a) (the portion of its GILTI

inclusion amount that is treated as with respect to F2 for the taxable year under section 951A(f)(2)). F2 does not make any covered distributions, and therefore does not distribute any previously taxed earnings and profits, during the taxable year. This example only analyzes basis increases for the income inclusions. *See also* § 1.312–6(f) (income inclusions increase US1’s earnings and profits); § 1.959–3 (adjustments to previously taxed earnings and profits accounts).

(ii) *Analysis—(A) In general.* To reflect US1’s income inclusions for F2’s taxable year ending on December 31 of year 3, basis of shares of stock of F2, and basis of shares of stock of F1 (property units through which US1 owns stock of F2), is in each case increased in accordance with § 1.961–3. *See* § 1.961–3(b). In the case of stock of F2, F1’s section 961(c) basis with respect to US1 is increased because shares of stock of F2 are section 961(c) ownership units and F2 is a controlled foreign corporation, as required by § 1.961–3(f)(1). In the case of stock of F1, US1’s adjusted basis is increased because shares of stock of F1 are section 961(a) ownership units. Paragraph (c)(2)(ii)(B) of this section provides the specific increases to basis.

(B) *Increases to basis of each property unit.* The amount of US1’s income inclusions with respect to F2 that give rise to increases to basis under section 961 is \$200x (\$80x + \$120x). *See* § 1.961–3(c)(1). In determining the specific increases to basis, the actual distribution rule in § 1.961–3(d) does not apply because F2 does not distribute any previously taxed earnings and profits before the last relevant day. *See* § 1.961–3(c)(3). Thus, the hypothetical distribution rule in § 1.961–3(e) determines the entirety of the increases to basis for the income inclusions. *See* § 1.961–3(c)(4). Under the hypothetical distribution rule, the basis of each share of stock of F2 is increased by \$4x (\$200x ÷ 50 shares), and the basis of each share of stock of F1 is increased by \$2x (\$200x ÷ 100 shares), which in each case is equal to the portion of a \$200x hypothetical distribution treated as made by F2 through all tiers to US1 on the last relevant day that would be distributed with respect to the property unit. *See* § 1.961–3(e). These increases to basis are treated as made at the beginning of F2’s taxable year 3 because there are no midyear transactions and the entirety of the \$200x of income inclusions is under section 951(a)(1)(A) or 951A(a). *See* § 1.961–3(c)(2) and (e)(1). Accordingly, at the beginning of F2’s taxable year 3, F1 increases its section 961(c) basis with respect to US1 of each share of stock of F2 by \$4x, and

US1 increases its adjusted basis of each share of stock of F1 by \$2x.

(iii) *Alternative facts: midyear transaction and actual distribution rule—(A) Facts.* The facts are the same as in paragraph (c)(2)(i) of this section, except as follows. On January 1 of year 3, US1 directly owns all the stock of F2. On March 31 of year 3, F2 distributes previously taxed earnings and profits to US1 (pro rata with respect to the shares of stock of F2) and, consequently, US1 is required under § 1.961–4 (basis reductions and gain recognition for distributions) to adjust its adjusted basis of each share of stock of F2 by \$3x (the sum of the dollar basis and associated foreign income taxes of the previously taxed earnings and profits that are distributed on the share). On June 30 of year 3, F1 is formed and US1 immediately contributes all its stock of F2 to F1 in exchange for 100 shares of stock of F1. Thus, before the contribution, shares of stock of F2 are section 961(a) ownership units and, beginning as of the contribution, all the shares of stock of F1 are section 961(a) ownership units and all the shares of stock of F2 are section 961(c) ownership units.

(B) *Analysis—(1) In general.* To reflect US1’s income inclusions for F2’s taxable year ending on December 31 of year 3, basis of shares of stock of F2, and basis of shares of stock of F1 (property units through which US1 owns stock of F2), is in each case increased in accordance with § 1.961–3. *See* § 1.961–3(b). In the case of stock of F2, because shares of the stock are section 961(a) ownership units before the contribution and section 961(c) ownership units after the contribution, the type of basis that is increased depends on the timing of adjustments. Specifically, in the case of stock of F2 and an increase to basis that is treated as made before the contribution, the basis that is increased is US1’s adjusted basis because shares of stock of F2 are section 961(a) ownership units before the contribution. In the case of stock of F2 and an increase to basis that is treated as made after the contribution, the basis that is increased is F1’s section 961(c) basis with respect to US1 because shares of stock of F2 are section 961(c) ownership units after the contribution and F2 is a controlled foreign corporation, as required by § 1.961–3(f)(1). In the case of stock of F1, US1’s adjusted basis is increased because shares of stock of F1 are section 961(a) ownership units. Paragraph (c)(2)(iii)(B)(2) of this section provides the specific increases to basis.

(2) *Increases to basis of each property unit.* The amount of US1’s income inclusions with respect to F2 that give

rise to increases to basis under section 961 is \$200x (\$80x + \$120x). *See* § 1.961–3(c)(1). In determining the specific increases to basis for the income inclusions, the actual distribution rule in § 1.961–3(d) applies because F2's distribution of previously taxed earnings and profits is made before the last relevant day. *See* § 1.961–3(c)(3). Under the actual distribution rule, basis of each share of stock of F2 is increased by \$3x, which is equal to the adjustment required under § 1.961–4 to the basis of such share by reason of the distribution, and thus basis of stock of F2 increases by \$150x in total

(\$3x × 50 shares). *See* § 1.961–3(d)(2). These increases to basis are treated as made at the beginning of F2's taxable year because the distribution is made before the contribution of all the stock of F2 to F1, the sole midyear transaction occurring within the taxable year. *See* § 1.961–3(c)(2) and (d)(1). Then, the hypothetical distribution rule in § 1.961–3(e) determines increases to basis for the remaining \$50x of income inclusions (\$200x of income inclusions – \$150x of basis increases to stock of F2 under the actual distribution rule). *See* § 1.961–3(c)(4). Under the hypothetical distribution rule, the basis

of each share of stock of F2, and the basis of each share of stock of F1, is increased by the portion of a \$50x hypothetical distribution treated as made by F2 through all tiers to US1 on the last relevant day that would be distributed with respect to the property unit. *See* § 1.961–3(e). These increases to basis are treated as made immediately after the contribution (the sole midyear transaction occurring within F2's taxable year). *See* § 1.961–3(e)(1). Table 1 in this paragraph (c)(2)(iii)(B)(2) provides the increases to basis.

TABLE 1 TO PARAGRAPH (c)(2)(iii)(B)(2) OF THIS SECTION—BASIS INCREASES TO REFLECT US1'S INCOME INCLUSIONS WITH RESPECT TO F2

	Basis increases	
	January 1 of year 3	June 30 of year 3
US1's adjusted basis of stock of F1 (100 shares) .....	.....	\$0.5x increase for each share (\$50x hypothetical distribution ÷ 100 shares).
Stock of F2 (50 shares):		
US1's adjusted basis (before contribution)	\$3x increase for each share (actual distribution rule).	
F1's section 961(c) basis with respect to US1 (as of contribution) .....	.....	\$1x increase for each share (\$50x hypothetical distribution ÷ 50 shares).

(iv) *Alternative facts: partnership structure and section 951(a)(1)(B) inclusion*—(A) *Facts*. The facts are the same as in paragraph (c)(2)(i) of this section (*Example 2*), except as follows. US1 is a citizen of the United States (rather than a domestic corporation), referred to as Individual A for purposes of the rest of this paragraph (c)(2)(iv), and does not make an election to apply the provisions of section 962 for any taxable year. PRS1 directly owns all the stock of F1, and Individual A owns 60%, and a nonresident alien individual owns 40%, of the interests in PRS1. Thus, the interest in PRS1 directly owned by Individual A is a section 961(a) ownership unit, the shares of stock of F1 directly owned by PRS1 are derivative ownership units, and the shares of stock of F2 directly owned by F1 are section 961(c) ownership units. In addition, for F2's taxable year ending on December 31 of year 3, Individual A includes \$80x in gross income under section 951(a)(1)(A) (its pro rata share of F2's subpart F income, translated into U.S. dollars in accordance with section 989(b)), \$120x in gross income under section 951A(a) (the portion of its GILTI inclusion amount that is treated as with respect to F2 for the taxable year under section 951A(f)(2)), and \$50x in gross income under section 951(a)(1)(B) (the portion of its section 956 amount that is not allocated to previously taxed

earnings and profits, translated into U.S. dollars in accordance with section 989(b)).

(B) *Analysis*—(1) *In general*. To reflect Individual A's income inclusions for F2's taxable year ending on December 31 of year 3, basis of shares of stock of F2, and basis of shares of stock of F1 and basis of Individual A's interest in PRS1 (property units through which Individual A owns stock of F2), is in each case increased in accordance with § 1.961–3. *See* § 1.961–3(b). In the case of stock of F2, the basis that is increased is F1's section 961(c) basis with respect to Individual A because shares of stock of F2 are section 961(c) ownership units and F2 is a controlled foreign corporation, as required by § 1.961–3(f)(1). In the case of stock of F1, PRS1's derived basis with respect to Individual A is increased because shares of stock of F1 are derivative ownership units. In the case of Individual A's interest in PRS1, Individual A's adjusted basis is increased because its interest in PRS1 is a section 961(a) ownership unit. Paragraph (c)(2)(iv)(B) of this section provides the specific increases to basis.

(2) *Increases to basis of each property unit*. The amount of Individual A's income inclusions with respect to F2 that give rise to increases to basis under section 961 is \$250x (\$80x + \$120x + \$50x). *See* § 1.961–3(c)(1). The hypothetical distribution rule in

§ 1.961–3(e) determines the entirety of the increases to basis for the income inclusions. *See* § 1.961–3(c)(3) and (4). Under the hypothetical distribution rule, the basis of each property unit is increased by the portion of a \$250x hypothetical distribution treated as made by F2 through all tiers to Individual A on the last relevant day that would be distributed with respect to the property unit (determined by regarding stock of F2 and other property only to the extent owned by Individual A on the last relevant day). *See* § 1.961–3(e). In addition, because 20% of the \$250x of income inclusions is under section 951(a)(1)(B) (\$50x/\$250x), 20% of each increase to basis is treated as made at the end of the last day of F2's taxable year (which is when the previously taxed earnings and profits resulting from the income inclusion under section 951(a)(1)(B) are added to previously taxed earnings and profits accounts), with the remaining 80% treated as made at the beginning of the taxable year (which is when the previously taxed earnings and profits resulting from the income inclusions under sections 951(a)(1)(A) and 951A(a) are added to previously taxed earnings and profits accounts). *See* § 1.961–3(e)(1). Table 1 in this paragraph (c)(2)(iii)(B)(2) provides the increases to basis.

TABLE 1 TO PARAGRAPH (c)(2)(iv)(B)(2) OF THIS SECTION—BASIS INCREASES TO REFLECT INDIVIDUAL A'S INCOME INCLUSIONS WITH RESPECT TO F2

	Basis increases	
	January 1 of year 3	December 31 of year 3
Individual A's adjusted basis of its interest in PRS1	\$200x increase (\$250x × 80%)	\$50x increase (\$250x × 20%).
PRS1's derived basis with respect to Individual A of stock of F1 (100 shares).	\$2x increase for each share (\$250x + 100 shares × 80%).	\$0.5 increase for each share (\$250x + 100 shares × 20%).
F1's section 961(c) basis with respect to Individual A of stock of F2 (50 shares).	\$4x increase for each share (\$250x + 50 shares × 80%).	\$1x increase for each share (\$250x + 50 shares × 20%).

(3) *Example 3: Basis reductions and gain recognition for distributions—(i) Facts.* US1 and US2, in the aggregate, directly own all the shares of the single class of outstanding stock of F1. In year 3, F1 makes a covered distribution (pro rata with respect to the shares of stock of F1). Under § 1.959–4, the entirety of the portion of the covered distribution received by each of US1 and US2 is previously taxed earnings and profits excluded from the covered shareholder's (US1's or US2's) gross income. In addition, the sum of the dollar basis and associated foreign income taxes of the previously taxed earnings and profits that are distributed on each share of stock of F1 owned by US1 is \$6x, and the sum of the dollar

basis and associated foreign income taxes of the previously taxed earnings and profits that are distributed on each share of stock of F1 owned by US2 is \$4x. Immediately before the covered distribution, US1's adjusted basis of each of its shares of stock of F1 is \$4.5x, and US2's adjusted basis of each of its shares of stock of F1 is \$3x. Each of US1 and US2 is deemed to pay the entirety of the associated foreign income taxes of the previously taxed earnings and profits distributed to it under section 960(b) (because all such taxes are sourced from the creditable PTEP tax group and the covered shareholder is a United States shareholder of F1) and is allowed a credit under section 901 for the entirety of such taxes. This example

only analyzes adjustments to basis of US1's and US2's shares of stock of F1 (section 961(a) ownership units) under section 961. *See also* § 1.959–3 (adjustments to previously taxed earnings and profits accounts).

(ii) *Analysis—(A) In general.* Under § 1.961–4(b), each of US1 and US2 reduces its adjusted basis of, and if applicable recognizes gain with respect to, each share of stock of F1 on which it receives previously taxed earnings and profits. The specific adjustments are provided in paragraphs (c)(3)(ii)(B) through (D) of this section and summarized in table 1 in this paragraph (c)(3)(ii)(A).

TABLE 1 TO PARAGRAPH (c)(3)(ii)(A) OF THIS SECTION—BASIS ADJUSTMENTS RESULTING FROM F1'S DISTRIBUTION OF PTEP

	Basis immediately before the covered distribution	Adjustments to basis under § 1.961–4(b)	
US1's adjusted basis of its shares of stock of F1.	\$4.5x for each share	\$6x adjustment for each share	\$4.5x reduction to basis (to \$0). \$1.5x gain recognized.
US2's adjusted basis of its shares of stock of F1.	\$3x for each share	\$4x adjustment for each share	\$3x reduction to basis (to \$0). \$1x gain recognized.

(B) *US1's receipt of previously taxed earnings and profits.* As a result of US1's receipt of previously taxed earnings and profits, the amount of the adjustment to US1's adjusted basis of each of its shares of stock of F1 is \$6x, the dollar basis and associated foreign income taxes of the previously taxed earnings and profits received on the share. *See* § 1.961–4(b)(2)(i). Consequently, US1 reduces its adjusted basis of each of its shares of stock of F1 (\$4.5x) to \$0 and then is treated as recognizing \$1.5x of gain with respect to the share (computed as the excess of the \$6x adjustment to basis over the \$4.5x reduction to basis). *See* § 1.961–4(b)(2)(ii) and (iii).

(C) *US2's receipt of previously taxed earnings and profits.* As a result of US2's receipt of previously taxed earnings and profits, the amount of the adjustment to US2's adjusted basis of each of its shares of stock of F1 is \$4x, the dollar basis and associated foreign

income taxes of the previously taxed earnings and profits received on the share. *See* § 1.961–4(b)(2)(i). Consequently, US2 reduces its adjusted basis of each of its shares of stock of F1 (\$3x) to \$0 and then is treated as recognizing \$1x of gain with respect to the share (computed as the excess of the \$4x adjustment to basis over the \$3x reduction to basis). *See* § 1.961–4(b)(2)(ii) and (iii).

(D) *Timing of adjustments.* The reductions to adjusted basis described in paragraphs (c)(3)(ii)(B) and (C) of this section are treated as made, and the gains described in those paragraphs are treated as recognized, concurrently with the covered distribution. *See* § 1.961–4(e)(1) and (f)(1).

(iii) *Alternative facts: previously taxed earnings and profits received through a partnership—(A) Facts.* The facts are the same as in paragraph (c)(3)(i) of this section (*Example 3*), except as follows. PRS1 directly owns all the shares of the

single class of outstanding stock of F1, and US1 and US2, in the aggregate, directly own all the interests in PRS1. Under § 1.959–4, the entirety of the portion of the covered distribution treated as received by each of US1 and US2 through PRS1 is previously taxed earnings and profits excluded from the covered shareholder's (US1's or US2's) gross income. In addition, the sum of the dollar basis and associated foreign income taxes of the previously taxed earnings and profits that are both with respect to US1 and distributed on each share of stock of F1 is \$6x, and the sum of the dollar basis and associated foreign income taxes of the previously taxed earnings and profits that are both with respect to US2 and distributed on each share of stock of F1 is \$4x. Immediately before the covered distribution, for each share of stock of F1, PRS1's common basis is \$2.5x, its derived basis with respect to US1 is \$3x, and its derived basis with respect to US2 is \$2x. This

paragraph (c)(3)(iii) analyzes adjustments to basis of PRS1's shares of stock of F1 (derivative ownership units) under section 961. *See also* § 1.961–4(b) (related adjustments to basis of US1's and US2's interests in PRS1).

(B) *Analysis*—(1) *In general.* Under § 1.961–4(c), PRS1 reduces its derived basis of, and if applicable recognizes gain with respect to, each share of stock of F1 on which US1 or US2 receives previously taxed earnings and profits

through PRS1. The specific adjustments are provided in paragraphs (c)(3)(iii)(B)(2) through (5) of this section and summarized in table 1 in this paragraph (c)(3)(iii)(B)(1).

TABLE 1 TO PARAGRAPH (c)(3)(iii)(B)(1) OF THIS SECTION—BASIS ADJUSTMENTS RESULTING FROM F1'S DISTRIBUTION OF PTEP

	PRS1 derived basis immediately before the covered distribution	Adjustments to PRS1 derived basis under § 1.961–4(c)	
PRS1's derived basis with respect to US1 of its shares of stock of F1.	\$3x for each share	\$6x adjustment for each share	\$4.5x reduction to basis (to negative \$1.5x). \$1.5x gain recognized.
PRS1's derived basis with respect to US2 of its shares of stock of F1.	\$2x for each share	\$4x adjustment for each share	\$3x reduction to basis (to negative \$1x). \$1x gain recognized.

(2) *US1's receipt of previously taxed earnings and profits through PRS1.* As a result of US1's receipt of previously taxed earnings and profits through PRS1, the amount of the adjustment to PRS1's derived basis with respect to US1 of each of PRS1's shares of stock of F1 is \$6x, the dollar basis and associated foreign income taxes of the previously taxed earnings and profits that are both with respect to US1 and received on the share. *See* § 1.961–4(c)(2)(i). Consequently, PRS1 reduces its derived basis with respect to US1 of each of its shares of stock of F1 (\$3x) to \$0 and then reduces such derived basis below zero in accordance with the limitation in § 1.961–4(c)(3), which permits a \$1.5x reduction below zero to the derived basis because \$1.5x of PRS1's common basis of the share is available with respect to US1 (as described in paragraph (c)(3)(iii)(B)(4) of this section). *See* § 1.961–4(c)(2)(ii) and (iii), (c)(3)(i). Further, PRS1 is treated as recognizing \$1.5x of gain with respect to each of its shares of stock of F1 (computed as the excess of the \$6x adjustment to basis over the sum of the \$3x reduction to positive derived basis and the \$1.5x reduction of derived basis below zero), and this gain is allocated solely to US1. *See* § 1.961–4(c)(2)(iv); *see also* § 1.961–4(f)(2) (taking the gain into account in adjusting US1's basis in its interest in PRS1 under section 705).

(3) *US2's receipt of previously taxed earnings and profits through PRS1.* As a result of US2's receipt of previously taxed earnings and profits through PRS1, the amount of the adjustment to PRS1's derived basis with respect to US2 of each of PRS1's shares of stock of F1 is \$4x, the dollar basis and associated foreign income taxes of the previously taxed earnings and profits that are both with respect to US2 and received on the share. *See* § 1.961–4(c)(2)(i). Consequently, PRS1 reduces

its derived basis with respect to US2 of each of its shares of stock of F1 (\$2x) to \$0 and then reduces such derived basis below zero in accordance with the limitation in § 1.961–4(c)(3), which permits a \$1x reduction below zero to the derived basis because \$1x of PRS1's common basis of the share is available with respect to US2 (as described in paragraph (c)(3)(iii)(B)(4) of this section). *See* § 1.961–4(c)(2)(ii) and (iii) and (c)(3)(i). Further, PRS1 is treated as recognizing \$1x of gain with respect to each of its shares of stock of F1 (computed as the excess of the \$4x adjustment to basis over the sum of the \$2x reduction to positive derived basis and the \$1x reduction of derived basis below zero), and this gain is allocated solely to US2. *See* § 1.961–4(c)(2)(iv); *see also* § 1.961–4(f)(2) (taking the gain into account in adjusting US2's basis in its interest in PRS1 under section 705).

(4) *Available common basis.* For each of PRS1's shares of stock of F1, the amount of common basis of the share that is available with respect to each of US1 and US2 is determined by multiplying \$2.5x (the common basis of the share, reduced by all negative derived basis of the share existing immediately before the distribution being analyzed, of which there is none) by a fraction. *See* § 1.961–4(c)(3)(ii). The numerator of the fraction is the amount by which PRS1's derived basis with respect to the covered shareholder of the share would be reduced below zero if derived basis could be reduced without limitation and, accordingly, is \$3x in the case of the derived basis with respect to US1 (computed as the excess of the \$6x adjustment to basis over the \$3x reduction to positive derived basis) and is \$2x in the case of derived basis with respect to US2 (computed as the excess of the \$4x adjustment to basis over the \$2x reduction to positive derived basis). The denominator of the

fraction is the sum of the amounts by which any of PRS1's derived basis of the share would be reduced below zero if derived basis could be reduced without limitation (\$5x, computed as the \$3x with respect to US1 plus the \$2x with respect to US2). Therefore, for each of PRS1's shares of stock of F1, there is \$1.5x of common basis available with respect to US1 (\$2.5x × \$3x/\$5x) and \$1x of common basis available with respect to US2 (\$2.5x × \$2x/\$5x), and this common basis permits a \$1.5x and \$1x reduction below zero to derived basis with respect to US1 and US2, respectively (as described in paragraphs (c)(3)(iii)(B)(2) and (3) of this section). *See also* § 1.961–10(b) (gain resulting from negative derived basis is allocated to covered shareholders in proportion to relative negative derived basis).

(5) *Timing of adjustments.* The reductions to derived basis described in paragraphs (c)(3)(iii)(B)(2) and (3) of this section are treated as made, and the gains described in those paragraphs are treated as recognized, concurrently with the covered distribution. *See* § 1.961–4(e)(1) and (f)(1).

(iv) *Alternative facts: previously taxed earnings and profits received by a controlled foreign corporation*—(A) *Facts.* The facts are the same as in paragraph (c)(3)(i) of this section (*Example 3*), except as follows. US1 and US2, in the aggregate, directly own all the outstanding stock of F2 and are United States shareholders of F2. F2 directly owns all the shares of the single class of outstanding stock of F1. Under § 1.959–4, the entirety of each of US1's and US2's share of F1's covered distribution is previously taxed earnings and profits excluded from F2's gross income for purposes of determining its subpart F income and tested income or tested loss. In addition, the sum of the dollar basis and associated foreign income taxes of the previously taxed

earnings and profits that are both with respect to US1 and distributed on each share of stock of F1 is \$6x, and the sum of the dollar basis and associated foreign income taxes of the previously taxed earnings and profits that are both with respect to US2 and distributed on each share of stock of F1 is \$4x. Immediately before the covered distribution, for each share of stock of F1, F2's adjusted basis

is £1.25x, its section 961(c) basis with respect to US1 is \$3x, and its section 961(c) basis with respect to US2 is \$2x. On the day of the covered distribution, the spot rate is \$1:£0.5. This paragraph (c)(3)(iv) analyzes adjustments to basis of F2's shares of stock of F1 (section 961(c) ownership units) under section 961.

(B) *Analysis*—(1) *In general*. Under § 1.961–4(d), F2 reduces its section 961(c) basis of, and if applicable recognizes gain with respect to, each share of stock of F1 on which it receives previously taxed earnings and profits. The specific adjustments are provided in paragraphs (c)(3)(iv)(B)(2) through (5) of this section and summarized in table 1 in this paragraph (c)(3)(iv)(B)(1).

TABLE 1 TO PARAGRAPH (c)(3)(iv)(B)(1) OF THIS SECTION—BASIS ADJUSTMENTS RESULTING FROM F1'S DISTRIBUTION OF PTEP

	F2 section 961(c) basis immediately before the covered distribution	Adjustments to F2 section 961(c) basis under § 1.961–4(d)	
F2's section 961(c) basis with respect to US1 of its shares of stock of F1.	\$3x for each share	\$6x adjustment for each share	\$4.5x reduction to basis (to negative \$1.5x). \$1.5x gain recognized.
F2's section 961(c) basis with respect to US2 of its shares of stock of F1.	\$2x for each share	\$4x adjustment for each share	\$3x reduction to basis (to negative \$1x). \$1x gain recognized.

(2) *F2's receipt of previously taxed earnings and profits with respect to US1*. As a result of F2's receipt of previously taxed earnings and profits with respect to US1, the amount of the adjustment to F2's section 961(c) basis with respect to US1 of each of F2's shares of stock of F1 is \$6x, the dollar basis and associated foreign income taxes of the previously taxed earnings and profits that are both with respect to US1 and received on the share. *See* § 1.961–4(d)(2)(i). Consequently, F2 reduces its section 961(c) basis with respect to US1 of each of its shares of stock of F1 (\$3x) to \$0 and then reduces such section 961(c) basis below zero in accordance with the limitation in § 1.961–4(d)(3), which permits a \$1.5x reduction below zero to the section 961(c) basis because \$1.5x of F2's adjusted basis of the share is available with respect to US1 (as described in paragraph (c)(3)(iv)(B)(4) of this section). *See* § 1.961–4(d)(2)(ii) and (d)(3)(i). Further, F2 is treated as recognizing £0.75x of gain with respect to each of its shares of stock of F1 (computed as the excess of the \$6x adjustment to basis over the sum of the \$3x reduction to positive section 961(c) basis and the \$1.5x reduction of section 961(c) basis below zero (\$1.5x excess), with such excess of \$1.5x translated into British pounds at \$1:£0.5), and this gain is assigned solely to US1. *See* § 1.961–4(d)(2)(iii) and (f)(4). Moreover, the gain applies only for purposes of determining amounts included in gross income of US1 and US2 (the United States shareholders of F2) under § 1.961–11. *See* § 1.961–4(f)(3).

(3) *F2's receipt of previously taxed earnings and profits with respect to*

US2. As a result of F2's receipt of previously taxed earnings and profits with respect to US2, the amount of the adjustment to F2's section 961(c) basis with respect to US2 of each of F2's shares of stock of F1 is \$4x, the dollar basis and associated foreign income taxes of the previously taxed earnings and profits that are both with respect to US2 and received on the share. *See* § 1.961–4(d)(2)(i). Consequently, F2 reduces its section 961(c) basis with respect to US2 of each of its shares of stock of F1 (\$2x) to \$0 and then reduces such section 961(c) basis below zero in accordance with the limitation in § 1.961–4(d)(3), which permits a \$1x reduction below zero to the section 961(c) basis because \$1x of F2's adjusted basis of the share is available with respect to US2 (as described in paragraph (c)(3)(iv)(B)(4) of this section). *See* § 1.961–4(d)(2)(ii) and (d)(3)(i). Further, F2 is treated as recognizing £0.5x of gain with respect to each of its shares of stock of F1 (computed as the excess of the \$4x adjustment to basis over the sum of the \$2x reduction to positive section 961(c) basis and the \$1x reduction of section 961(c) basis below zero (\$1x excess), with such excess of \$1x translated into British pounds at \$1:£0.5), and this gain is assigned solely to US2. *See* § 1.961–4(d)(2)(iii) and (f)(4). Moreover, the gain applies only for purposes of determining amounts included in gross income of US1 and US2 (the United States shareholders of F2) under § 1.961–11. *See* § 1.961–4(f)(3).

(4) *Available adjusted basis*. For each of F2's shares of stock of F1, the amount of adjusted basis of the share that is available with respect to each of US1

and US2 is determined by multiplying \$2.5x (the £1.25x of adjusted basis of the share translated into U.S. dollars at \$1:£0.5, reduced by all negative derived basis of the share existing immediately before the distribution being analyzed, of which there is none) by a fraction. *See* § 1.961–4(d)(3)(ii). The numerator of the fraction is the amount by which F2's section 961(c) basis with respect to the covered shareholder of the share would be reduced below zero if section 961(c) basis could be reduced without limitation and, accordingly, is \$3x in the case of the section 961(c) basis with respect to US1 (computed as the excess of the \$6x adjustment to basis over the \$3x reduction to positive section 961(c) basis) and is \$2x in the case of section 961(c) basis with respect to US2 (computed as the excess of the \$4x adjustment to basis over the \$2x reduction to positive section 961(c) basis). The denominator of the fraction is the sum of the amounts by which any of F2's section 961(c) basis of the share would be reduced below zero if section 961(c) basis could be reduced without limitation (\$5x, computed as the \$3x with respect to US1 plus the \$2x with respect to US2). Therefore, for each of F2's shares of stock of F1, there is \$1.5x of adjusted basis available with respect to US1 ($\$2.5x \times \$3x/\$5x$) and \$1x of adjusted basis available with respect to US2 ($\$2.5x \times \$2x/\$5x$), and this adjusted basis permits a \$1.5x and \$1x reduction below zero to section 961(c) basis with respect to US1 and US2, respectively (as described in paragraphs (c)(3)(iv)(B)(2) and (3) of this section). *See also* § 1.961–10(c) (gain resulting from negative section 961(c) basis is allocated to

covered shareholders in proportion to relative negative section 961(c) basis).

(5) *Timing of adjustments.* The reductions to section 961(c) basis described in paragraphs (c)(3)(iv)(B)(2) and (3) of this section are treated as made, and the gains described in those paragraphs are treated as recognized, concurrently with the covered distribution. *See* § 1.961–4(e)(1) and (f)(1).

(4) *Example 4: Use of positive derived basis—(i) Facts.* US1 and a nonresident alien individual, in the aggregate, directly own all the interests in PRS1. PRS1 directly owns all the shares of the single class of outstanding stock of F1 (derivative ownership units). In year 3, PRS1 sells all the stock of F1 for money equal to the stock's fair market value. Section 304 does not apply to the sale. US1's distributive share of gain recognized by PRS1 on the sale is \$60x, determined without regard to derived basis. Immediately before the sale (and taking into account any adjustments under § 1.961–5(b) resulting from the sale), PRS1's positive derived basis with respect to US1 of the shares of stock of F1 is \$50x in total. In addition, PRS1 has no negative derived basis in any of the shares. This example only analyzes the application of positive derived basis to US1's distributive share of gain on the sale. *See also* § 1.959–3 (adjustments to previously taxed earnings and profits accounts); § 1.959–7 (transfer of previously taxed earnings and profits in general successor transactions); § 1.986(c)–1 (foreign currency gain or loss recognized in general successor transactions).

(ii) *Analysis.* PRS1 is treated as applying its \$50x of positive derived basis with respect to US1 of the stock of F1 to US1's \$60x distributive share of gain on the sale. *See* § 1.961–8(b). As result, US1's distributive share of gain on the sale is adjusted by \$50x, to a \$10x distributive share of gain. *See also* § 1.961–8(c) (for purposes of adjusting US1's adjusted basis of its interest in PRS1 under section 705, US1's distributive share on the sale is \$10x of gain).

(iii) *Alternative facts: positive derived basis creates a distributive share of loss—(A) Facts.* The facts are the same as in paragraph (c)(4)(i) of this section, except that PRS1's positive derived basis with respect to US1 of the shares of stock of F1 is \$75x in total. In addition, if there were a loss in PRS1's stock of F1, PRS1 would recognize all such loss in the sale and a current deduction in respect of the loss would be allowable.

(B) *Analysis.* PRS1 is treated as applying its \$75x of positive derived basis with respect to US1 of the stock of F1 to US1's \$60x distributive share of gain on the sale. *See* § 1.961–8(b). As result, US1's distributive share of the gain on the sale is adjusted by \$75x, to a \$15x distributive share of loss. *See also* § 1.961–8(c) (for purposes of adjusting US1's adjusted basis of its interest in PRS1 under section 705, US1's distributive share on the sale is \$15x of loss).

(iv) *Alternative facts: tiered partnerships—(A) Facts.* The facts are the same as in paragraph (c)(4)(i) of this section (*Example 4*), except as follows. US1 and a nonresident alien individual, in the aggregate, directly own all the interests in PRS2. PRS2 and a nonresident alien individual, in the aggregate, directly own all the interests in PRS1. US1's distributive share of gain recognized by PRS1 on the sale (through its interest in PRS2) is \$55x, determined without regard to derived basis.

(B) *Analysis.* PRS2 is treated as applying PRS1's \$50x of positive derived basis with respect to US1 of the stock of F1 to US1's \$55x distributive share of gain on the sale. *See* § 1.961–8(b). As result, US1's distributive share of gain on the sale is adjusted by \$50x, to a \$5x distributive share of gain. *See also* § 1.961–8(c) (for purposes of adjusting US1's adjusted basis of its interest in PRS2 under section 705, US1's distributive share on the sale is \$5x of gain); § 1.961–8(d) (for purposes of adjusting PRS2's common basis of its interest in PRS1 under section 705, PRS2's distributive share of gain is determined without regard to the application of positive derived basis;

concurrently with the adjustment under section 705, reducing PRS2's derived basis with respect to US1 of the interest in PRS1 by \$50x, the amount of positive derived basis applied to US1's distributive share of gain).

(5) *Example 5: Use of positive section 961(c) basis—(i) Facts.* US1 and a nonresident alien individual, in the aggregate, directly own all the shares of the single class of outstanding stock of F1. F1 directly owns all the shares of the single class of outstanding stock of F2 (section 961(c) ownership units). In year 3, F1 sells all the stock of F2 for money equal to the stock's fair market value. Section 304 does not apply to the sale. F1 recognizes £100x of gain on the sale, determined without regard to loss recognized on any share and without regard to section 961(c) basis. This £100x is covered gain and US1 is assigned a £60x portion of the covered gain under § 1.951–2. Immediately before the sale (and taking into account any adjustments under § 1.961–5(b) resulting from the sale), F1's positive section 961(c) basis with respect to US1 of the shares of stock of F2 is £50x in total (as translated from U.S. dollars into British pounds at the spot rate on the day of the sale). In addition, F1 has no negative section 961(c) basis in any of the shares. Table 1 in this paragraph (c)(5)(i) provides the previously taxed earnings and profits of F2 that transfer from US1 in the sale to a successor covered shareholder under § 1.959–7 (total of £44x), along with the foreign income taxes that are associated with such previously taxed earnings and profits (total of £6x, as translated from U.S. dollars into British pounds at the spot rate on the day of the sale for purposes of § 1.961–9(f)(2)). This example only analyzes the extent to which previously taxed earnings and profits result from the application of F1's section 961(c) basis and are excluded from F1's gross income under section 961(c). *See also* § 1.959–3 (adjustments to previously taxed earnings and profits accounts); § 1.986(c)–1 (foreign currency gain or loss recognized in general successor transactions).

TABLE 1 TO PARAGRAPH (c)(5)(i) OF THIS SECTION—F2 PTEP TRANSFERRING FROM US1 & ASSOCIATED FOREIGN INCOME TAXES

Taxable year	§ 904 category			
	General category		Passive category	§ 951A category
	§ 951(a)(1)(A) PTEP group	§ 245A(d) PTEP group	§ 951(a)(1)(A) PTEP group	§ 951A PTEP group
Year 2:				
Transferred PTEP Taxes.				£10x

TABLE 1 TO PARAGRAPH (c)(5)(i) OF THIS SECTION—F2 PTEP TRANSFERRING FROM US1 & ASSOCIATED FOREIGN INCOME TAXES—Continued

Taxable year	§ 904 category			
	General category		Passive category	§ 951A category
	§ 951(a)(1)(A) PTEP group	§ 245A(d) PTEP group	§ 951(a)(1)(A) PTEP group	§ 951A PTEP group
Year 1:				
Transferred PTEP	£7.2x	£4x	£4.8x	18x
Taxes	1.8x	1x	1.2x	2x

(ii) *Analysis*—(A) *In general*. For purposes of analyzing the covered gain, US1's share of the covered gain is £60x because that amount of the covered gain is assigned to US1 under § 1.951–2. See § 1.961–9(d)(1). All £50x of F1's positive section 961(c) basis with respect to US1 of the stock of F2 is applied to such share. See § 1.961–9(d)(2) and (e)(1). As a result, £50x of the covered gain is previously taxed earnings and profits of F1 with respect to US1, characterized as described in paragraph (c)(5)(ii)(B) of this section. See § 1.961–9(d)(3) and (f)(1). F1 excludes the £50x of previously taxed earnings resulting from section 961(c) basis from its gross

income, solely for purposes of determining its subpart F income and tested income or tested loss. See § 1.961–9(b).

(B) *Character of previously taxed earnings and profits resulting from section 961(c) basis*. The mirroring rule in § 1.961–9(f)(2) determines the specific character of all £50x of F1's previously taxed earnings and profits resulting from section 961(c) basis because the amount of such previously taxed earnings and profits does not exceed the amount of mirrored PTEP, of which there is £50x. See § 1.961–9(f)(2)(i). The mirrored PTEP is the previously taxed earnings and profits

described in table 1 to paragraph (c)(5)(i) of this section, determined by treating foreign income taxes associated with transferred previously taxed earnings and profits as additional previously taxed earnings and profits (£44x + £6x). See § 1.961–9(f)(2)(ii). Under the mirroring rule, the £50x of previously taxed earnings and profits resulting from section 961(c) basis have the same character as the £50x of mirrored PTEP, as summarized in table 1 in this paragraph (c)(5)(ii)(B). See § 1.961–9(f)(2)(i); see also § 1.961–9(g) and (h) (dollar basis rule and rule for allocating previously taxed earnings and profits to specific shares of stock).

TABLE 1 TO PARAGRAPH (c)(5)(ii)(B) OF THIS SECTION—F1 PTEP RESULTING FROM § 961(C) BASIS

Taxable year	§ 904 category			
	General category		Passive category	§ 951A category
	§ 951(a)(1)(A) PTEP group	§ 245A(d) PTEP group	§ 951(a)(1)(A) PTEP group	§ 951A PTEP group
Year 2				£10x (£10x + £0).
Year 1	£9x	£5x	£6x	£20x
	(£7.2x + £1.8x)	(£4x + £1x)	(£4.8x + £1.2x)	(£18x + £2x).

(iii) *Alternative facts: unused section 961(c) basis*—(A) *Facts*. The facts are the same as in paragraph (c)(5)(i) of this section (*Example 5*), except that the amount of F1's covered gain is £70x (instead of £100x) and US1 is assigned a £42x (instead of £60x) portion of the covered gain under § 1.951–2.

(B) *Analysis*. For purposes of analyzing the covered gain, US1's share of the covered gain is £42x, and £42x of F1's £50x of positive section 961(c) basis with respect to US1 of the stock of F2 is applied to such share. See § 1.961–9(d)(1) and (2), (e)(1). As a result, £42x of the covered gain is previously taxed earnings and profits of F1 with respect to US1, with the same character as a pro rata portion of the previously taxed earnings and profits set forth in table 1 to paragraph (c)(5)(ii)(B) of this section, determined by multiplying all such previously taxed earnings and profits by 84% (computed as \$42x of previously taxed earnings

and profits resulting from section 961(c) basis divided by £50x of mirrored PTEP). See § 1.961–9(d)(3), (f)(1) and (2). Moreover, the £8x of F1's positive section 961(c) basis that is not applied to the covered gain is taken into account only for purposes of determining amounts included in gross income of United States shareholders of F1 under § 1.961–11.

(6) *Example 6: Gain recognition for negative derived basis*—(i) *Facts*. US1 and US2, in the aggregate, directly own all the interests in PRS1. PRS1 directly owns all the shares of the single class of stock of F1 (derivative ownership units). In year 3, PRS1 sells all the stock of F1 for money equal to the stock's fair market value. Section 304 does not apply to the sale, and the shares of stock of F1 remain derivative ownership units immediately after the sale (because the buyer is a partnership the interests in which are owned by one or more covered shareholders). PRS1 recognizes

\$2x of loss with respect to each share of stock of F1, determined without regard to derived basis and allocated to US1 and US2 in accordance with section 704. Immediately before the sale (and taking into account any adjustments under § 1.961–5(b) resulting from the sale), for each share of stock of F1, PRS1's derived basis with respect to US1 is negative \$1.5x and its derived basis with respect to US2 is negative \$1x. This example only analyzes the consequences of negative derived basis in the sale. See also § 1.959–3 (adjustments to previously taxed earnings and profits accounts); § 1.959–7 (transfer of previously taxed earnings and profits in general successor transactions); § 1.986(c)–1 (foreign currency gain or loss recognized in general successor transactions).

(ii) *Analysis*. As a result of negative derived basis, PRS1 is treated as recognizing gain with respect to each share of stock of F1. See § 1.961–

10(b)(1). For each share of stock of F1, the amount of such gain is \$2.5x, which is the lesser amount of loss (\$2x, expressed as a positive amount), plus the additional amount of gain (\$0.5x), that PRS1 would have recognized with respect to the share if PRS1's common basis of the share were reduced by \$2.5x (the sum of all PRS1's negative derived basis of the share), and thus all negative derived basis gives rise to gain. *See* § 1.961–10(b)(2)(i); *compare* paragraph (c)(6)(iii) of this section (scenario where less than all negative derived basis gives rise to gain). A pro rata portion of the \$2.5x of gain treated as recognized with respect to each share of stock of F1 is allocated to US1 and US2 by multiplying the amount of such gain by a fraction, the numerator of which is PRS1's negative derived basis with respect to the covered shareholder of the share (\$1.5x in the case of US1, and \$1x in the case of US2), and the denominator of which is the sum of all PRS1's negative derived basis of the share (\$2.5x). *See* § 1.961–10(b)(3). Thus, in addition to the allocation in accordance with section 704 of the \$2x of loss that PRS1 recognizes with respect to each share of stock of F1, US1 is allocated \$1.5x, and US2 is allocated \$1x, of the \$2.5x of gain treated as recognized by PRS1 with respect to each share of stock of F1. *See* § 1.961–10(b)(4); *see also* § 1.961–4(f)(2) (gain allocated to US1 or US2 is taken into account in adjusting US1's or US2's basis in its interest in PRS1 under section 705).

(iii) *Alternative facts: section 301(c)(2) distribution—(A) Facts.* The facts are the same as in paragraph (c)(6)(i) of this section (*Example 6*), except as follows. PRS1 does not sell any stock of F1. In year 3, F1 makes a distribution that is \$10x with respect to each share of its stock. None of the distribution is a covered distribution because F1 has no accumulated or current year earnings and profits in year 3. Immediately before the distribution, for each share of stock of F1, PRS1's common basis is \$12x, its derived basis with respect to US1 is negative \$1.5x, and its derived basis with respect to US2 is negative \$1x. Thus, section 301(c)(2) applies to the entirety of the \$10x that is distributed with respect to each share of stock of F1. This example only analyzes the consequences of negative derived basis in the distribution.

(B) *Analysis.* PRS1 determines the amount of gain it is treated as recognizing as a result of negative derived basis by calculating the additional amount of gain that it would have recognized with respect to each share of stock of F1 under section

301(c)(3) if its common basis of the share were reduced by \$2.5x (the sum of all PRS1's negative derived basis of the share). *See* § 1.961–10(b)(2)(i). Specifically, if PRS1's common basis of each share were reduced by \$2.5x, the common basis would be \$9.5x (\$12x – \$2.5x), such that the distribution of \$10x on the share would result in \$9.5x being treated as a return of basis under section 301(c)(2) and \$0.5x being treated as gain recognized under section 301(c)(3). Thus, PRS1 is treated as recognizing \$0.5x of gain with respect to each share as a result of the \$2.5x of negative derived basis of the share, and PRS1 retains the remaining \$2x of negative derived basis of the share (which, under these facts, is equal to the portion of the common basis of the share that is not reduced by the distribution under section 301(c)(2) (\$12x – \$10x, or \$2x)). A pro rata portion of the \$0.5x of gain treated as recognized with respect to each share of stock of F1 is allocated to US1 and US2 by multiplying the amount of such gain by a fraction, the numerator of which is PRS1's negative derived basis with respect to the covered shareholder of the share (\$1.5x in the case of US1, and \$1x in the case of US2), and the denominator of which is the sum of all PRS1's negative derived basis of the share (\$2.5x). *See* § 1.961–10(b)(3). Thus, US1 is allocated \$0.3x, and US2 is allocated \$0.2x, of the \$0.5x of gain treated as recognized by PRS1 with respect to each share of stock of F1. *See* § 1.961–10(b)(4); *see also* § 1.961–4(f)(2) (gain allocated to US1 or US2 is taken into account in adjusting US1's or US2's basis in its interest in PRS1 under section 705). Immediately after the distribution, for each share of stock of F1, PRS1's derived basis with respect to US1 is negative \$1.2x (negative \$1.5x + \$0.3x) and its derived basis with respect to US2 is negative \$0.8x (negative \$1x + \$0.2x). *See* § 1.961–10(b)(5).

(7) *Example 7: Gain recognition for negative section 961(c) basis—(i) Facts.* US1 and US2, in the aggregate, directly own all the shares of the single class of stock of F1 and are United States shareholders of F1. F1 directly owns all the shares of the single class of stock of F2 (section 961(c) ownership units). In year 3, F1 sells all the stock of F2 for money equal to the stock's fair market value. Section 304 does not apply to the sale, and the shares of stock of F2 remain section 961(c) ownership units immediately after the sale (because the buyer is a controlled foreign corporation). F1 recognizes £2x of loss with respect to each share of stock of F2, determined without regard to section

961(c) basis. Immediately before the sale (and taking into account any adjustments under § 1.961–5(b) resulting from the sale), for each share of stock of F2, F1's section 961(c) basis with respect to US1 is negative £1.5x and its section 961(c) basis with respect to US2 is negative £1x (as translated from U.S. dollars into British pounds at the spot rate on the day of the sale). This example only analyzes the consequences of negative section 961(c) basis in the sale. *See also* § 1.959–3 (adjustments to previously taxed earnings and profits accounts); § 1.959–7 (transfer of previously taxed earnings and profits in general successor transactions); § 1.986(c)–1 (foreign currency gain or loss recognized in general successor transactions).

(ii) *Analysis.* As a result of negative section 961(c) basis, F1 is treated as recognizing gain with respect to each share of stock of F2. *See* § 1.961–10(c)(1). For each share of stock of F2, the amount of such gain is £2.5x, which is the lesser amount of loss (£2x, expressed as a positive amount), plus the additional amount of gain (£0.5x), that F1 would have recognized with respect to the share if F1's adjusted basis of the share were reduced by £2.5x (the sum of all F1's negative section 961(c) basis of the share), and thus all negative section 961(c) basis gives rise to gain. *See* § 1.961–10(c)(2)(i); *compare* paragraph (c)(7)(iii) of this section (scenario where less than all negative section 961(c) basis gives rise to gain). A pro rata portion of the £2.5x of gain treated as recognized with respect to each share of stock of F2 is assigned to US1 and US2 by multiplying the amount of such gain by a fraction, the numerator of which is F1's negative section 961(c) basis with respect to the covered shareholder of the share (£1.5x in the case of US1, and £1x in the case of US2), and the denominator of which is the sum of all F1's negative section 961(c) basis of the share (£2.5x). *See* § 1.961–10(c)(3). Thus, US1 is assigned £1.5x, and US2 is assigned £1x, of the £2.5x of gain treated as recognized by F1 with respect to each share of stock of F2. Moreover, the gain applies only for purposes of determining amounts included in gross income of US1 and US2 (the United States shareholders of F1) under § 1.961–11. *See* § 1.961–10(c)(4); *see also* §§ 1.961–4(f)(3) (the gain does not affect F1's items of gross income for purposes of section 952 or 951A or its earnings and profits).

(iii) *Alternative facts: section 351 exchange with boot—(A) Facts.* The facts are the same as in paragraph (c)(7)(i) of this section (*Example 7*), except as follows. Instead of the sale, F1

contributes property, including all its stock of F2, to F3, a controlled foreign corporation, in exchange for stock of F3 and money equal, in the aggregate, to the fair market value of the contributed property. Other unrelated persons also contribute property to F3 in exchange for stock of F3 as part of the same transaction. Section 351(b) applies to F1's exchange, but sections 304 and 362(e) do not, and no income inclusions are required under § 1.367(b)–4. The shares of stock of F2 remain section 961(c) ownership units immediately after the contribution (because F3 is a controlled foreign corporation). In the exchange, for each share of stock of F2, F1 receives stock of F3 and £10x of money but recognizes no gain because F1's adjusted basis of the share is £2x greater than the fair market value of the share. Immediately before the exchange (and taking into account any adjustments under § 1.961–5(b) resulting from the exchange), for each share of stock of F2, F1's section 961(c) basis with respect to US1 is negative £1.5x and its section 961(c) basis with respect to US2 is negative £1x (as translated from U.S. dollars into British pounds at the spot rate on the day of the exchange). This example only analyzes the consequences of negative section 961(c) basis in the exchange.

(B) *Analysis.* F1 determines the amount of gain it is treated as recognizing as a result of negative section 961(c) basis by calculating the additional amount of gain that it would have recognized with respect to each share of stock of F2 under section 351(b) if its adjusted basis of the share were reduced by £2.5x (the sum of all F1's negative section 961(c) basis of the share). See § 1.961–10(c)(2)(i). Specifically, a £2.5x reduction to F1's adjusted basis of each share would convert a £2x loss on the share into a £0.5x gain, which would then be recognized pursuant to section 351(b) in the exchange. Thus, F1 is treated as recognizing £0.5x of gain with respect to each share as a result of the £2.5x of negative section 961(c) basis of the share, and the remaining £2x of negative section 961(c) basis of the share is retained (which, under these facts, is equal to the loss in the share that is not recognized in the exchange (£2x, the excess of the adjusted basis of the share over the fair market value of the share)). A pro rata portion of the £0.5x of gain treated as recognized with respect to each share of stock of F2 is assigned to US1 and US2 by multiplying the amount of such gain by a fraction, the numerator of which is F1's negative section 961(c) basis with respect to the

covered shareholder of the share (£1.5x in the case of US1, and £1x in the case of US2), and the denominator of which is the sum of all F1's negative section 961(c) basis of the share (£2.5x). See § 1.961–10(c)(3). Thus, US1 is assigned £0.3x, and US2 is assigned £0.2x, of the £0.5x of gain treated as recognized by F1 with respect to each share of stock of F2. Moreover, the gain applies only for purposes of determining amounts included in gross income of US1 and US2 (the United States shareholders of F1) under § 1.961–11. See § 1.961–10(c)(4); see also §§ 1.961–4(f)(3) (the gain does not affect F1's items of gross income for purposes of section 952 or 951A or its earnings and profits). Immediately after the exchange, for each share of stock of F2, the functional currency amount of F3's section 961(c) basis with respect to US1 is negative £1.2x (negative £1.5x + £0.3x) and its section 961(c) basis with respect to US2 is negative £0.8x (negative £1x + £0.2x). See § 1.961–10(c)(5).

(8) *Example 8: Amounts included in gross income of United States shareholders*—(i) *Facts.* US1 and US2, in the aggregate, directly own all the shares of the single class of stock of F1 and are United States shareholders of F1. F1 directly owns all the shares of the single class of stock of each of F2 and F3 (section 961(c) ownership units). For F1's taxable year ending on December 31 of year 3, F1 recognizes £50x of section 961(c) income. The section 961(c) income consists of £10x of gain recognized as a result of F1's receipt of previously taxed earnings and profits from F2 and £40x of gain recognized as a result of F1's sale of stock of F3 with negative section 961(c) basis. US1 and US2 are assigned equal portions of the £10x gain under § 1.961–4(d) (basis reductions and gain recognition for distributions) and US2 is assigned all the £40x gain under § 1.961–10(c) (gain recognition for negative basis). F1 has no positive section 961(c) basis in any of the sold shares of stock of F3. This example only analyzes the allocation of F1's section 961(c) income and resulting inclusions in gross income of United States shareholders under section 961(c).

(ii) *Analysis.* Under § 1.961–11, F1's £50x of section 961(c) income is allocated to each of US1 and US2 by adding up the amounts of the section 961(c) income that are assigned to each United States shareholder. See § 1.961–11(c). No additional computations are required because F1 does not recognize any loss under section 961(c) and there are no transfers of stock of F1. See *id.* Thus, US1 is allocated £5x (£5x of gain with respect to stock of F2 plus £0 of

gain with respect to stock of F3), and US2 is allocated £45x (£5x of gain with respect to stock of F2 plus £40x of gain with respect to stock of F3), of the section 961(c) income. Accordingly, US1 includes £5x in its gross income and US2 includes £45x in its gross income, in each case for the United States shareholder's (US1's or US2's) taxable year ending on December 31 of year 3 and translated into U.S. dollars in accordance with section 989(b). See § 1.961–11(b). Under § 1.961–3, each of US1's and US2's income inclusion increases its adjusted basis of its stock of F1 by the U.S. dollar amount of the inclusion.

(iii) *Alternative facts: loss under section 961(c)*—(A) *Facts.* The facts are the same as in paragraph (c)(8)(i) of this section (*Example 8*), except as follows. F1 is treated as recognizing £7x of loss under section 961(c) with respect to US2 because F1 has positive section 961(c) basis with respect to US2 in some of the sold shares of stock of F3 and, under § 1.961–9, all but £7x of such positive section 961(c) basis is applied to US2's share of covered gain recognized by F1 on the sale of stock of F3.

(B) *Analysis.* Under § 1.961–11, F1's £50x of section 961(c) income is allocated to each of US1 and US2 by first adding up the amounts of the section 961(c) income that are assigned to the United States shareholder (£5x in the case of US1, and £45x in the case of US2) and then reducing (but not below zero) such sum by the amount of loss F1 is treated as recognizing under section 961(c) with respect to the United States shareholder (£0 in the case of US1, and £7x in the case of US2). See § 1.961–11(c). Thus, US1 is allocated £5x (£5x – £0), and US2 is allocated £38x (£45x – £7x), of the section 961(c) income. Accordingly, US1 includes £5x in its gross income and US2 includes £38x in its gross income, in each case for the United States shareholder's (US1's or US2's) taxable year ending on December 31 of year 3 and translated into U.S. dollars in accordance with section 989(b). See § 1.961–11(b). Under § 1.961–3, each of US1's and US2's income inclusion increases its adjusted basis of its stock of F1 by the U.S. dollar amount of the inclusion.

§ 1.961–13 Transition rules.

(a) *Scope.* This section sets forth transition rules for the section 961 regulations. Paragraph (b) of this section addresses the establishment of derived basis of a partnership and section 961(c) basis of a controlled foreign corporation. Paragraph (c) of this section treats a domestic partnership (including an S

corporation) as a covered shareholder for periods in which § 1.958–1(d)(1) does not apply. Paragraph (d) of this section converts basis with respect to a domestic partnership (including an S corporation) to basis with respect to covered shareholders owning interests in the domestic partnership when both § 1.958–1(d)(1) and the section 961 regulations first apply.

(b) *Establishing derived basis of a partnership and section 961(c) basis of a controlled foreign corporation—(1) In general.* As of the beginning of the first taxable year of a foreign corporation to which the section 961 regulations (other than §§ 1.961–6 and 1.961–7) apply pursuant to § 1.961–14(b), a partnership's derived basis of derivative ownership units, and a controlled foreign corporation's section 961(c) basis of section 961(c) ownership units, that are shares of stock of the foreign corporation or property through one or more covered shareholders own stock of the foreign corporation must be established in accordance with the rules described in paragraphs (b)(2) through (5) of this section.

(2) *Derived basis—(i) In general.* The partnership's derived basis of each derivative ownership unit is established by increasing derived basis with respect to each covered shareholder by the U.S. dollar amount of derived basis with respect to the covered shareholder that would exist at the beginning of the taxable year (and therefore would not have been decreased in a distribution or general successor transaction, for example) if the principles of §§ 1.961–2 through 1.961–5, 1.961–8, and 1.961–10 were to have previously applied, determined using a reasonable method (consistently applied to each foreign corporation whose stock is owned by the partnership and with respect to each covered shareholder that owns an interest in the partnership). In the case of a domestic partnership, the increase described in the preceding sentence is determined without regard to an income inclusion of the domestic partnership or any lower-tier domestic partnership (for example, an income inclusion of the domestic partnership under section 951(a)(1)(A) that occurs in a period before § 1.958–1(d) applies to the domestic partnership).

(3) *Section 961(c) basis.* The controlled foreign corporation's section 961(c) basis of each section 961(c) ownership unit is established by increasing section 961(c) basis with respect to each covered shareholder by the U.S. dollar amount of section 961(c) basis with respect to the covered shareholder that would exist at the beginning of the taxable year (and

therefore would not have been decreased in a distribution or general successor transaction, for example) if the principles of §§ 1.961–2 through 1.961–5, 1.961–9, 1.961–10, and 1.961–11 were to have previously applied, determined using a reasonable method (consistently applied to each foreign corporation whose stock is owned by the controlled foreign corporation and with respect to each covered shareholder that owns stock in the controlled foreign corporation).

(4) *Treatment of a specified foreign corporation as a controlled foreign corporation.* A specified foreign corporation (as defined in § 1.965–1(f)(45)(i)(B)) that is not otherwise a controlled foreign corporation is treated as a controlled foreign corporation for purposes of the application of the principles of § 1.961–3 to an income inclusion under section 951(a)(1)(A) by reason of section 965(a).

(5) *Anti-duplication rule.* Derived basis or section 961(c) basis is increased under this paragraph (b) to reflect an income inclusion under section 951(a)(1)(A) or 951A(a) only to the extent such an increase would not duplicate basis (including basis previously used) at the level of the partnership or the controlled foreign corporation, as applicable, to reflect the income inclusion (for example, in the case of a foreign partnership, basis previously provided under § 1.965–2(h)(5)(ii)).

(c) *Treatment of domestic partnerships (including S corporations) before application of § 1.958–1(d)(1).* For purposes of the section 961 regulations, a domestic partnership (including an S corporation) is treated as a covered shareholder for any taxable year of the domestic partnership to which § 1.958–1(d)(1) does not apply. If a domestic partnership is treated as a covered shareholder, then rules regarding derived basis (of a partnership that is owned by the domestic partnership) or section 961(c) basis (of a controlled foreign corporation that is owned by the domestic partnership) apply to the domestic partnership in its capacity as a covered shareholder before those rules apply to a covered shareholder that owns interests in the domestic partnership. In such a case, for example, covered gain recognized by a controlled foreign corporation and assigned to the domestic partnership is first previously taxed earnings and profits by reason of the controlled foreign corporation's positive section 961(c) basis with respect to the domestic partnership and then, to the extent remaining, previously taxed earnings and profits by reason of positive section

961(c) basis with respect to covered shareholders owning interests in the domestic partnership.

(d) *Converting basis with respect to domestic partnerships (including S corporations) to basis with respect to partners (or shareholders) after the application of § 1.958–1(d)(1)—(1) In general.* As of the beginning of the first taxable year of a domestic partnership (including an S corporation) to which both § 1.958–1(d)(1) and the section 961 regulations (other than §§ 1.961–6 and 1.961–7) apply (pursuant to § 1.961–14(b)), the rules described in paragraphs (d)(2) through (4) of this section apply to convert—

(i) A lower-tier partnership's derived basis with respect to the domestic partnership of derivative ownership units (if such derived basis was earlier established pursuant to paragraphs (b)(2) and (c) of this section) to derived basis with respect to covered shareholders owning interests in the domestic partnership; and

(ii) A controlled foreign corporation's section 961(c) basis with respect to the domestic partnership of section 961(c) ownership units (if such section 961(c) basis was earlier established pursuant to paragraphs (b)(3) and (c) of this section) to section 961(c) basis with respect to covered shareholders owning interests in the domestic partnership.

(2) *Rules for converting derived basis with respect to a domestic partnership—*

(i) *Allocate derived basis to each covered shareholder.* First, allocate a pro rata portion of the lower-tier partnership's derived basis with respect to the domestic partnership of each derivative ownership unit to each covered shareholder owning an interest in the domestic partnership at the beginning of the taxable year, determined by multiplying the derived basis with respect to the domestic partnership by the fraction described in § 1.959–11(e)(2)(i)(A) for the covered shareholder and the domestic partnership.

(ii) *Transfer derived basis.* Second, transfer to each covered shareholder the portion of the lower-tier partnership's derived basis with respect to the domestic partnership of each derivative ownership unit that is allocated to the covered shareholder under paragraph (d)(2)(i) of this section.

(3) *Rules for converting section 961(c) basis with respect to a domestic partnership—(i) Allocate section 961(c) basis to each covered shareholder.* First, allocate a pro rata portion of the controlled foreign corporation's section 961(c) basis with respect to the domestic partnership of each section 961(c) ownership unit to each covered

shareholder owning an interest in the domestic partnership at the beginning of the taxable year, determined by multiplying the section 961(c) basis with respect to the domestic partnership by the fraction described in § 1.959–11(e)(2)(i)(A) for the covered shareholder and the domestic partnership.

(ii) *Transfer section 961(c) basis.*

Second, transfer to each covered shareholder the portion of the controlled foreign corporation's section 961(c) basis with respect to the domestic partnership of each section 961(c) ownership unit that is allocated to the covered shareholder under paragraph (d)(3)(i) of this section.

(4) *Coordination with deemed covered shareholder rules.* The portion, if any, of the lower-tier partnership's derived basis with respect to the domestic partnership, or the controlled foreign corporation's section 961(c) basis with respect to the domestic partnership, that does not increase derived basis or section 961(c) basis with respect to a covered shareholder becomes with respect to the deemed covered shareholder for purposes of subsequently transferring the basis under § 1.961–5(c).

§ 1.961–14 Applicability dates.

(a) *Scope.* This section sets forth applicability dates for the section 961 regulations. Paragraph (b) of this section provides the applicability dates.

(b) *Applicability dates.* Sections 1.961–1 through 1.961–5 and 1.961–8 through 1.961–13 apply to taxable years of foreign corporations that begin on or after [date of publication of final regulations in the **Federal Register**] or are early application years (as described in § 1.959–12(d)) and to taxable years of persons for which such taxable years of those foreign corporations are relevant.

■ **Par. 29.** Section 1.962–1 is amended by:

- 1. Removing the last sentence in paragraph (a)(3); and
- 2. Adding paragraph (a)(4).

The addition reads as follows:

§ 1.962–1 Limitation of tax for individuals on amounts included in gross income under section 951(a).

(a) * * *

(4) *See* section 959 and the regulations in this part issued under section 959 for rules regarding previously taxed earnings and profits, including previously taxed earnings and profits assigned to the taxable section 962 PTEP subgroup (as defined in § 1.959–2(b)(2)(ii)(A)).

* * * * *

§ 1.962–3 [Removed].

■ **Par. 30.** Section 1.962–3 is removed.

■ **Par. 31.** Section 1.965–5 is amended by:

- 1. In the introductory text of paragraph (d)(1), removing the language “and (d)(3)” and adding the language “through (d)(5)” in its place; and
- 2. Adding paragraph (d)(5).

The addition reads as follows:

§ 1.965–5 Allowance of credit or deduction for foreign income taxes.

* * * * *

(d) * * *

(5) *Adjusted applicable percentage for certain taxable years.* For taxable years to which §§ 1.959–1 through 1.959–7 and 1.959–10 and 1.959–11 apply (*see* § 1.959–12), the term applicable percentage means “adjusted applicable percentage” as defined in § 1.959–2(b)(2)(iii)(A), except for purposes of § 1.959–11(c)(3) (initial determination of the adjusted applicable percentage).

■ **Par. 32.** Section 1.965–9 is amended by adding paragraph (d) to read as follows:

§ 1.965–9 Applicability Dates.

* * * * *

(d) *Applicability date for adjusted applicable percentage.* Section 1.965–5(d)(5) applies to taxable years of foreign corporations that begin on or after [date of publication of final regulations in the **Federal Register**] or are early application years (as described in § 1.959–12(d)) and to taxable years of persons for which such taxable years of those foreign corporations are relevant.

§ 1.985–5 [Amended].

■ **Par. 33.** Section 1.985–5 is amended by removing the language “(e)(2),” from the last sentence in paragraph (a) and removing and reserving paragraph (e)(2).

§ 1.986(a)–1 [Amended].

■ **Par. 34.** Section 1.986(a)–1 is amended by:

- 1. In paragraph (c), removing the language “PTEP group taxes (as defined in § 1.960–3(d)(1))” from the first sentence and adding the language “the corporate PTEP tax pool (as defined in § 1.959–1(b)) or any covered shareholder's PTEP tax pool (as defined in § 1.959–1(b))” in its place.
- 2. In paragraph (e)(1) removing the language “PTEP group taxes” and adding the language “a PTEP tax pool” in its place.
- 3. In paragraph (e)(2) removing the language “PTEP group taxes (as defined in § 1.960–3(d)(1))” in the first sentence and adding the language “the corporate PTEP tax pool (as defined in § 1.959–1(b)) or any covered shareholder's PTEP

tax pool (as defined in § 1.959–1(b))” in its place, and removing the language “PTEP group taxes” in the second sentence and adding the language “a PTEP tax pool” in its place.

■ 4. In paragraph (e)(3) removing the language “PTEP group taxes” in the last sentence and adding the language “a PTEP tax pool” in its place.

■ **Par. 35.** Section 1.986(c)–1 is revised to read as follows:

§ 1.986(c)–1 Foreign currency gain or loss with respect to previously taxed earnings and profits.

(a) *Scope.* This section provides rules for the recognition of foreign currency gain or loss with respect to previously taxed earnings and profits (as described in section 959) under section 986(c). Paragraph (b) of this section provides rules for distributions of previously taxed earnings and profits to a covered shareholder and certain transactions that transfer or eliminate previously taxed earnings and profits. Paragraph (c) of this section provides a rule for distributions of previously taxed earnings and profits to a foreign corporation. Paragraph (d) of this section provides definitions. Paragraph (e) of this section provides the applicability date of this section. *See* § 1.961–5 for related basis adjustments in certain cases and § 1.959–10(c)(2) (*Example 2*) for an example illustrating the application of this section. *See also* § 1.367(b)–2(j)(2) for the interaction of certain nonrecognition transactions and section 986(c).

(b) *Recognition of foreign currency gain or loss—(1) In general.* If, in any transaction, previously taxed earnings and profits with respect to a covered shareholder are distributed to the covered shareholder or cease to be with respect to the covered shareholder (for example, because the previously taxed earnings and profits transfer from the covered shareholder in a general successor transaction or are eliminated by reason of an election under section 338(g)), then the covered shareholder recognizes foreign currency gain or loss with respect to such previously taxed earnings and profits in accordance with the rules described in paragraphs (b)(2) through (4) of this section, subject to the exception in paragraph (b)(5) of this section for transfers of previously taxed earnings and profits other than in a general successor transaction.

(2) *Determining foreign currency gain or loss.* Foreign currency gain or loss is determined by comparing the U.S. dollar amount of the previously taxed earnings and profits described in paragraph (b)(1) of this section on the day on which the transaction occurs to

the dollar basis of the previously taxed earnings and profits. If the U.S. dollar amount exceeds the dollar basis, the excess is foreign currency gain. If the dollar basis exceeds the U.S. dollar amount, the excess is foreign currency loss. If applicable, the U.S. dollar amount is determined by translating the previously taxed earnings and profits into U.S. dollars at the spot rate on the day on which the transaction occurs. See §§ 1.959–4 and 1.959–7 for determining dollar basis in distributions and general successor transactions, respectively.

(3) *Limitations*—(i) *Section 965(a) previously taxed earnings and profits*. In the case of previously taxed earnings and profits that are described in paragraph (b)(1) of this section and relate to the reclassified section 965(a) PTEP group or section 965(a) PTEP group, only a portion of foreign currency gain or loss with respect to the previously taxed earnings and profits is recognized, determined by multiplying the amount of the foreign currency gain or loss by the excess of 100 percent over the section 965(c) deduction percentage with respect to the previously taxed earnings and profits.

(ii) *Section 965(b) previously taxed earnings and profits*. No foreign currency gain or loss is recognized with respect to previously taxed earnings and profits that are described in paragraph (b)(1) of this section and relate to the reclassified section 965(b) PTEP group or section 965(b) PTEP group.

(iii) *Taxable section 962 earnings and profits*. No foreign currency gain or loss is recognized with respect to previously taxed earnings and profits that are described in paragraph (b)(1) of this section and relate to the taxable section 962 PTEP subgroup.

(4) *Treatment of foreign currency gain or loss*. Foreign currency gain or loss described in paragraph (b)(1) of this section is recognized concurrently with the transaction and is treated as ordinary income or loss from the same source, and relating to the same section 904 category, as the income inclusion to which the previously taxed earnings and profits are attributable.

(5) *Exception for transfer of previously taxed earnings and profits other than in a general successor transaction*. Except as provided in § 1.367(b)–2(j)(2)(i), no foreign currency gain or loss is recognized with respect to previously taxed earnings and profits when the previously taxed earnings and profits transfer to another covered shareholder in a transaction other than a general successor transaction.

(c) *Distributions of previously taxed earnings and profits to a foreign*

corporation. No foreign currency gain or loss is recognized with respect to previously taxed earnings and profits when the previously taxed earnings and profits are distributed to a foreign corporation.

(d) *Definitions*. The definitions in § 1.959–1(b) apply for purposes of this section.

(e) *Applicability date*. This section applies to taxable years of foreign corporations that begin on or after [date of publication of final regulations in the **Federal Register**] or are early application years (as described in § 1.959–12(d)) and to taxable years of persons for which such taxable years of those foreign corporations are relevant. See § 1.986(c)–1 as contained in 26 CFR part 1 revised as of April 1, 2024, for a version of this section applicable to prior taxable years.

■ **Par. 36.** Section 1.1411–10 is amended by adding a sentence at the end of paragraph (c)(1)(i)(A)(1) to read as follows:

§ 1.1411–10 Controlled foreign corporations and passive foreign investment companies.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(A) * * *

(1) * * * See section 959 and the regulations in this part issued under section 959 for rules regarding previously taxed earnings and profits, including previously taxed earnings and profits assigned to the taxable section 1411 PTEP subgroup (as defined in § 1.959–2(b)(2)(ii)(A)).

* * * * *

■ **Par. 37.** Section 1.1502–59 is added to read as follows:

§ 1.1502–59 Previously taxed earnings and profits and related basis adjustments.

(a) *Overview and scope*. This section addresses the consequences to consolidated groups of previously taxed earnings and profits of foreign corporations, including under section 959 (regarding exclusions from gross income of distributions of previously taxed earnings and profits of foreign corporations) and section 961 (regarding basis adjustments to the stock of foreign corporations and other property). Paragraph (b) of this section provides definitions. Paragraph (c) of this section provides rules to treat a consolidated group as a single covered shareholder for purposes of the rules relating to previously taxed earnings and profits. Paragraph (d) of this section addresses the application of section 961 to consolidated groups. Paragraph (e) of

this section addresses members that join or leave a consolidated group. Paragraph (f) of this section contains examples. Paragraph (g) of this section provides the applicability date of this section.

(b) *Definitions*. The definitions and rules of general applicability in §§ 1.959–1 and 1.961–1 apply for purposes of this section, with the following additions:

(1) *Departing transaction*. The term *departing transaction* has the meaning provided in paragraph (e)(3) of this section.

(2) *Group derived basis*. The term *group derived basis* has the meaning provided in paragraph (d)(2)(ii) of this section.

(3) *Group section 961(c) basis*. The term *group section 961(c) basis* has the meaning provided in paragraph (d)(2)(ii) of this section.

(4) *Joining transaction*. The term *joining transaction* has the meaning provided in paragraph (e)(2) of this section.

(5) *Member shareholder*. The term *member shareholder* means a member that owns stock of a foreign corporation.

(6) *Section 959 rules*. The term *section 959 rules* means section 959 and the section 959 regulations.

(7) *Section 961 rules*. The term *section 961 rules* means section 961 and the section 961 regulations.

(c) *Single covered shareholder treatment under section 959*—(1) *Overview*. This paragraph (c) addresses the application of the section 959 rules to a consolidated group. Paragraph (c)(2) of this section provides the general rule that treats the group as a single covered shareholder. Paragraphs (c)(3) through (5) of this section describe the application of this general rule: paragraph (c)(3) of this section addresses the maintenance of group PTEP accounts; paragraph (c)(4) of this section provides for the allocation of PTEP among members; and paragraph (c)(5) of this section addresses intercompany transfers of foreign corporation stock. Where other provisions of the Code or regulations reference the section 959 rules (for example, sections 960(b) and 986(c)), the treatment described in this paragraph (c) applies for purposes of the application of those provisions.

(2) *In general*. For purposes of applying the section 959 rules, members of a consolidated group are treated as a single covered shareholder. However, each member computes and takes into account its own items with respect to the stock of foreign corporations (including items allocated by a partnership, or assigned from a controlled foreign corporation, to the

member). For example, if a member receives a distribution from a foreign corporation, that member takes into account the tax consequences of the distribution.

(3) *PTEP accounting.* For purposes of applying §§ 1.959–2 (regarding accounting of previously taxed earnings and profits) and 1.959–3 (regarding adjustments to shareholder-level accounts relating to previously taxed earnings and profits)—

(i) A consolidated group establishes and maintains a single set of annual PTEP accounts, dollar basis pools, and PTEP tax pools with respect to a foreign corporation whose stock is owned by one or more members (for example, a consolidated group has a single combined pool election under § 1.959–2(c)); and

(ii) A foreign corporation establishes and maintains a single corporate PTEP account and corporate PTEP tax pool with respect to a consolidated group.

(4) *Allocation of group accounts—(i) In general.* When necessary (for example, to determine a member shareholder's section 956 amount or foreign currency gain or loss under section 986(c)), the relevant amount of the consolidated group's accounts described in paragraph (c)(3) of this section is allocated among the member shareholders. The relevant amount is the amount that the single covered shareholder would access if all members of a consolidated group were treated as a single covered shareholder. The allocation is made in proportion to each member shareholder's share of the item at issue relative to the total amount of the item for all member shareholders.

(ii) *Application to covered distributions—(A) Overview.* The allocation rule in paragraph (c)(4)(i) of this section applies if one or more member shareholders receive, or are assigned under § 1.951–2, a portion of a covered distribution (each, a *member's portion*), then each member shareholder is allocated a portion of the group's accounts described in paragraph (c)(3) of this section to determine the extent to which the member's portion is previously taxed earnings and profits under § 1.959–4.

(B) *The relevant amount of the covered distribution.* For purposes of allocating the group accounts, the relevant amount is the amount of the total portion of the covered distribution received by or assigned to all member shareholders (*group's portion*) that would be previously taxed earnings and profits to a single covered shareholder. This amount is determined under § 1.959–4 based on the consolidated

group's accounts described in paragraph (c)(3) of this section.

(C) *Member shareholder's PTEP amount for covered distribution.* The extent to which the member's portion is previously taxed earnings and profits under § 1.959–4 is determined by multiplying the amount determined under paragraph (c)(4)(ii)(B) of this section by a fraction. The numerator of the fraction is the member's portion, and the denominator is the group's portion.

(5) *Intercompany transfers.* Because a group maintains a single set of accounts under paragraph (c)(3) of this section (that is, member shareholders do not have their own accounts), an intercompany transfer (within the meaning of § 1.1502–13(b)(1)) of the stock of a foreign corporation is not a general successor transaction as defined in § 1.959–7(b).

(d) *Basis under section 961—(1) Overview.* This paragraph (d) addresses the application of the section 961 rules to consolidated groups. Paragraph (d)(2) of this section contains the general rule providing for single- or separate-entity treatment of the group with respect to different types of property units. Paragraphs (d)(3) and (4) of this section, respectively, address basis increases and reductions under section 961. Paragraph (d)(5) of this section addresses the use of the group's basis to determine gain or loss on a property unit.

(2) *Treatment of property units—(i) Section 961(a) ownership units.* Because member shareholders directly own section 961(a) ownership units, adjustments to these ownership units under the section 961 rules are made separately to member shareholders' actual ownership interests.

(ii) *Derivative ownership units and section 961(c) ownership units.* Members of a consolidated group are treated as a single covered shareholder for purposes of accounting for the basis of derivative ownership units and section 961(c) ownership units. Therefore, a partnership has a single derived basis with respect to a consolidated group in a derivative ownership unit (*group derived basis*), and a controlled foreign corporation has a single section 961(c) basis with respect to a consolidated group in a section 961(c) ownership unit (*group section 961(c) basis*).

(3) *Basis increases for income inclusions and gains—(i) In general.* Adjustments under §§ 1.961–3 (for inclusions under sections 951(a), 951A(a), and 961) and 1.961–5(b) (relating to foreign currency gain) are determined based on each member shareholder's respective income

inclusions under sections 951(a) and 951A(a), foreign currency gain under section 986(c), or income inclusions under § 1.961–11. To the extent the adjustment is to a section 961(a) ownership unit, the adjustments are made separately to each member shareholder's section 961(a) ownership unit. In contrast, to the extent the adjustment is to a derivative ownership unit or a section 961(c) ownership unit, the adjustment is made to the group derived basis or the group section 961(c) basis.

(ii) *Example.* A member (M1) directly owns all the stock of a foreign corporation (CFC1), which directly owns all the preferred stock in another foreign corporation (CFC3). Another member (M2) owns all the stock of a foreign corporation (CFC2), which owns all the common stock of CFC3. M1 and M2 have section 951(a) inclusions resulting from CFC3's subpart F income. M1's basis in its CFC1 stock, which is determined separately with respect to M1, and the group section 961(c) basis in CFC1's preferred stock in CFC3, are both adjusted based on M1's inclusion. Similarly, M2's basis in its CFC2 stock, which is determined separately with respect to M2, and the group section 961(c) basis in CFC2's common stock in CFC3, are both adjusted based on M2's inclusion.

(4) *Basis reductions—(i) Reductions to basis of section 961(a) ownership units.* Reductions to the basis of section 961(a) ownership units under §§ 1.961–4 (for distributions of previously taxed earnings and profits) and 1.961–5(b) (relating to foreign currency loss) are determined on a separate-entity basis. See paragraph (d)(2)(i) of this section.

(ii) *Reductions to derived basis or section 961(c) basis.* This paragraph (d)(4)(ii) coordinates the application of the section 961 rules to determine how to reduce group derived basis and group section 961(c) basis under §§ 1.961–4 and 1.961–5.

(A) *Step 1: Proportionate allocation of derived basis and section 961(c) basis.* When the section 961 rules apply to reduce derived basis or section 961(c) basis, the group derived basis and group section 961(c) basis is allocated to the member shareholders. The allocation is made in proportion to each member shareholder's share of the item at issue relative to the total for all member shareholders (for example, in proportion to a member shareholder's PTEP amount for a covered distribution, as described in paragraph (c)(4)(ii)(C) of this section).

(B) *Step 2: Separate entity basis reduction.* The member shareholders separately apply the section 961 rules to make the necessary basis reductions,

taking into account the amount of group derived basis and group section 961(c) basis allocated to that member in paragraph (d)(4)(ii)(A) of this section (step 1) (for example, *see* § 1.961–4(d) for adjustments to section 961(c) ownership units for distributions of previously taxed earnings and profits to a controlled foreign corporation owned by member shareholders). To the extent the basis reduction exceeds the relevant basis in the ownership unit with respect to the member shareholder, the partnership or controlled foreign corporation recognizes gain (for example, *see* § 1.961–4(f)), which is allocated or assigned to the member shareholder.

(C) *Step 3: Recombination of derived basis and section 961(c) basis.* After applying the rules in paragraphs (d)(4)(ii)(A) and (B) of this section, to the extent there is any remaining positive derived basis or positive section 961(c) basis, or any resulting negative derived basis or negative section 961(c) basis, those bases are combined to produce the group derived basis or group section 961(c) basis for the relevant ownership unit.

(5) *Use of group derived basis and group section 961(c) basis to determine gain or loss—(i) Section 1.961–8(b)(1) gain or loss.* This paragraph (d)(5)(i) applies when a member shareholder is allocated a distributive share of gain or loss as described in § 1.961–8(b)(1). For purposes of applying positive derived basis under § 1.961–8(b)(2), the member shareholder is allocated a portion of the relevant group derived basis in proportion to the member shareholder's ownership interest in the foreign corporation described in § 1.961–8(b)(1) relative to the aggregate of all ownership interests in the foreign corporation of all member shareholders. The relevant group derived basis is the amount of derived basis the single covered shareholder would access if all members of the consolidated group were treated as a single covered shareholder.

(ii) *Section 1.961–9(c) covered gain.* This paragraph (d)(5)(ii) applies when a member shareholder is assigned a share of covered gain under § 1.951–2. For purposes of applying positive section 961(c) basis under § 1.961–9(e), the member shareholder is allocated a portion of the relevant group section 961(c) basis in proportion to the member shareholder's share of covered gain relative to the total for all member shareholders. The relevant group section 961(c) basis is the amount of section 961(c) basis the single covered shareholder would access if all members of a consolidated group were treated as a single covered shareholder.

(e) *Consequences of joining or leaving a consolidated group—(1) In general.* For purposes of applying the section 959 rules and the section 961 rules, a transaction in which a member shareholder joins or leaves a consolidated group is treated in the same manner as an acquisition or disposition of the stock of a foreign corporation owned by the member at the time the member joins or leaves the consolidated group, as applicable. Paragraphs (e)(2) and (3) of this section coordinate the application of §§ 1.959–7 (general successor transaction rules) and 1.961–5 (successor basis rules) to transactions in which a member shareholder joins or leaves a consolidated group, respectively. Paragraph (e)(4) of this section coordinates the application of section 986(c) to such transactions. The rules of this paragraph (e) apply only to transactions treated as acquisitions or dispositions of stock of the member shareholder (for example, if a member shareholder is sold to an unrelated party and an election under section 338(h)(10) is made, paragraph (e)(3) of this section does not apply).

(2) *Joining transactions—(i) In general.* A transaction (*joining transaction*) in which a corporation (*joining member*) becomes a member of a consolidated group is treated in the same manner as a general successor transaction. In the joining transaction, the transferor covered shareholder is the joining member, the successor covered shareholder is the consolidated group, and the consolidated group is treated as acquiring ownership of all the stock of foreign corporations owned by the joining member. Thus, for example, any previously taxed earnings and profits in the joining member's annual PTEP accounts with respect to a foreign corporation are added to the consolidated group's annual PTEP accounts with respect to the foreign corporation. Similarly, a controlled foreign corporation's section 961(c) basis with respect to the joining member in a section 961(c) ownership unit is added to the controlled foreign corporation's section 961(c) basis with respect to the consolidated group in that unit, and a partnership's derived basis with respect to the joining member in a derivative ownership unit is added to the partnership's derived basis with respect to the consolidated group in that unit.

(ii) *Combined pool election.* The consolidated group's combined pool election status pursuant to § 1.959–2(c) controls after a joining transaction.

(3) *Departing transactions—(i) In general.* A transaction (*departing*

transaction) in which a member shareholder (*departing member*) ceases to be a member of a consolidated group is treated in the same manner as a general successor transaction. In the departing transaction, the transferor covered shareholder is the consolidated group, the successor covered shareholder is the departing member, and the departing member is treated as acquiring ownership of all the stock of foreign corporations owned by the departing member at the time of the departing transaction. Thus, for example, any previously taxed earnings and profits in the consolidated group's annual PTEP accounts with respect to the foreign corporation are allocated between the consolidated group and the departing member shareholder. Similarly, a controlled foreign corporation's section 961(c) basis in a section 961(c) ownership unit with respect to the consolidated group is allocated between the consolidated group and the departing member, and a partnership's derived basis in a derivative ownership unit with respect to the consolidated group is allocated between the consolidated group and the departing member.

(ii) *Combined pool election.* The departing member retains the consolidated group's combined pool election status under § 1.959–2(c). However, if the departing member joins a new consolidated group, paragraph (e)(2)(ii) of this section applies to the new consolidated group.

(4) *Coordination with section 986(c).* Joining transactions and departing transactions do not result in recognition of foreign currency gain or loss under section 986(c) (notwithstanding § 1.986(c)–1). Thus, for example, the dollar basis of previously taxed earnings and profits in a joining member's annual PTEP accounts carries over when adding the previously taxed earnings and profits to the consolidated group's annual PTEP accounts pursuant to paragraph (e)(2)(i) of this section.

(f) *Examples—(1) In general.* This paragraph (f) provides examples illustrating the application of this section. These examples do not discuss every consequence of the transactions under related provisions of the Code and regulations.

(2) *Assumed facts.* For purposes of the examples in this paragraph (f), unless otherwise indicated, the following facts are assumed:

(i) USP, USS1, and USS2 are domestic corporations, each of which uses the U.S. dollar as its functional currency. USP is the common parent of the P consolidated group (P group), USS1 and USS2 are members of the P group, and

all the stock of USS1 and USS2 is owned by USP.

(ii) F1 and F2 are controlled foreign corporations, each of which uses the British pound (£) as its functional currency.

(iii) PRS1 is a partnership.

(iv) Each entity uses the calendar year as its taxable year, and no entity has a short taxable year.

(v) There are no adjustments under section 743(b) to the basis of any partnership property.

(3) *Example 1: Exclusion from gross income of distributed previously taxed earnings and profits*—(i) *Facts.* Each of USS1 and USS2 directly owns 50 of the 100 shares of the single class of outstanding stock of F1. In year 3, F1 makes a £300x distribution of money with respect to its stock (£3x with respect to each share), and the entirety of this £300x is a covered distribution (a dividend as defined in section 316, determined without regard to section 959(d)). Immediately before the covered distribution, F1 has £180x of previously taxed earnings and profits with respect to the P group, none of which is assigned to the taxable section 962 PTEP group.

(ii) *Analysis.* For purposes of analyzing the covered distribution under § 1.959–4, the P group is treated as a single covered shareholder. See paragraph (c)(2) of this section. The P group's share of the covered distribution is the entire £300x because the entire covered distribution is made to members of the P group (£150x to USS1 plus £150x to USS2). See § 1.959–4(d)(1). The £300x are allocated first to F1's previously taxed earnings and profits that are with respect to the P group immediately before the covered distribution (£180x), and then to F1's earnings and profits described in section 959(c)(3). Therefore, the £300x consist of £180x of previously taxed earnings and profits and £120x of earnings and profits described in section 959(c)(3). See § 1.959–4(d)(2) and (e)(1). These previously taxed earnings and profits are treated as distributed pro rata with respect to the F1 stock on which the P group's share of the covered distribution is made. See § 1.959–4(d)(4) and paragraph (c)(4)(ii) of this section. Accordingly, £1.8x of previously taxed earnings and profits is treated as distributed with respect to each share of F1 stock. See *id.* USS1 and USS2 each excludes the £90x ((£150x + £300x) × £180x) of previously taxed earnings and profits distributed to it from its gross income. See § 1.959–4(b)(1) and paragraph (c)(4)(ii) of this section. Moreover, the distributions of previously taxed earnings and profits to

USS1 and USS2 do not result in any investment adjustments under § 1.1502–32 (see § 1.1502–32(b)(5)(ii), *Example 9*) or adjustments to earnings and profits (see §§ 1.312–8(c) and 1.1502–33). Because this analysis depends only on F1's PTEP with respect to the P group, these results do not depend on whether USS1 or USS2 owned F1 stock or had income inclusions with respect to F1 during the taxable years to which the distributed previously taxed earnings and profits relate.

(4) *Example 2: Basis increases for income inclusions*—(i) *Facts.* F1 has two classes of stock outstanding. USS1 directly owns all 100 shares of F1 common stock, and USS2 directly owns all 100 shares of F1 preferred stock. F1 directly owns all 50 shares of the single class of outstanding stock of F2. The shares of F1 stock directly owned by USS1 or USS2 are section 961(a) ownership units, and the shares of F2 stock directly owned by F1 are section 961(c) ownership units. For year 3, USS1 includes \$60x and USS2 includes \$40x in gross income under section 951(a)(1)(A) with respect to F2 (their pro rata shares of F2's subpart F income, translated into U.S. dollars in accordance with section 989(b)). F2 does not make any covered distributions, and therefore does not distribute any previously taxed earnings and profits, during the taxable year.

(ii) *Analysis*—(A) *In general.* To reflect USS1's and USS2's income inclusions for year 3, the basis of the F2 stock and F1 stock is increased in accordance with § 1.961–3. See § 1.961–3(b). F1's section 961(c) basis in the F2 stock with respect to the P group is increased based on the total inclusions of the P group, because members of a consolidated group are treated as a single covered shareholder for purposes of accounting for basis of section 961(c) ownership units, and because all of the P group's inclusions arise with respect to this F2 stock. See paragraphs (d)(2)(ii) and (d)(3)(i) of this section. USS1's adjusted basis in the F1 common stock and USS2's adjusted basis in the F1 preferred stock are increased based on each member's separate inclusion, because adjustments to section 961(a) ownership units are made separately to member shareholders' actual ownership interests. See paragraphs (d)(2)(i) and (d)(3)(i) of this section.

(B) *Increases to basis of each property unit.* The amount of the P group's income inclusions with respect to F2 that give rise to increases to basis under section 961 is \$100x (\$60x + \$40x). See § 1.961–3(c)(1) and paragraph (d)(3) of this section. Under § 1.961–3(e), the section 961(c) basis with respect to the

P group of each share of F2 stock is increased by \$2x (\$100x ÷ 50 shares). The basis of each share of F1 common stock owned by USS1 is increased by \$0.60x (\$60x ÷ 100 shares) and the basis of each share of F1 preferred stock owned by USS2 is increased by \$0.40x (\$40x ÷ 100 shares). These increases to basis are treated as made at the beginning of F2's taxable year. See § 1.961–3(c)(2) and (e)(1). These adjustments to the basis of the section 961(a) ownership units may be different from the adjustments that would be made under § 1.961–3(e) if they were all held by a single owner.

(C) *Section 1502 basis and E&P adjustments.* USP increases its basis in its USS1 stock by \$60x and in its USS2 stock by \$40x, reflecting each member's inclusion in income under section 951(a)(1)(A). See § 1.1502–32(b)(2)(i). Because the income inclusions increase USS1's and USS2's earnings and profits (see § 1.312–6(f)), USP's earnings and profits are increased under § 1.1502–33(b)(1).

(5) *Example 3: Basis reductions and gain recognition for distributions from upper-tier foreign corporation*—(i) *Facts.* USS1 and USS2 directly own all the shares of the single class of outstanding stock of F1, with USS1 owning 60 shares and USS2 owning 40 shares. In year 3, F1 makes a pro rata covered distribution to USS1 and USS2. Under § 1.959–4, the entirety of the covered distribution is previously taxed earnings and profits with respect to the P group and excluded from the members' gross income. In addition, the sum of the dollar basis and associated foreign income taxes of the previously taxed earnings and profits that are distributed on each share of F1 stock is \$6x. Immediately before the covered distribution, USS1's adjusted basis in each share of its F1 stock is \$8x, and USS2's adjusted basis in each share of its F1 stock is \$5x. Each of USS1 and USS2 is deemed to pay the entirety of the associated foreign income taxes of the previously taxed earnings and profits distributed to it under section 960(b) (because all such taxes are sourced from the creditable PTEP tax group and the member is a United States shareholder of F1) and is allowed a credit under section 901 for the entirety of such taxes.

(ii) *Analysis.* Under § 1.961–4(b), each of USS1 and USS2 separately reduces its adjusted basis in each share of F1 stock on which it receives previously taxed earnings and profits and, if applicable, recognizes gain with respect to those shares. See paragraph (d)(4)(i) of this section. The adjustment to each share of F1 stock is \$6x, the sum of the

dollar basis and associated foreign income taxes of the previously taxed earnings and profits received by the member on the share. *See* § 1.961–4(b)(2)(i). The basis of each of USS1’s shares of F1 stock is reduced to \$2x (\$8x original basis – \$6x adjustment). *See* § 1.961–4(b)(2)(ii). The basis of each of USS2’s shares of F1 stock is reduced to \$0x, and USS2 recognizes \$1x of gain per share (\$5x original basis – \$6x adjustment). *See* § 1.961–4(b)(2)(ii) and (iii). These adjustments are treated as made concurrently with the covered distribution. *See* § 1.961–4(e)(1) and (f)(1).

(6) *Example 4: Basis reductions and gain recognition for distributions from lower-tier foreign corporation*—(i) *Facts*. USS1 and USS2 directly own all the shares of the single class of outstanding stock of F1, with USS1 owning 60 shares and USS2 owning 40 shares. F1 directly owns all the shares of the single class of outstanding stock of F2. In year 3, F2 makes a covered distribution to F1. Under § 1.959–4, the entirety of the covered distribution is previously taxed earnings and profits that are with respect to the P group and excluded from F1’s gross income for purposes of determining its subpart F income and its tested income or tested loss. In addition, the sum of the dollar basis and associated foreign income taxes of the previously taxed earnings and profits that are distributed on each share of F2 stock is \$6x. Immediately before the covered distribution, F1’s adjusted basis in each share of F2 stock is £1.50x, and its section 961(c) basis with respect to the P group in each share is \$5x. On the day of the covered distribution, the spot rate is \$1:£0.5.

(ii) *Analysis*. Under § 1.961–4(d), F1 reduces its section 961(c) basis in each share of F2 stock on which it receives previously taxed earnings and profits. If applicable, F1 recognizes gain with respect to those shares. These adjustments are made separately with respect to USS1 and USS2. *See* paragraph (d)(4)(ii) of this section. First, under paragraph (d)(4)(ii)(A) of this section, for each share of F2 stock, F1’s section 961(c) basis with respect to the P group is allocated proportionately to USS1 (\$3x, or 60%) and USS2 (\$2x, or 40%). Next, under paragraph (d)(4)(ii)(B) of this section, the basis reductions are made separately for each of USS1 and USS2. For each share of F2 stock, USS1’s portion of F1’s section 961(c) basis (\$3x) is reduced by USS1’s share of the dollar basis and associated foreign income taxes (\$3.60x = 60% × \$6x). *See* § 1.961–4(d)(2). Because the reduction exceeds the positive section 961(c) basis, it must be tested against

the limitation in § 1.961–4(d)(3). The amount of F1’s adjusted basis in each share that is available with respect to USS1 is £0.90x (60% × £1.50x), which is equal to \$1.80x. Because \$1.80x is greater than \$0.60x, USS1’s portion of F1’s section 961(c) basis is reduced to negative \$0.60x (\$3x – \$3.60x), and no gain is recognized under § 1.961–4(d)(2)(iii). Similarly, USS2’s share of F1’s section 961(c) basis in each share of F2 stock (\$2x) is reduced by its share of the dollar basis and associated foreign income taxes (\$2.40x = 40% × \$6x). The amount of F1’s adjusted basis in each share that is available with respect to USS2 is £0.60x (40% × £1.50x), which is equal to \$1.20x. Therefore, USS2’s portion of F1’s section 961(c) basis is reduced to negative \$0.40x (\$2x – \$2.40x), and no gain is recognized under § 1.961–4(d)(2)(iii). Finally, under paragraph (d)(4)(ii)(C) of this section, the separately computed section 961(c) bases are recombined. As a result, F1’s section 961(c) basis with respect to the P group in each share of F2 stock is negative \$1x (negative \$0.60x + negative \$0.40x = negative \$1x). The reductions to section 961(c) basis are treated as made concurrently with the covered distribution. *See* § 1.961–4(e)(1) and (f)(1).

(iii) *Alternative facts: distribution in excess of basis*. The facts are the same as in paragraph (f)(6)(i) of this section (*Example 4*), except that the sum of the dollar basis and associated foreign income taxes per share of F2 stock is \$9x instead of \$6x. The application of paragraph (d)(4)(ii)(A) of this section is the same as in paragraph (f)(6)(ii) of this section. When applying paragraph (d)(4)(ii)(B) of this section, the basis reductions per share are \$5.40x (60% × \$9x) for USS1 and \$3.60x (40% × \$9x) for USS2. Because the reductions again exceed the positive section 961(c) basis, they must be tested against the limitation in § 1.961–4(d)(3). The amounts of F1’s adjusted basis in each share that are available with respect to each member are the same as in paragraph (f)(6)(ii) of this section. For USS1, because the \$1.80x limitation is less than \$2.40x (\$3x section 961(c) basis – \$5.40x adjustment), USS1’s portion of F1’s section 961(c) basis per share is reduced to negative \$1.80x, and \$0.60x (\$2.40x – \$1.80x) of gain per share is recognized under § 1.961–4(d)(2)(iii), with this gain assigned solely to USS1. Similarly, for USS2, the \$1.20x limitation is less than \$1.60x (\$2x section 961(c) basis – \$3.60x adjustment). Therefore, USS2’s portion of F1’s section 961(c) basis per share is reduced to negative \$1.20x, and \$0.40x

(\$1.60x – \$1.20x) of gain per share is recognized under § 1.961–4(d)(2)(iii), with this gain assigned solely to USS2. The basis of USS1 and USS2’s F1 stock is increased under § 1.961–3 to reflect the gains recognized by F1 and included in the member’s gross income pursuant to § 1.961–11. Finally, under paragraph (d)(4)(ii)(C) of this section, the separately computed section 961(c) bases are recombined. As a result, F1’s section 961(c) basis with respect to the P group in each share of F2 stock is negative \$3x (negative \$1.80x + negative \$1.20x = negative \$3x).

(7) *Example 5: Use of positive derived basis*—(i) *Facts*. USS1, USS2, and a nonresident alien individual, in the aggregate, directly own all the interests in PRS1, with USS1 and USS2 owning equal interests in PRS1. PRS1 directly owns all the shares of the single class of outstanding stock of F1 (derivative ownership units). In year 3, PRS1 sells all the F1 stock to an unrelated party for money. The distributive share of the gain recognized by PRS1 is \$30x to each of USS1 and USS2, determined without regard to derived basis. Immediately before the sale (and taking into account any adjustments under § 1.961–5(b) resulting from the sale), PRS1’s positive derived basis with respect to the P group in the F1 stock is \$50x in total. In addition, PRS1 has no negative derived basis with respect to the P group in any of the shares.

(ii) *Analysis*. In applying PRS1’s positive derived basis with respect to the P group in the F1 stock, a pro rata portion of such derived basis is taken into account with respect to each member. *See* paragraph (d)(5)(i) of this section. Thus, because USS1 and USS2 own equal interests in PRS1, \$25x (or 50%) of the derived basis is taken into account with respect to each of USS1 and USS2. Accordingly, for each of USS1 and USS2, PRS1 is treated as applying \$25x of derived basis to the member’s \$30x distributive share of gain on the sale. *See* § 1.961–8(b). As result, each member’s distributive share of gain on the sale is adjusted by \$25x, to a \$5x distributive share of gain. *See also* § 1.961–8(c) (for purposes of adjusting each member’s adjusted basis in its PRS1 interest under section 705, the member’s distributive share of gain on the sale is \$5x).

(8) *Example 6: Use of positive section 961(c) basis*—(i) *Facts*. USS1, USS2, and a nonresident alien individual, in the aggregate, directly own all the shares of the single class of outstanding stock of F1. USS1 and USS2 own an equal number of shares of F1. F1 directly owns all the shares of the single class of outstanding stock of F2 (section 961(c)

ownership units). In year 3, F1 sells all the F2 stock to an unrelated party for money. F1 recognizes £100x of gain on the sale, determined without regard to loss recognized on any share and without regard to section 961(c) basis. This £100x is covered gain, and each of USS1 and USS2 is assigned a £30x portion of the covered gain under § 1.951–2. Immediately before the sale (and taking into account any adjustments under § 1.961–5(b) resulting from the sale), F1’s positive section 961(c) basis in the F2 stock with respect to the P group is £50x (as translated from U.S. dollars into British pounds at the spot rate on the day of the sale). In addition, F1 has no negative section 961(c) basis with respect to the P group in any of the shares.

(ii) *Analysis*. In applying F1’s positive section 961(c) basis with respect to the

P group of the F2 stock, a pro rata portion of such section 961(c) basis is taken into account with respect to each member. *See* paragraph (d)(5)(ii) of this section. Thus, because USS1 and USS2 own equal interests in F1, £25x (£30x ÷ £60x, or 50%) of the section 961(c) basis is taken into account with respect to each of USS1 and USS2. All £25x of the section 961(c) basis taken into account with respect to each of USS1 and USS2 is applied to the member’s £30x share of the covered gain. *See* § 1.961–9(d)(2) and (e)(1). As a result, a total of £50x of the covered gain is previously taxed earnings and profits of F1 with respect to the P group, characterized in accordance with § 1.961–9(f)(2) through (4). *See* § 1.961–9(d)(3), (f)(1) and paragraph (c)(1) of this section. F1 excludes the £50x of previously taxed earnings resulting from section 961(c)

basis from its gross income, solely for purposes of determining its subpart F income and tested income or tested loss. *See* § 1.961–9(b).

(g) *Applicability date*. This section applies to a taxable year of a consolidated group for which a taxable year of a foreign corporation is relevant if such taxable year of the foreign corporation begins on or after [date of publication of final regulations in the **Federal Register**] or is an early application year (as described in § 1.959–12(d)).

Heather C. Maloy,

Acting Deputy Commissioner.

[FR Doc. 2024–27227 Filed 11–29–24; 8:45 am]

BILLING CODE 4830–01–P



FEDERAL REGISTER

Vol. 89

Monday,

No. 231

December 2, 2024

Part III

Department of Agriculture

Agricultural Marketing Service

7 CFR Parts 1000, 1001, 1005, et al.

Milk in the Northeast and Other Marketing Areas; Final Decision on Proposed Amendments to Marketing Agreements and Orders; Proposed Rule

DEPARTMENT OF AGRICULTURE**Agricultural Marketing Service**

7 CFR Parts 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1051, 1124, 1126, 1131, and 1170

[Doc. No. AMS-DA-23-0031]

Milk in the Northeast and Other Marketing Areas; Final Decision on Proposed Amendments to Marketing Agreements and Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; final decision.

SUMMARY: This proposed rule is the Secretary's final decision in this proceeding and recommends amendments to the pricing provisions in the 11 Federal Milk Marketing Orders (FMMOs). AMS will determine if producers approve of the proposed amended orders, as required by regulation.

DATES: The representative period for ascertaining producer approval is January 2024.

ADDRESSES: To review the hearing record, please see <https://www.ams.usda.gov/rules-regulations/moa/dairy/hearings/national-fmmo-pricing-hearing>. Webinars with information on the proposed amendments and the referendum process are also available on the hearing website.

FOR FURTHER INFORMATION CONTACT: Erin Taylor, USDA/AMS/Dairy Program, Order Formulation and Enforcement Branch, STOP 0231–Room 2530, 1400 Independence Avenue SW, Washington, DC 20250–0231; telephone: (202) 720–4392; email address: Erin.Taylor@usda.gov.

SUPPLEMENTARY INFORMATION: This proposed rule, in accordance with 7 CFR 900.13a, is the Secretary's final decision in this proceeding and proposes the issuance of marketing orders as defined in 7 CFR 900.2(j). AMS continues to find that amendments to five milk pricing categories would provide more orderly marketing in the 11 FMMOs. The final decision reflects changes to the make allowances and, to a very limited extent, the Class I differentials included in the recommended decision. This final decision recommends amendments to:

1. Milk Composition Factors. Update the factors to 3.3 percent true protein, 6 percent other solids, and 9.3 percent nonfat solids.

2. Surveyed Commodity Products. Remove 500-pound barrel cheddar

cheese prices from the Dairy Products Mandatory Reporting Program (DPMRP) survey and rely solely on the 40-pound block cheddar cheese price to determine the monthly average cheese price used in the formulas.

3. Class III and Class IV Formula Factors. Update the manufacturing allowances to: Cheese: \$0.2519; Butter: \$0.2272; Nonfat Dry Milk (NFDm): \$0.2393; and Dry Whey: \$0.2668. This decision also proposes updating the butterfat recovery factor to 91 percent.

4. Base Class I Skim Milk Price. Update the formula as follows: the base Class I skim milk price would be the higher-of the advanced Class III or Class IV skim milk prices for the month. In addition, adopt a Class I extended shelf life (ESL) adjustment equating to a Class I price for all ESL products equal to the average-of mover, plus a 24-month rolling average adjuster with a 12-month lag.

5. Class I and Class II differentials. Keep the \$1.60 base differential and adopt modified location specific Class I differential values.

The Agricultural Marketing Service (AMS) will determine if producers approve of each proposed amended order, as required by regulation. If at least two-thirds of the producers or two-thirds of the milk represented in the vote approve of an amended order, AMS will issue a final rule implementing the changes. If an order is not approved as amended, AMS will initiate steps to terminate the order.

In conjunction with this final decision, the AMS conducted a Regulatory Economic Impact Analysis to determine the potential impact of amending FMMO pricing formulas on producer revenue and marketwide pool values. AMS used a static analysis incorporating actual data reported from January 2019 to December 2023 to determine the estimated price impacts of the package of amendments included in this final decision. The full text of the Regulatory Economic Impact Analysis may be accessed at <https://www.regulations.gov> or <https://www.ams.usda.gov/rules-regulations/moa/dairy/hearings/national-fmmo-pricing-hearing>.

Prior Documents in This Proceeding

Notice of Hearing: Published July 24, 2023 (88 FR 47396).

Notice of Reconvened Hearing: Published November 6, 2023 (88 FR 76143).

Notice of Reconvened Hearing: Published December 29, 2023 (88 FR 90134).

Recommended Decision: Published July 15, 2024 (89 FR 57580).

This administrative action is governed by sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Orders 12866, 13563, and 13175.

The amendments to the regulations proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937 (AMAA), as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the AMAA, any handler subject to an order may request modification or exemption from such order by filing a petition with the USDA stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, USDA would rule on the petition. The AMAA provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review USDA's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Civil Rights Impact Analysis

AMS has reviewed this rulemaking in accordance with USDA Departmental Regulation 4300–004, Civil Rights Impact Analysis, to identify any major civil rights impacts the rule might have on FMMO participants on the basis of race, color, national origin, disability, sex, gender identity, political beliefs, age, marital, family/parental status, religion, sexual orientation, reprisal, or because of an individuals' income is derived from any public assistance program. Based on the review and analysis of the rule and all available data, issuance of this proposed rule is not likely to negatively impact low and moderate-income populations, minority populations, women, Tribes or persons with disabilities, by virtue of their age, race, color, national origin, sex, disability, or marital or familial status. No major civil rights impact is likely to result from this proposed rule.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory

flexibility analysis. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities

for their own benefit. A small dairy farm as defined by the Small Business Administration (SBA) (13 CFR 121.201) (NAICS Code 112120) is one that has an annual gross revenue of \$3.75 million or less, and a small dairy products manufacturer is one that has no more than the number of employees listed in the chart below:

NAICS code	NAICS U.S. industry title	Size standards in number of employees
311511	Fluid Milk Manufacturing	1,150
311512	Creamery Butter Manufacturing	750
311513	Cheese Manufacturing	1,250
311514	Dry, Condensed, and Evaporated Dairy Product Manufacturing ...	1,000

To determine which dairy farms are “small businesses,” the \$3.75 million per year income limit was used to establish an annual milk marketing threshold of 18.3 million pounds. Although this threshold does not factor in additional monies that may be received by dairy producers, it should be an accurate standard for most “small” dairy farmers. Based on the U.S. 2023 average yield per cow and 2023 NASS average All-Milk price, a dairy farm with approximately 780 cows or fewer would meet the definition of a small business. In 2022, the most recent year with statistics available, there were 24,470 dairy farms with milk sales, of which approximately 19,576 had milk regulated on an FMMO for at least one month of the year. Based on the 2022 Census of Agriculture, Milk Cow Herd Size by Inventory and Sales, an estimated 89 percent of operations with milk sales are likely to be small businesses.

To determine a handler’s size, if the plant is part of a larger company operating multiple plants that collectively exceed the 750-employee limit for creamery butter manufacturing; the 1,000-employee limit for dry, condensed, and evaporated dairy product manufacturing; the 1,150-employee limit for fluid milk manufacturing; or the 1,250-employee limit for cheese manufacturing; the plant was considered a large business even if the local plant does not exceed the 750, 1,000, 1,150, or 1,250-employee limit, respectively.

In 2022, the following number of plants were regulated for at least one month of the year in each FMMO: 66 plants on the Northeast, 19 plants on the Appalachian, 9 plants on the Florida, 20 plants on the Southeast, 58 plants on the Upper Midwest, 32 plants on the Central, 43 plants on the Mideast, 24 plants on California, 17 plants on the Pacific Northwest, 26 plants on the

Southwest, and 8 plants on Arizona. According to the 2022 Census of Agriculture, approximately 86 percent of fluid milk manufacturing plants, approximately 96 percent of cheese plants, approximately 82 percent of dry products plants, and approximately 78 percent of butter plants met the SBA definition of small businesses.

How FMMO Pricing Provisions Currently Operate

The proposed amendments in this decision cover five milk pricing subject areas: Milk Composition Factors, Surveyed Commodity Products, Class III and Class IV Formula Factors, base Class I skim milk price (Class I mover), and Class I and II Differentials. This decision proposes to amend provisions in all five pricing subject areas. The amendments are intended to update formulas and factors in response to industry changes over time, many of which have not been updated since the provisions were adopted on January 1, 2000, to ensure USDA is carrying out the purposes of the AMAA.

Milk Composition Factors. FMMO milk prices are based on three primary components—protein, other solids, and nonfat solids. Skim milk composition factors in the current price formulas codified in the FMMO regulations were adopted in 2000: 3.1 percent protein, 5.9 percent other solids, and 9 percent nonfat solids. The proposed amendments would increase milk composition factors to 3.3 percent protein, 6.0 percent other solids, and 9.3 percent nonfat solids. Actual component tests of skim milk have increased since 2000, with more significant increases beginning in 2016. The amendments are intended to more accurately represent component levels in milk produced.

Surveyed Commodity Products. Milk prices under FMMOs are related to wholesale prices for butter, cheese,

nonfat dry milk, and dry whey. The formulas use USDA-surveyed average wholesale prices to calculate milk component prices (butterfat, protein, nonfat solids, and other solids) that are converted to Class III and IV milk prices. The protein value in cheese is a component of the Class III price. Currently, the prices of commodity cheddar cheese packaged in 40-lb blocks (“blocks”) and 500-lb barrels (“barrels”) are collected weekly by AMS through the DPMRP survey. A monthly average of those prices is used to represent commodity cheese in the Class III price formula. The butterfat value in commodity salted butter is the driver of the butterfat price used in all classified prices. The proposed amendments would eliminate 500-lb barrels from the DPMRP survey and rely solely on the monthly average survey price for 40-lb cheddar blocks. The amendment is intended to provide for more orderly marketing through a survey of only one product.

Class III and IV Formulas Factors. Make allowances are a factor in the FMMO pricing formulas representing the cost of converting raw milk into the four manufactured dairy products surveyed by USDA (butter, cheese, nonfat dry milk, and dry whey). Make allowances were last updated in 2008 following a rulemaking proceeding in 2007. The proposed amendments would update the make allowances in the FMMO Class III and IV formulas to the following: \$0.2519 for cheese; \$0.2272 for butter; \$0.2393 for NFDM; and \$0.2668 for dry whey. The proposed amendments would also update the butterfat recovery factor in the Class III formula to 91 percent. The amendments are intended to update the formula factors to be more representative of current costs and butterfat recovery observed in dairy product manufacturing.

Class I mover. The Class I mover is the base price for the skim milk portion of raw milk used in the production of Class I products. Agriculture Improvement Act of 2018 (2018 Farm Bill) amended the Class I skim milk price mover from the “higher of” Class III or Class IV skim prices to a simple average of the two classes plus \$0.74, referred to as the “average of” mover. The proposed amendments would return the base Class I skim milk price calculation to the higher-of Class III or Class IV skim prices. The proposed amendments would also adopt a rolling monthly Class I ESL adjustment equating to a Class I price for all ESL products equal to the average-of the Class III and Class IV advance prices, plus a 24-month rolling average adjuster, with a 12-month lag. The monthly Class I ESL adjustment would be calculated as the average of the differences between the higher-of and the average-of calculations for the prior 13 to 36 months. The amendments are intended to provide for more orderly marketing by returning to the higher-of mover; while the Class I ESL adjustment would provide better price equity for ESL products whose marketing characteristics are distinct from other Class I products.

Class I and II Differentials. FMMO Class I prices are calculated as the average of the advanced Class III and Class IV prices, plus \$0.74, plus a location-specific differential referred to as a Class I differential. As the value of milk varies by location, Class I differentials have been determined for every county in the continental U.S. Current Class I differential levels were implemented January 1, 2000, with updates to the differentials in the three southeastern orders taking effect May 1, 2008. The proposed amendments would retain the \$1.60 base differential and adopt modified location-specific Class I differential values. The amendments are intended to recognize the evolution of the dairy industry since 2000 and the increased cost of servicing the Class I market given current transportation costs and plant and producer locations.

This decision continues to find these amendments are necessary. The evidentiary record reflected testimony from a broad range of stakeholder views that updates are necessary in all five pricing subject areas to reflect current market conditions.

Impact on Small Businesses

An economic analysis has been performed on impacts the proposed amendments will have on industry participants, including producers and handlers. It can be found on the AMS

website at <https://www.ams.usda.gov/rules-regulations/moa/dairy/hearings/national-fmmo-pricing-hearing>. The proposed amendments would be applied identically to all proprietary and cooperative handlers regulated by FMMOs, regardless of their size. The proposed amendments would implement prices that more accurately reflect current market conditions, providing for more orderly marketing for both small and large producers and handlers.

AMS considered alternatives to each of the proposed amendments. Over 49 days of hearing, dozens of witnesses from 9 industry stakeholder groups presented testimony and evidence on 21 proposals in the 5 pricing subject areas. AMS considered all evidence and testimony, including alternative proposals presented, in making its recommendations.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). It was determined that these proposed amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed, and no additional reporting requirements would be necessary.

This proposed rule does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, since the information is already provided, no new information collection requirements are needed, and the current information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

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

No other burdens are expected to fall on the dairy industry as a result of this rulemaking. This rulemaking does not duplicate, overlap, or conflict with any existing Federal rules.

Preliminary Statement

A public hearing was held upon proposed amendments to the marketing agreements and orders regulating the handling of milk in all 11 Federal milk marketing areas. The hearing was held pursuant to the provisions of the AMAA, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The proposed amendments set forth below are based on the record of a public hearing held in Carmel, IN, from August 23–October 11, 2023, November 27–December 8, 2023, January 16–19, 2024, and January 29–31, 2024, pursuant to a notice of hearing published July 24, 2023 (88 FR 47396), a notice of reconvened hearing published November 6, 2023 (88 FR 76143), and a second notice of reconvened hearing, published December 29, 2023 (88 FR 90134).

The hearing was held to receive evidence on 21 proposals submitted by dairy farmers, handlers, and other interested parties. A total of 165 witnesses testified over the course of the 49-day hearing. Witnesses provided an overview of the complexity of the U.S. dairy industry and submitted 511 exhibits containing supporting data, analyses, and historical information.

The material issues, related to FMMO pricing formulas, presented on the record of hearing are as follows:

1. Milk Composition Factors
2. Surveyed Commodity Products
3. Class III and Class IV Formula Factors
4. Base Class I Skim Milk Price
5. Class I and Class II differentials

Summary of Testimony

Milk Composition

Two proposals seeking to amend the milk composition standards are being considered in this rulemaking. Proposal 1, submitted by the National Milk Producers Federation (NMPF) seeks to increase the skim component factors, with a 12-month implementation lag. The proposed standards are as follows: increase the nonfat solids assumption from 9.0 to 9.41 per hundredweight (cwt) of Class IV skim milk; increase the protein assumption from 3.1 to 3.39 per cwt of Class III skim milk; and increase the other solids assumption from 5.9 to 6.02 per cwt of Class III skim milk. Proposal 1 also contains an updating methodology that would automatically update the standards no more than once every three years once the nonfat solids component for the prior three years changes by at least .07 percentage points.

Proposal 2, submitted on behalf of National All-Jersey (NAJ), is identical to Proposal 1, except for the automatic update methodology. The proposal would update the standards annually using the previous year's weighted averages, with a 12-month implementation lag.

A witness from NMPF, a trade association representing dairy farmer-owned cooperative marketing associations throughout the United States, testified in support of updating the skim milk price milk component factors, as contained in Proposal 1. The witness explained how the U.S. dairy industry has undergone dynamic structural change since 2000, while FMMO product price formulas have generally remained static. The witness stated dairy farmers have responded to component pricing by significantly increasing the butterfat, protein, and other solid levels in their milking herds. According to the USDA's National Agricultural Statistics Service (NASS), said the witness, average butterfat tests have increased 10.9 percent from 2000 to 2022, and USDA's Economic Research Service (ERS) reported average skim milk solids content of U.S. milk production increased 0.31 percent during the same period. The witness said average protein, other solids, and nonfat solids (NFS) in milk pooled on FMMOs in 2022 were 3.39 percent, 6.02 percent, and 9.41 percent, respectively.

The NMPF witness asserted the static component levels contained in the formulas result in underpayments to producers in all FMMOs for the value of their Class I skim milk. Therefore, NMPF proposes to increase the milk composition factors in skim milk to 2022 levels. The NMPF witness analyzed 2013–2022 FMMO product prices and concluded adoption of Proposal 1 would have increased the Class III skim price by \$0.80 per cwt and the Class IV skim milk price by \$0.41 per cwt. An increase from the 2022-based skim milk component factors by the proposed 0.07 percentage point threshold level, the witness added, would have increased the Class III and Class IV prices by \$0.14 and \$0.07 per cwt, respectively.

Another NMPF witness testified the announced FMMO Class III and Class IV skim milk values do not reflect the current component levels of producer milk, resulting in announced prices being lower than actual market values. The witness said this leads to a misalignment of fluid and manufacturing milk, possibly leading to disorderly marketing conditions. This occurs because the Class I Mover skim milk price is calculated based on skim

milk component levels based on 2000 levels, narrowing the difference between Class I prices and manufacturing milk prices (Classes III and IV) and resulting in more instances of price inversions and depooling.

Several NMPF dairy farmer witnesses testified in support of Proposal 1. The witnesses stated improved genetics and feed quality have caused component levels in the milk they market to increase. The witnesses stated component levels in the pricing formulas should be updated to reflect the additional protein produced.

An NMPF witness testified regarding their work as a business consultant with dairy farmers. The witness said dairy farming costs have been consistently increasing due to higher feed prices, overall inflation, interest rate increases, and rising costs associated with labor and environmental regulations. The witness estimated the average margin per cwt of milk produced over the past decade was less than \$1, or approximately 4 to 7 percent of the average milk price. The witness opined that financially sustainable margins are necessary to avoid further consolidation in the industry.

An NMPF dairy farmer witness testified that monthly pay price volatility has increased since 2000. According to the witness, in 2000 their pay price varied \$0.52, from a high of \$12.95 to a low of \$12.43. In the 12 months prior to August 2023, the witness said the variance was \$7.46, ranging from \$22.50 to \$15.04, while costs continued to rise, including the price of corn and soybean meal more than doubling. The witness said that during the same 12-month period their milk output rose over 10,000 pounds. The witness attributed improvements in cow comfort, genetics, and feed quality to the increases in milk output and component levels but opined low component standards were depressing producer price differentials (PPDs) and discouraging milk from supplying the Class I market.

NMPF, in their post-hearing brief, offered additional support for Proposal 1. The brief credited significant advances related to animal genetics, farm management, and cow nutrition as contributing to rising skim milk component levels. NMPF reiterated hearing testimony regarding the static component levels in the formulas leading to a narrowing of the difference between Class I and manufacturing milk prices resulting in more price inversions, larger volumes of depooled milk, and resulting in disorderly marketing. NMPF stated higher skim milk component levels have value in the

competitive manufacturing dairy market, which is the basis for determining Class I values. NMPF stated that increasing the skim milk components in the formulas to reflect current levels would recognize the current average value of producer milk used for manufacturing dairy products and result in a Class I price that properly reflects base milk values. Additionally, NMPF argued delayed implementation of updated component level factors is necessary because of dairy farmers' use of risk management programs. Such a delay would allow for the completion of most transactions placed prior to announcement of the change.

A Dairy Farmers of America, Inc. (DFA) witness, appearing on behalf of NMPF, testified the failure to delay an update in skim component standards would cause financial harm to dairy farmers, milk plants, end users, and others who entered into risk-management transactions. DFA is a dairy farmer cooperative and owns and operates 14 manufacturing plants which produce liquid whey, Italian cheese, skim milk powder, whole milk powder, American-style cheese, condensed milk, cream, nonfat dry milk, milk protein concentrate (MPC), sweetened condensed milk, and dry whey. The witness testified that failure to delay implementation would affect the basis, or the profit margin for milk being hedged. The witness testified that 35 to 45 percent of the U.S. milk supply was hedged by dairy farmers and there is a growing demand for risk management services among larger-sized dairies.

A witness representing the American Farm Bureau Federation (AFBF), a farmer advocacy organization with approximately 6 million members throughout the U.S., testified in support of Proposal 1. The witness estimated that raising the skim component standards would increase the Class I price by an average of \$0.70 per cwt, based on 2022 data. Consequently, raising the skim component standards would help bring the Class I, III, and IV prices in alignment, reduce the frequency of negative PPDs, and reduce the incentives for depooling, which the witness said undermines orderly marketing. The witness stated that raising the value of the skim milk in the manufacturing classes for the skim and butterfat markets would reduce the incentive of manufacturing plants in the multiple component pricing (MCP) orders to pool milk, which would lower the producer's price and discourage milk from entering a milk deficit region. The witness testified that updating component standards would address

some price misalignment issues and is preferred to prevent handlers from depooling.

AFBF offered support in their post-hearing brief stating Proposal 1 would more accurately define the market value of skim milk pooled on FMMOs. The brief asserted the resulting increase in Class I prices would reduce the incidences of price misalignment with Class III and IV prices, reduce the size and frequency of negative PPDs, and reduce depooling incentives. AFBF supported periodic adjustments to component levels, as contained in Proposal 1, to account for the continuing increases in the component levels but specified these levels should only be changed in the positive direction. In AFBF's opinion, more frequent updates, as contained in Proposal 2, would be disruptive.

A witness representing NAJ, an organization representing the interests of Jersey cattle breeders, testified in support of Proposal 2, which proposes the same milk composition levels as Proposal 1, with automatic annual updates. The witness said many factors have contributed to increased component levels, including improved genomics, increased use of gender-selected semen, and volume-based programs such as base/excess programs. The witness testified an annual update would provide improved accuracy because of the recently accelerated pace of component increases and would have better alignment with pricing between butterfat/skim and multiple component pricing FMMOs. Additionally, the witness stated a 1-year lag on implementing these updates would allow for greater risk management which is becoming increasingly more important to producers and processors.

NAJ's post-hearing brief reiterated their support for Proposal 2, arguing record evidence shows protein and other solids levels in producer milk have progressively and significantly increased since FMMO reform in the late 1990s. NAJ stated the trend of higher solids components in skim milk was expected to continue due to economic signals to producers from component values and improved production techniques. NAJ argued amendments of standard skim milk composition factors is necessary to help avoid periods of price inversions, depooling, undervaluing Class I milk, milk supply inefficiency, and disincentives to supply milk for Class I use. NAJ stated a change to the skim milk component levels should be announced at least 11 months in advance of implementation due to risk management practices used by

producers and processors. NAJ argued annual updates better serve risk management practices because it would lead to smaller incremental changes and less adverse impact on risk management contracts with more than 12-months open interest at the time component changes are announced.

A witness representing Edge Dairy Farmer Cooperative (Edge), a Wisconsin-based dairy milk test verification cooperative, testified in support of Proposals 1 and 2. The witness supported increasing the implementation lag to 15.5 months to support longer contract hedging. The witness was of the opinion the standard butterfat test also should be updated from 3.5 percent to 4.06 percent, the 2022 average butterfat for all markets combined as published by the USDA's AMS. According to the witness, this would more accurately reflect current butterfat levels and better align the butterfat to protein ratio used in the formula, ensuring more effective risk management tools, as farmers' ability to manage their gross pay price risk would improve.

Edge, in their post-hearing brief, reiterated hearing testimony that failure to adjust the butterfat level when updating skim component levels would cause disorderly milk marketing, as it undermines effective risk-management tools for dairy farmers. Edge argued that without the corresponding change, producers hedging milk revenue using risk management products based on Class III milk or Class IV milk prices, will tend to be under protected against the decline in butterfat prices. Edge added that changing the butterfat level would not affect handler obligations to the producer settlement fund, PPDs, or uniform producer prices.

A witness representing the International Dairy Foods Association (IDFA) testified in opposition to Proposals 1 and 2, stating that updating the component standards would increase the Class I skim price by \$0.60 per cwt, a value that cannot be recovered in the marketplace. IDFA is a trade organization representing manufacturers of milk, cheese, ice cream, yogurt, cultured products, and dairy ingredients. The IDFA witness testified consumers choose finished Class I products based on desired fat level, freshness, and price, not higher nonfat solids levels. The witness estimated that updating component levels in the formulas would result in manufacturing handlers in butterfat/skim FMMOs paying an additional \$0.40 to \$0.80 per cwt, even though the component levels of milk delivered to those plants was less than those

proposed. The witness cited National Dairy Herd Information Association (DHI) data showing 2020 to 2022 average skim protein levels in butterfat/skim FMMOs below the levels contained in Proposals 1 and 2. The witness attributed the lower observed component levels to the fact that producer payments in these orders are made on the basis of the fat and skim content of their milk, leaving no financial incentive to produce higher component milk.

A witness from Saputo Cheese USA (Saputo), appearing on behalf of IDFA, also testified in opposition of Proposals 1 and 2. Saputo is a dairy processor and manufacturer operating 29 plants throughout the U.S. The witness said Saputo operates three plants located in the skim/fat orders, and in 2022 the average NFS level of milk received at those plants was 9.1070 percent, which is less than what is proposed in Proposals 1 and 2. The witness explained Saputo purchases skim solids to add to its skim milk in order to ensure the Class II products it manufactures contain the skim solids necessary to meet standard of identity requirements for those products. Updating the component levels in the formula would only result in Saputo paying for skim solids not received, but it would not lower the amount of skim solids Saputo must purchase, explained the witness.

A post-hearing brief submitted by IDFA reiterated its opposition to Proposals 1 and 2, arguing that increased component levels have no financial benefit or economic value to Class I handlers who would be the primary entities impacted by adoption of these proposals. IDFA stated the current FMMO system of pricing Class I milk on a skim/fat basis versus Classes II, III, and IV milk on a component basis does not create disorderly marketing.

The Milk Innovation Group (MIG) is a group of fluid milk processors and producers that market value added dairy based products. MIG's members include Anderson Erickson Dairy (AE), Aurora Organic Dairy (Aurora), Crystal Creamery, Danone North America (Danone), fairlife, HP Hood LLC (HP Hood), Organic Valley/CROPP Cooperative (Organic Valley), Shamrock Foods Company (Shamrock), Shehadey Family Foods LLC (Shehadey), and Turner Dairy Farms (Turner Dairy). Crystal Creamery is a California fluid milk processor producing Class I, II, and IV conventional and organic milk products. Danone is a food and beverage company operating seven plants in the U.S. Fairlife is a fluid milk processor of ultra-filtered lactose free milk, and other

high protein products. Organic Valley is a dairy farmer-owned organic cooperative producing more than 30 percent of the organic milk sold in the U.S.

Seven witnesses representing MIG, including witnesses from HP Hood, Shehadey, Saputo, Shamrock, AE, Turner Dairy, and Aurora, testified in opposition to Proposals 1 and 2. HP Hood is a fluid milk processor operating five ESL plants and four high-temperature, short-time (HTST) plants in the Northeast and California. Shehadey operates four manufacturing plants in California, Nevada, and Oregon, producing Class I and Class II products. Shamrock is a fluid milk processor of HTST and ESL products with processing facilities in Arizona and Virginia, and a 20,000-head dairy farm located in Arizona. AE is an Iowa fluid milk processor producing both Class I and II products. Aurora is a vertically integrated organic milk supplier with four organic dairy farms located in Colorado and Texas. Turner Dairy is a small fluid milk processor with full or partial ownership of two fluid milk plants, as well as a standalone Class II plant, all located in western Pennsylvania.

Six witnesses testified their plants regularly receive milk with components below the proposed levels. One witness offered that component levels received ranged from 3.09 to 3.63 percent protein, 5.83 to 6.10 percent other solids, and 8.92 to 9.65 percent NFS. MIG members testified that increasing the component levels in the formulas would increase their raw milk costs, requiring them to pay for milk components not received. One witness stated that adoption of Proposals 1 and 2 would increase costs between \$0.60 and \$0.75 per cwt. All MIG witnesses claimed that fluid milk processors, even if they did receive higher component milk, are unable to convert those higher components into additional market revenue as Class I products are sold on a volume, not component basis.

Another MIG witness testified on a survey conducted of MIG members plus two additional large grocery retailers who own their own fluid milk processing plants. According to the witness, using component data from 32 out of the 36 plants surveyed, these plants frequently received milk with components below the proposed levels. As data was confidential, no specific data was provided. The witness also noted the data showed component levels changed due to seasonality and geographics, demonstrating inconsistent levels received by plants. The witness testified the adoption of Proposals 1 or

2 would raise Class I prices and make it more challenging for these plants to recover costs. Should USDA decide to change the standard component levels in the pricing formulas, the witness testified component minimums should be used instead of averages because FMMOs are meant to provide minimum prices.

A post-hearing brief filed on behalf of MIG argued it would be disorderly for Class I fluid milk processors, the only mandatory participant of FMMOs, to be forced to pay for component levels regardless of what is actually received. MIG opined consumers do not value additional skim component levels in fluid milk products, therefore Class I processors are unable to recoup additional revenue out of the market. MIG was of the opinion no record evidence was provided at the hearing that the current skim component formula factors are causing disorderly marketing and added that although they oppose Proposals 1 and 2, if any part of these proposals are adopted there should be a 12-month implementation delay.

A witness representing the CME Group (CME) testified to explain various dairy risk management tools offered through the exchange, including futures and options contracts. The witness explained the CME is a derivatives marketplace offering a range of futures exchanges to meet private risk management needs. The witness explained a futures contract is a legally binding agreement to buy or sell a standardized asset on a specific date or during a specific month. An option on a futures contract is the right, but not the obligation, to buy or sell the underlying futures contract at a predetermined price on or before a given date in the future. The witness stated 97.43 percent of contracts in the futures and options market are for 12-month periods, and in a previous change to futures contracts there was an 18-month lag on implementation to be beyond open interest. The witness testified that Dairy Revenue Protection (DRP) is one of many programs that rely on CME markets and advocated USDA to consider futures and options markets when establishing implementation plans.

In its post-hearing brief, CME reiterated its neutrality on all proposals under consideration. They stated any change modifying the current Class III and Class IV formulas would be considered a material change affecting current contracts. CME stressed the importance of sufficient and transparent notice of any changes.

A post-hearing brief was submitted on behalf of Select Milk Producers (Select), a dairy-farmer owned cooperative which owns and operates eight processing plants in Texas, New Mexico, and Michigan, manufacturing ESL fluid milk products and a variety of cheese, butter, and NFDM products. Select offered support for Proposal 1 and took exception to the assertion there is no value in higher protein levels in Class I products, as it is belied by the success of specialty fluid milk products such as fairlife, and the higher milk solids required for California fluid milk. Although Select supported adoption of Proposal 1, they do not support a delay in implementation, nor the annual update as contained in Proposal 2.

Lamers Dairy Inc. (Lamers), a Wisconsin based HTST fluid milk processor, submitted a post-hearing brief in opposition to Proposals 1 and 2. Lamers stated component levels can vary both regionally and from farm to farm. Lamers opined that USDA is statutorily required to conduct a study of component levels before any change could be made and argued adoption of Proposals 1 and 2 should not be considered.

New Dairy OPCO LLC (New Dairy), a fluid milk processor operating four fully regulated distributing plants (three of which are located in the southeastern U.S.), submitted a post-hearing brief in opposition to Proposals 1 and 2. New Dairy offered support for arguments made by IDFA and MIG that fluid milk processors would be unable to recoup the additional cost of components should Proposals 1 or 2 be adopted. They purport that charging fluid milk processors for components not actually received would be disorderly. New Dairy said raising component levels in the formulas would harm its southeastern plants as they pay on a skim/fat basis which provides no incentive to producer to increase components to match the national average.

In its post-hearing brief, NMPF opposed the annual updating feature contained in Proposal 2. NMPF stated that by limiting changes to the standard component levels to a periodic basis and relying on 3-year weighted average, Proposal 1 is more likely to produce accurate component values and avoid disruption from more frequent changes.

Surveyed Commodity Products

This rulemaking proceeding considers four proposals, and a modified proposal submitted during the hearing, that would add or remove a variety of products in the DPMRP survey, which are then reported in the National Dairy

Product Sales Report (NDPSR) and used to establish FMMO classified prices. The proposals are as follows:

Proposal 3, submitted by NMPF, seeks to eliminate the Cheddar cheese barrel price from the cheese price formula.

Proposal 4, submitted by AFBF, seeks to add Cheddar cheese 640-pound block price series to the cheese price formula.

Proposal 5, submitted by AFBF, seeks to add unsalted butter to the butterfat and cheese price formulas.

Proposal 6, submitted by the California Dairy Campaign (CDC), seeks to add a price series for mozzarella to the cheese price formula.

Edge offered a proposal modification during the hearing to adopt different weighting methodology which would reweigh 40-pound blocks and 500-pound barrels in the DPMRP survey by all U.S. cheddar block and barrel production volumes.

NMPF witnesses from Foremost Farms USA (Foremost), Ellsworth Cooperative Creamery (Ellsworth), Land O'Lakes (LOL), and DFA testified in support of Proposal 3. Foremost is a cooperative with 850 members located in Wisconsin, Michigan, Iowa, Minnesota, Indiana, Ohio, and Illinois, and operating eight manufacturing plants producing cheese and butter.

Ellsworth is a Wisconsin-based cheese manufacturer producing a significant volume of barrel cheese and a variety of specialized cheeses and cheese curds from 250 dairy-farmer members. LOL is a dairy farmer-owned cooperative with more than 1,000 dairy farmer members, primarily producing butter and cheese.

The witnesses explained the current cheese price formula includes both block and barrel cheese in the computation. They asserted the cheese price formula provides for orderly marketing if the difference, known as the "spread," in the respective market prices of blocks and barrels remains close to the assumed \$0.03 per pound cost difference, which occurred from 2000 to 2016. However, since 2017 the spread between the block and barrel prices has been volatile. One witness stated the weighted average spread published in the weekly NDPSR during January 2017 through July 2023 was \$0.120 per pound, with a much wider and more volatile range per pound. The LOL witness opined that the DPMRP survey could continue to include and publish prices of 500-pound barrel cheese without necessitating its inclusion in the Class III protein price calculation.

An NMPF witness testified the CME block cheddar price is used as a pricing index for most cheese produced in the U.S., including cheddar, 40-pound

block, 640-pound block, mozzarella, other American-type cheese, and other cheese including cream cheese, and Hispanic cheese. They estimated 90 percent of natural cheese produced in the U.S. is sold using the CME 40-pound block cheddar price as a pricing index. The witness estimated the CME barrel cheese price is used to price only about 9 percent of total domestically produced natural cheeses, including barrels themselves. They said DPMRP survey volumes of barrel cheese between 2013 and 2022 ranged from 44 to 52 percent, resulting in an overrepresentation of 500-pound barrels compared to the actual volume of cheese that is priced off of barrels. The witness testified that since 2017, the significantly wider and increasingly volatile block-barrel spread has caused instability in the cheese market. Consequently, the witness said, dairy farmer revenue has been reduced as the over representation of 500-pound barrels lowered the Class III price. The Foremost witness estimated the undervaluation represented \$2 billion since 2017, claiming the value would have been greater if not for the large volume of Class III milk not pooled in 2020 and 2021.

The NMPF witness testified eliminating 500-pound barrel prices from the Class III price would create more orderly marketing in FMMOs by reducing the financial uncertainty for dairy producers and manufacturers and ensuring the cheese price in the protein component formula represents the single commodity cheddar cheese product. The witness described how barrel cheese manufacturers are harmed when they must account to the pool at an FMMO cheese price higher than the revenue generated from barrel cheese product. The witness said eliminating the 500-pound barrels would have increased the Class III price by \$0.41 per cwt, using average product prices for 2017 to 2022.

An NMPF witness testified that removing 500-pound barrels had been addressed in prior rulemakings but denied by USDA in the rulemaking. However, current market conditions have significantly changed, necessitating a re-evaluation. The witness attributed the increased volatility in the block-barrel price spread since 2017 to a variety of factors, including increased 500-pound barrel production capacity that may be due to increasing values of its white whey by-product.

NMPF witnesses testified eliminating 500-pound barrel cheese from the protein component price (PCP) formula would still provide adequate volume of cheddar cheese for price discovery

purposes as 40-pound block cheese surveyed represents approximately 16 percent of total U.S. natural cheddar cheese production. The witness also said this methodology change would bring the cheese price into conformity with the price for butter, NFDM, and dry whey, which utilize only one surveyed product for price discovery purposes.

The witness testifying on behalf of Ellsworth stated 40-pound blocks and 500-pound barrels are not interchangeable products. The witness said while 40-pound block cheddar has many markets and uses, 500-pound barrel cheddar is used for processed cheese, a market driven by few processors and purchasers. As a result, the witness said, surveying barrel cheese prices skews the FMMO cheese price towards a smaller market that is not representative of the rest of the cheese market. The witness estimated the volatility in the block-barrel spread since 2017 cost Ellsworth producers \$0.84 per cwt. The witness said barrel cheese manufacturers would adjust to the elimination of barrel prices from the survey and eventually transition to prices based on the 40-pound block cheese price.

Witnesses representing IDFA, Leprino Foods Company (Leprino), and Associated Milk Producers, Inc. (AMPI) testified in opposition to Proposal 3. Leprino operates nine plants in the U.S., manufacturing mozzarella cheese, whey products, and NFDM. AMPI owns and operates eight manufacturing plants processing cheese, butter and powdered dairy products from member farms in Wisconsin, Minnesota, Iowa, Nebraska, South Dakota, and North Dakota.

The witnesses said sales of both block and barrel cheddar cheese are robust and each play a significant role in setting the market value of cheddar cheese. They argued eliminating 500-pound barrels would reduce by more than half the cheese market price contained in the survey and would result in a distorted picture of the total commodity cheddar market. The witness said opposition to removing barrels was not related to the presumed effect on the Class III price as the NDPSR weighted average cheese price (reflecting block and barrel cheese) was higher than the 40-pound block price in 9 of 14 years from 2009 to 2022. One witness opined additional cheddar block plant capacity is coming on-line in the next couple of years, increasing 40-pound block volumes, and would reduce the block-barrel spread to historical levels under normal supply-demand behavior.

The IDFA witness speculated cheddar barrel manufacturers may opt not to pool milk if the barrel price is no longer surveyed because they would be unable to garner sufficient market revenue in order to account to the pool and the Class III price.

Two Leprino witnesses testified eliminating 500-pound barrels from the Class III price formula removes the product most closely capturing the supply and demand balance. They opined that removing 500-pound barrels would both shrink the survey volume and likely result in greater cheddar block production to clear the market. The witnesses testified this would add volatility to the block market, cause unnecessary stress to the U.S. marketplace, and make U.S. cheese less attractive to global buyers.

The Leprino witnesses said dropping 500-pound barrels from the survey would create a presumption within the Class III formula that all cheese, including barrels, would then be priced off blocks. The witnesses asserted barrels and blocks have different supply and demand functions and eliminating barrels from the Class III formula would force barrels to be priced off blocks, adding dysfunction to the barrel market. The witnesses argued barrels are the market-clearing cheese, and instead 40-pound blocks should be eliminated from the price formula to be more consistent with the minimum pricing provisions.

In its post-hearing brief, NMPF reiterated testimony regarding price differences between 40-pound blocks and 500-pound barrels becoming more volatile since 2017. Historically, NMPF wrote, using both block and barrel prices in the Class III pricing formula increased the volume of cheddar cheese reported in the NDPSR. However, the increased price spread has caused instability in the cheese market, reducing revenue for dairy farmers as the barrel price is a disproportionately large share of the cheese price compared to its volume sold. NMPF estimated 90 percent of the natural cheese produced in the U.S. is priced using the CME 40-pound block price, while the remaining is priced off the CME barrel cheese price. As a result, NMPF wrote, the Class III milk price has been undervalued and lowered producer revenue.

Leprino submitted a post-hearing brief reiterating the important balancing function barrels provide and opined removing them would push 40-pound blocks into the balancing role and would increase price volatility for cheddar blocks.

Select submitted a post-hearing brief in support of Proposal 3, arguing 500-

pound barrels no longer represent the commodity cheddar market and 40-pound blocks are an appropriate commodity to establish the protein price. According to Select's brief, current formulas dramatically overweight the barrel price relative to the market's actual barrel use.

The AFBF submitted a post-hearing brief in support of Proposal 3 reiterating hearing testimony that barrels represent roughly 50 percent of the NDPSR volume but are used to set prices for only 10 percent of U.S. cheese. The AFBF stressed use of barrels in the cheddar cheese price formula creates a price not representative of the value of 90 percent of cheddar cheese produced.

In their post-hearing brief, IDFA opposed Proposal 3, arguing its adoption would make 500-pound barrel production uneconomical. This, they explained, would result in barrel-makers going out of business or switching to block production, which would destabilize the block market. IDFA wrote that 40-pound blocks and 500-pound barrels serve materially different functions in the market and the failure to include both in the survey would distort the commodity cheddar cheese market.

NAJ submitted a post-hearing brief in opposition to Proposal 3. NAJ cited hearing evidence showing the market price of block and barrel cheese has diverged significantly since 2017, with barrel cheese priced about \$0.11 per pound less than block cheese from 2017–2022. NAJ stated blocks and barrels have different uses, different buyer markets, and limited substitutability. With an expected increase in block production in the coming years, NAJ wrote, there may be many months in which barrels are more per pound and should remain part of the cheese price formula.

A witness representing the AFBF testified in support of adding 640-pound cheddar blocks to the Class III formula, as contained in Proposal 4. The witness said adding 640-pound blocks would expand the volume of cheese surveyed and better reflect U.S. block and barrel production volumes. The witness was of the opinion there has been a pronounced production shift from 40-pound blocks to 640-pound blocks and adding 640-pound blocks would provide more survey volume to avoid future rulemaking to address the dwindling 40-pound block survey volume. The witness testified that 40-pound and 640-pound blocks are largely interchangeable in price, use, and storage, and therefore it is appropriate those prices be reflected in the Class III price.

A witness representing IDFA testified in opposition to Proposal 4. The witness said the DPMRP cheese survey encompassed more than 1.34 billion pounds of sales in 2022, divided almost evenly between 40-pound blocks and 500-pound barrels. The witness testified the data set is sufficient to determine prices in the market and, since 640-pound blocks typically trade off the 40-pound block price, its addition would provide little additional price discovery information. The witness opined that only a small percentage of the 640-pound block market would meet survey specifications because of the nature of how the product is manufactured and sold.

The two Leprino witnesses argued it would be inappropriate to add 640-pound blocks as the market is largely make-to-order and the lack of equipment to handle 640-pound blocks limits sales to a narrow group of buyers. The witnesses noted the 640-pound block market is balanced through the cutting down of 640-pound blocks into 40-pound blocks, so the 40-pound block cheddar market is already reflected in its pricing.

A witness representing Glanbia PLC (Glanbia), testified in opposition to Proposal 4. Glanbia owns four dairy plants in Idaho and partially owns two joint venture plants in New Mexico and Michigan, processing 34 million pounds of milk daily into barrel cheese, block cheese, whey protein concentrates, proprietary protein blends, and lactose. The witness testified Glanbia plants manufacture 40-pound and 640-pound blocks, both priced off the CME 40-pound block price and opined that adding 640-pound blocks would not add new information to the survey.

A witness representing the Wisconsin Cheese Makers Association (WCMA), whose 81 members include cheese manufacturers making 40-pound blocks, 640-pound blocks, and 500-pound barrels, testified in opposition to Proposal 4. The witness testified the industry uses the 40-pound block price to price 640-pound blocks, and since 40-pounds blocks are already used in the protein formula, adding 640-pound blocks would add no new price information.

A DFA witness representing NMPF, testifying in opposition to Proposal 4, said the 40-pound block volume provides an adequate data set and the sole inclusion of 40-pound blocks is sufficient for cheese price discovery, making adoption of Proposal 4 unnecessary. The witness stated the daily CME cash block cheese market is widely recognized by market participants as heavily influencing the

price of cheese. The witness concluded that because annual CME block cheese traded volumes are not as large as NDPSR block survey volumes, the volume of 40-pound blocks reported in the NDPSR is more than adequate to determine the FMMO cheese price. The witness testified that incorporating 640-pound blocks into the NDPSR data set could promote the same disorderly market conditions currently observed with the inclusion of 500-pound barrels.

The AFBF reiterated their support of Proposal 4 in their post-hearing brief. The AFBF indicated 640-pound blocks are priced identically, or nearly identically, to 40-pound blocks, and are a standardized commodity cheddar cheese product. Including the 640-pound blocks in the NDPSR survey, they argued, would help make the survey more robust.

Select, in their post-hearing brief, expressed support for Proposal 4 agreeing with proponents that its inclusion would increase DPMRP survey volume. Select mentioned that, with new cheese processing capacity starting in upcoming years in Minnesota, New Mexico, Michigan, and Texas, 640-pound blocks would become a larger proportion of the commodity cheddar market, and it would be prudent to incorporate their prices and volume in the survey.

IDFA reiterated opposition to Proposal 4 in its post-hearing brief. IDFA highlighted evidence describing how 640-pound blocks are typically made to customer order as there is only a small number of cheese buyers who are able to purchase and process them. Since manufacturers of 640-pound blocks often balance the 640-pound block market by cutting them down to 40-pound blocks, IDFA said no new price information would be gained from including 640-pound blocks in the survey.

WCMA also expressed opposition to Proposal 4 in their post-hearing brief and wrote that because 640-pound blocks do not have a unique price discovery mechanism, they would add no new price information to the formulas.

A witness representing the AFBF testified in support of Proposal 5, seeking to add unsalted butter to the DPMRP butter survey. The witness said because of the growing volume of unsalted butter production and use in the U.S., the DPMRP salted-only butter price collection increasingly underrepresents the value of U.S. butter. According to the witness, the amount of butter captured by the NDPSR as a percentage of total butter production has been declining, from 16 percent in 1999

to 9.4 percent in 2022. The witness expected this trend to continue without the addition of unsalted butter.

Citing USDA voluntarily graded salted and unsalted butter volumes, the AFBF witness said one reason for declining butter survey volumes is the increase in U.S. unsalted butter production. The AFBF witness testified the exclusion of unsalted butter is unnecessarily restrictive for the purposes of the DPMRP survey. The witness cited U.S. butter export data showing 2,000 metric tons exported in 2000, to over 65,000 metric tons in 2022, estimating almost all the exports were unsalted. The witness said incorporating unsalted butter prices into the FMMO butterfat formula would make the survey more representative of the evolving butter market, allow for better market transparency, and provide for more orderly marketing of butter and milk. The witness claimed salted and unsalted butter are production substitutes, as the same production line can be used for both without substantial interruption. The witness clarified Proposal 5 is not intended to change the current 80 percent butterfat reporting standard for butter, and therefore exported unsalted butter at 82 percent butterfat would continue to be excluded.

A witness representing CDC expressed support for Proposal 5, without additional testimony. The CDC represents dairy farmers throughout California and is a state chapter of the National Farmers Union.

A witness representing IDFA testified in opposition to Proposal 5. The witness testified there is no uniform specification for unsalted butter, so it is impossible to derive a uniform price for purposes of an FMMO pricing formula. The witness explained unsalted butter does not store as well compared to salted butter, rendering unsalted butter less capable of providing useful uniform price information. The witness also testified unsalted butter tends to be priced off the CME Grade AA salted butter price, and therefore does not bring any new pricing information. As substantial quantities of unsalted butter are exported through premium-assisted sales, which would not be included in the DPMRP survey, emphasizing unsalted butter should not be relied on for determining the market price of butter. Moreover, the witness considered the current volume of salted butter reported in the DPMRP to be a robust quantity of butter sales.

A witness representing the Dairy Institute of California (DIC) testified in opposition to Proposal 5. The DIC is a trade association, representing fluid

milk and dairy product processing plants in California. The witness asserted most unsalted butter is 82 percent butterfat and exported and should be considered substantively different from domestically consumed butter which contains 80 percent butterfat. The witness referenced a lack of clarity on how subsidies on exported butter would be handled in the product price reporting as another reason for their opposition.

A California Dairies, Inc. (CDI) witness, representing NMPF, testified in opposition to Proposal 5. CDI is a California dairy farmer-owned cooperative with 258 members producing and marketing 41 percent of California's total milk production and operating six butter and milk powder manufacturing facilities in the state. The witness disagreed with the assertion that salted butter at 80 percent butterfat no longer represents an adequate survey volume. The witness testified CDI manufactures both types of butter, and unlike salted butter, unsalted butter is manufactured exclusively for customer order. The witness argued sales of the two types of butter are not interchangeable. The witness stressed the addition of salt allows salted butter to be stored for long periods, making it a market clearing product, whereas the nature of unsalted butter requires it to be sold and consumed in a significantly shorter period of time. The witness was of the opinion introducing unsalted butter into the survey may result in volatility in the relationship between salted and unsalted butter similar to the current volatile relationship between 40-pound block and 500-pound cheddar barrels. The witness said it was preferable to have one product generate the singular commodity reference price for purposes of calculating the minimum FMMO prices.

In post-hearing briefs, the AFBF offered additional support for Proposal 5, stating the growing volume of unsalted butter production and use in the U.S. markets results in a salted-only butter price collection in the NDPSR survey which increasingly underrepresents the value of U.S. butter. The AFBF argued the declining trend in butter survey volume as a percent of actual production would continue, as butter survey volume has fallen from 16 percent of total production in the 1999 to 9.4 percent in 2022.

Select expressed opposition to Proposal 5 in its post-hearing brief. Select argued that despite the growth of unsalted butter products, it should not be included in the survey because it lacks a uniform specification, is typically produced for special orders,

has no active commodity market, is often made with 82 percent butterfat versus 80 percent, and is viewed as a higher-value product.

IDFA's post-hearing brief reiterated their opposition to Proposal 5 stating the Grade AA salted butter survey volume is robust and the product is traded on the CME. IDFA wrote that a majority of unsalted butter is exported through government or private assisted sales, such as Dairy Export Incentive Program or Cooperatives Working Together, which would disqualify such sales from being reported. IDFA also stated unsalted butter does not store as well as salted butter, making it more likely to be made to order to a particular buyer's specifications.

A witness representing the CDC testified in support of adding mozzarella prices to the FMMO cheese price, as contained in Proposal 6. The witness was of the opinion that adding mozzarella would make the FMMO Class III price more reflective of all U.S. cheese production. The witness asserted that because the volume of mozzarella production significantly exceeds cheddar production it should be reflected in the FMMO cheese price to improve price transparency and increase dairy farmer revenue. The CDC witness also stated mozzarella production is the largest category of cheese produced today and deserves a standard specification determined by the volume of mozzarella produced today.

The CDC witness proposed adding mozzarella to the FMMO protein price based on the Van Slyke cheese yield formula, a formula for predicting cheddar cheese yields from milk on the basis of its fat and casein content. The witness submitted numerous USDA Specifications of Mozzarella Cheese for the Department to consider when determining an acceptable moisture and fat content of mozzarella cheese to be surveyed. The specification detailed requirements for six variations of mozzarella types in four forms (loaf, sliced, shredded, or diced). The witness testified that 5 to 6-pound loaves of mozzarella would be representative of a wholesale commodity mozzarella product and reasonable for inclusion in the survey.

A California dairy farmer testified in support of Proposal 6. The witness said including mozzarella in the survey would create a Class III price that more accurately reflects the value of the current cheese market. The witness attributed the ongoing decline in the number of California dairy farms to negative margins and price volatility and stressed the urgency in capturing

the additional value of mozzarella. A Wisconsin dairy farmer also supported inclusion of mozzarella for similar reasons.

A witness representing IDFA testified in opposition to Proposal 6. The witness described the difficulty in selecting appropriate mozzarella product specifications, yield assumptions, and manufacturing costs to include in the formulas whose factors currently reflect only cheddar production. The witness also testified the commercial mozzarella cheese market contains wide product variability, including varying fat and moisture parameters demanded by mozzarella customers. The witness testified that unlike bulk cheddar products, mozzarella is not a market-clearing product, is often sold to meet the customer specifications, is not traded on the CME, and is not storable for extended periods.

Witnesses from Leprino and Glanbia testified in opposition to Proposal 6, asserting the proposal lacked critical details making it difficult to interpret and evaluate. The witnesses explained the equipment, production, and yield difference between mozzarella and commodity cheddar. The witnesses said Proposal 6 does not define the type of mozzarella to be surveyed or how USDA should address the diversity of mozzarella cheese types and packages. The witnesses stated significant volumes of mozzarella are manufactured into value-added forms, whether as shred, string, or smaller retail or foodservice loaves by the primary manufacturer. The witnesses also noted most mozzarella is not market-clearing and is stored in refrigerated form with limited shelf life reducing its role as a market clearing product. The witnesses added that the volume of mozzarella production sold by the primary manufacturer in bulk format is comparatively small, in contrast to cheddar, in which most shredding, processing into consumer packaging, and conversion to other forms is performed by different companies rather than the original manufacturer. The witnesses opined cheddar remains the most appropriate Class III cheese product.

Leprino reiterated their opposition to Proposal 6 in their post-hearing brief. Leprino argued mozzarella cheese is a grouping or collection of similar products with diverse specifications, and that the assumption mozzarella production volume represents a single defined bulk product is incorrect. Leprino further stated mozzarella has different manufacturing processes, costs, and product yields. Therefore, if mozzarella was added to the Class III

pricing formula, the formula would become substantially more complicated with little incremental benefit.

A Foremost witness, testifying on behalf of NMPF, testified in opposition to Proposal 6, urging USDA to only utilize one commodity price series to represent each of the four dairy prices: cheese, butter, NFD, and dry whey, to ensure orderly marketing. The witness noted the many mozzarella composition types, and purported deriving a 40-pound block cheddar equivalent price would be difficult. The witness added mozzarella manufacturing costs are different and no data exists to determine how those costs should be reflected in the cheese make allowance. The witness said including mozzarella pricing into the protein price calculation would not enhance price discovery as mozzarella prices already move with the 40-pound cheddar market. Other NMPF witnesses testified to the appropriateness of limiting the cheese price to one survey product, cheddar. Witnesses representing the AFBF and WCMA opposed the inclusion of mozzarella due to the lack of standard format that could be surveyed.

Select's post-hearing brief opposed Proposal 6 because no workable framework for incorporating mozzarella into the price formula was provided on the record.

IDFA's post-hearing brief reiterated their opposition of Proposal 6 as mozzarella lacks uniformity in compositional specifications and yields and is not traded on the CME. IDFA wrote the U.S. Food and Drug Administration (FDA) Standards of Identity provide four different variants of mozzarella cheese, with a wide variety of fat and moisture levels. IDFA also stated that while proponents advocated use of the Van Slyke formula to determine yields, the record lacked evidence as to how the formula should be revised to incorporate mozzarella cheese.

WCMA opposed Proposal 6 in their post-hearing brief. WCMA members argued that there is no FDA Standard of Identity for mozzarella and are concerned over the vast variety of forms and functionality of each mozzarella manufacturer.

A witness testifying on behalf of the CME offered information regarding its dairy futures and options markets which utilize FMMO prices. The witness did not appear in support or in opposition to any proposal under consideration. The witness testified that the CME dairy product portfolio, which began in 1996, includes Class III and Class IV milk futures and options, cash-settled cheese, 40-pound block cheese, cash-settled

butter, NFDM, and dry whey. The witness said the relationship between Class III and Class IV milk futures can serve as a mechanism to manage both input and output costs and provide the dairy trading community with an opportunity to provide liquidity to the market while managing risk. The witness testified any changes to FMMO formulas, or underlying DPMRP survey methodology could result in a material change to the valuation of the contracts. A post-hearing brief filed by CME reiterated its hearing testimony and stressed that the Department consider the impact to futures and options markets when determining the implementation timeframe for any FMMO price formula changes.

A witness representing Edge offered the modified proposal that would reweight 40-pound blocks and 500-pound barrels by U.S. production volumes, not DPMRP survey volumes. The witness said this alternative weighting methodology would reduce the weight of barrel cheese as most cheddar cheese is manufactured into blocks. The witness explained that since a significant volume of block cheddar cheese does not qualify for inclusion in the NDPSR, barrels have a weight disproportionate to their true market share of the cheddar market. The witness was of the opinion the protein price should primarily reflect the block cheddar cheese market as it is estimated 70 to 75 percent of all cheddar cheese

is produced into 40-pound or 640-pound blocks.

The Edge witness predicted that the block-barrel spread could invert in 2025 due to the growth of block cheese production. The witness expects cheese manufacturers who can make either blocks or barrels will react to profitable opportunities, thus reducing the spread between block and barrel prices by altering their production schedules. The witness argued that, given the anticipated trends over the next 3 to 5 years, it would be more prudent to reduce the weight of barrels today and revisit the topic of removing barrels in 5 years.

Edge reiterated their support for the weighting methodology in its post-hearing brief, as an alternative to eliminating barrel cheese or adding 640-pound blocks to the survey. Edge explained that, in practice, the Department would survey all barrel cheese production volume on an annual basis, including forward contracted cheese volumes, to determine the percentage of barrel cheese produced in relation to the NASS total U.S. cheddar cheese production estimates. Edge proposed the percentage be rounded to the nearest 5 percent, and the inverse would be assumed to represent block production. This calculated weight would be announced by September 15 and be applicable for the following calendar year. Survey prices would then be weighted by these percentages to

determine weighted average cheese prices.

IDFA, in their post-hearing brief, opposed Edge’s modified proposal, arguing that it ignores market clearing, minimum pricing principles. IDFA opposed the idea of Class III prices being predominantly determined through a 40-pound block cheddar price.

A post-hearing brief submitted by NMPF opposed Proposals 4, 5, 6, and Edge’s modified proposal on the grounds the proposals perpetuate the problem Proposal 3 seeks to fix, which is to have only one product surveyed to determine a wholesale commodity price.

Class III and Class IV Formula Factors

a. Make Allowances

Proponents submitted three proposals to amend the make allowances in the Class III and IV formulas. Proposal 7, submitted by NMPF, seeks to update make allowances to the following: cheese, \$0.2400; dry whey, \$0.2300; NFDM, \$0.2100; butter, \$0.0210. WCMA and IDFA submitted Proposal 8 and identical Proposal 9, respectively, to update make allowances as described in the below table. The proposals contain a four-year implementation schedule with 50 percent of the increase implemented in year 1 and the remaining 50 percent implemented evenly across the following 3 years.

IDFA/WCMA PROPOSED MAKE ALLOWANCES

Product	Year 1	Year 2	Year 3	Year 4
Cheese	\$0.2422	\$0.2561	\$0.2701	\$0.2840
Dry Whey	0.2582	0.2778	0.2976	0.3172
NFDM	0.2198	0.2370	0.2544	0.2716
Butter	0.2251	0.2428	0.2607	0.2785

A former University of Wisconsin economics professor testified regarding separate manufacturing cost surveys they conducted on behalf of USDA and IDFA in 2021 and 2023, respectively. Each survey collected data submitted voluntarily from plants producing commodity cheddar cheese, dry whey, butter, and NFDM. The witness previously conducted similar surveys used by the Department in determining make allowance levels. The witness did not testify in support or opposition to any manufacturing allowance proposals under consideration.

The witness explained that only plants manufacturing commodity products meeting DPMRP product specifications were eligible to participate. As plant participation was

voluntary, the sample of plants and respective volumes varied by product and between surveys, with increasing cost variation between plants over time. The witness noted more observed cost variation across plants can occur due to newer automation technology employed in some plants, varying utility costs over time, and economies of scale achieved by some plants who negotiate input costs. The witness explained that dairy-based raw product costs, such as raw milk or purchased cream, are excluded, while costs of non-dairy ingredients needed to transform the raw milk into a manufactured product, such as salt and enzymes, are collected and included in the survey results. According to the witness, costs, such as labor and utility, through the product-

packaging stage are incorporated, but post-packaging costs, such as long-term storage or distribution and sales costs, are not. The witness explained an economic depreciation factor, not consistent with taxable depreciation, is incorporated to cover consumed capital, and the asset’s return on investment is included to capture opportunity costs.

The witness explained two different methodologies used for allocating costs in multi-product plants that could not be associated with a specific product (unallocated costs). The witness said the 2021 survey utilized a degree-of-transformation factor to allocate costs based on degree of transformation raw milk must undergo to be manufactured into the wholesale product. Transformation factors were assigned

subjectively, based on knowledge of manufacturing processes. As a result, the witness said, unallocated costs were weighted towards heavily transformed products, such as NFDM, while products undergoing less transformation, for example, butter, were assigned a lower portion of the unallocated costs. Due to questions from the industry regarding this methodology, the witness said the 2023 survey reverted to allocating costs on a solids basis, a methodology more familiar to industry stakeholders. The witness said the 2021 survey showed more variation of costs when compared to current make allowance levels, ranging from an 18 percent decrease in butter costs to a 75 percent increase in NFDM costs. The 2023 survey results revealed a more consistent cost change when compared to current FMMO levels, ranging from a 65 percent increase in NFDM costs to a 72 percent increase in butter costs.

The witness attributed much of the survey result differences to the plant samples. For NFDM, the 2021 survey had 27 participating plants, whereas the 2023 survey had 15, with larger average volume per plant, according to the witness. For cheese, the 2023 survey included 18 plants compared to 10 in the 2021 survey. Further, the witness elaborated that the cheese plants surveyed were much larger on average and represented a significant proportion of the NDPSR volume when compared to the 2021 survey.

The witness testified the data on butter highlighted the importance of sample composition. Both surveys sampled a similar numbers of butter plants, 13 in 2023 and 12 in 2021, and represented roughly the same total volume. However, the witness stated the 2023 survey had more variation in production volumes whereas in the 2021 survey, butter plants were more similarly sized. Finally, the witness testified the dry whey surveys had similar numbers of participating plants, 9 in 2023 and 8 in 2021, but the surveyed volume in the 2023 survey was nearly 50 percent more than that contained in the 2021 survey.

NMPF offered Proposal 7 as one option for amending FMMO make allowance levels. Eleven NMPF witnesses representing the manufacturing interests of cooperatives testified in support of Proposal 7. The witnesses testified the current FMMO make allowances do not resemble manufacturing costs currently experienced in their plants. The witnesses provided detailed testimony on the impact of inadequate make allowances, which consisted of similar

themes. First, they opined inadequate make allowances cause the FMMOs to overvalue raw milk. Consequently, the witnesses said many cooperatives have rebledened cooperative revenues to members as a way of recouping manufacturing costs not covered by current FMMO make allowances. Second, the witnesses said insufficient make allowances disincentivize plant investment, whether it be in current or potential new plants.

The NMPF witnesses testified the industry lacks consensus on reliable data to determine make allowances due to inconsistencies in cost allocation and reporting across operations. The witnesses were of the opinion the available manufacturing cost surveys are not comprehensive or reliable enough to justify large make allowance increases. The witnesses all stressed increasing make allowances to levels above actual costs could cause untenable financial harm to producers, putting many out of business and jeopardizing the milk supply. One NMPF witness described how an informal manufacturing cost survey of some NMPF members was used in the development of Proposal 7.

A CDI witness testified regarding the impact insufficient make allowances have had on their member farms and six butter and milk powder manufacturing facilities. According to the CDI witness, the NFDM and butter make allowances in Proposal 7 are transformations of the 2021 survey results, using the combined costs and yields of the two products. An LOL witness testified inadequate make allowances have led to disorderly market conditions, including lack of investment in manufacturing plants to process and balance milk supplies and inequitable producer pay prices between producers of different cooperatives and between cooperative and nonmember producers.

A witness from Agri-Mark, a dairy farmer-owned cooperative with over 550 members, 3 cheese manufacturing plants and 1 butter-powder plant in the Northeast, said current make allowances overvalue producer milk and make it difficult for cooperatives with manufacturing facilities to remain profitable and pay the FMMO blend price. Consequently, the witness said, cooperatives must re-blend proceeds to recoup manufacturing costs, resulting in producer pay prices often less than FMMO blend prices.

A Foremost witness attributed higher operating costs seen in their plants to inflation since 2008, adding that in the last 2 years, they have experienced particularly acute price increases in all categories. A witness representing FarmFirst Dairy Cooperative

(FarmFirst), a cooperative operating in the Upper Midwest with 2,600 dairy farmer members, testified negotiated over-order premiums have diminished by 24 percent since 2020 due to their processor's compressed margins, partly a result of inadequate make allowance levels. In addition to reducing premiums, the FarmFirst witness attested the current make allowances overvalue producer milk and have contributed to an oversupply of milk in the Upper Midwest, resulting in milk dumping, negative PPDs, depooling, and milk selling at below Class III prices.

A Northwest Dairy Association (NDA) witness testified in support of Proposal 7. NDA is a dairy farmer-owned cooperative located in the Pacific Northwest with approximately 295 members, whose subsidiary (Darigold) operates 5 fluid milk bottling plants and 7 manufacturing plants making butter, cheese, dry whey, and dry milk products. The witness testified Darigold's manufacturing costs increased 80 percent between 2008 and 2022. The witness said inadequate or delayed investment in manufacturing plant capacity increases transportation costs, which are borne by producers, since milk must be shipped farther distances to find an available manufacturing market. A witness representing Maryland and Virginia Milk Producers Cooperative, Inc. (MDVA), a dairy farmer-owned cooperative located in the Mid-Atlantic that operates three pool distributing plants and two pool supply plants manufacturing bulk butter and NFDM, testified costs had increased compared to 2008 levels, with NFDM conversion costs increasing 64 percent over the period. According to the MDVA witness, Proposal 7 would reduce, but not eliminate, the manufacturing losses incurred in balancing their milk supply. A witness representing Lone Star Milk Producers (Lone Star), a dairy-farmer owned cooperative marketing milk on the Appalachian, Southeast, Central, and Southwest FMMOs, testified that manufacturing costs at their butter and NFDM plant have risen since commencing operation in 2017. A witness representing Ellsworth testified to the increasing costs of production at their cheese and dry whey operation. Lastly, a DFA witness testified in support of Proposal 7 and provided dairy farm cost of production data, arguing this data should be considered when determining make allowances.

A dairy economist from the University of Missouri, appearing on behalf of NMPF, testified on the estimated economic impact of Proposal 7. Using an econometric model, the

witness estimated the proposed make allowances would lead to a \$0.30 decline in the All-Milk Price and a 200-million-pound milk production decline in the first year of implementation, with a further milk production decline of 400 million pounds in the second year. In the long run, the witness forecasted the decline in the All-Milk Price would moderate to \$0.04 as markets adjusted to lowered milk production.

A dairy farm accountant, testifying on behalf of NMPF, presented various statistics related to their dairy farmer clientele. The witness testified average total income from their clients' operations was \$5.50 per cwt in 2022, with a break-even milk price of \$19.78 per cwt. According to the witness, the average net income from 2006 to 2023 was \$1.23 per cwt, on an average milk production of 995,115 cwt, yielding an average net income of approximately \$1.2 million. The witness later stated that a 3,300-milking cow herd would require an investment of approximately \$40 million.

An economist from Cornell University, on behalf of NMPF, testified on the topics of dairy farm profitability, cost of production measures, and farm data from the Cornell Dairy Farm Business Summary, Michigan State University, and the University of Wisconsin. The witness warned that setting make allowances "too high" would lead to unwarranted investments in processing facilities while setting make allowances "too low" would lead to insufficient plant investments and cooperative deductions on member milk checks.

Numerous dairy farmers testified in support of Proposal 7, recognizing the need for increased make allowances despite what they acknowledge would be a decrease in FMMO producer prices. These witnesses testified to recent decreased farm margins due to a declining All-Milk Price, falling net pay prices, higher feed costs, and increasing production costs, leading to near negative operating incomes. While make allowance increases would hasten this trend, the witnesses said, Proposal 7 accounts for these factors, balancing producer and processor needs. Multiple witnesses expressed doubt in the available manufacturing cost survey data due to its voluntary and unaudited nature, as well as observations of cheese manufacturing profitability and continued investment.

Dairy farmer witnesses testified that inadequate make allowances have disadvantaged dairy farmer-members of cooperatives who own manufacturing plants compared to dairy farmer-members of cooperatives who own no

plants. Several dairy farmer witnesses said that the prevalence of market adjustment deductions from their member milk check signifies negative returns on the cooperatives' manufacturing assets due to inadequate make allowances. Another dairy farmer testified processing costs for Agri-Mark's four manufacturing plants producing cheese, butter, NFD, and whey have increased by an average of 20 percent since 2008, and insufficient make allowances have resulted in deductions to member milk checks to cover processing costs. According to the Agri-Mark witness, this has led to disorderly market conditions, which impair plant investment and disadvantage cooperative members. A CDI dairy farmer witness testified to the financial difficulties of operating CDI's balancing plants given current make allowance levels.

A witness from the Milk Producers Council (MPC), an organization representing California dairy farms, testified Proposal 7's proposed make allowances balance producer and processor needs. The witness said the cost survey information entered into evidence is of limited value due to its voluntary, unaudited nature and the lack of transparency in cost allocation for multi-product plants. The witness argued differences between the All-Milk Price and the Mailbox Price indicate a need for increased make allowances and a guideline to the resulting impact on producer pay prices, currently estimated at \$0.75 per cwt.

In its post-hearing brief, NMPF reiterated its arguments for adopting the make allowance levels contained in Proposal 7, writing it is the only option accounting for an increased cost in manufacturing while protecting producer pay prices. NMPF stated there has never been a make allowance adjustment greater than \$0.35 per cwt, and the changes contained in Proposal 7 would decrease farmer milk prices by approximately \$0.50 per cwt.

NMPF presented in its brief the aggregated costs cooperatives with manufacturing capacity shared on the record, emphasizing the increases across cost categories since make allowances were last updated. While the need to update make allowances to reflect higher costs is necessary, NMPF stated, the data on the record is not sufficiently comprehensive, verifiable, or unambiguous to determine make allowances above those offered in Proposal 7. In its post-hearing brief, Agri-Mark reiterated support for Proposal 7 as the most balanced approach to updating make allowances, despite acknowledging the proposed

levels are not sufficient to cover all manufacturing costs.

Opponents to Proposal 7, primarily representatives for IDFA or WCMA, echoed similar concerns from cooperative manufacturers regarding inadequate make allowances, claiming the inability to recover manufacturing costs on wholesale commodity products has led to a lack of investment in manufacturing capacity. These witnesses testified on the importance of make allowances fully covering manufacturing costs, rather than a portion of costs as proposed in Proposal 7. Witnesses testified that continued capital investment in plant yield and efficiency gains have not fully countered the effects of insufficient make allowances as costs have continued to increase. Without make allowances accurately reflecting costs, the witness said, manufacturers receive inaccurate financial signals, which impact investments, capital distribution, and FMMO pooling decisions. Additionally, they argued the competitive advantage gained by manufacturing plants not regulated by an FMMO leads to more investments into operations unaffiliated with the FMMO system. Only make allowance increases that reasonably cover commodity product manufacturing costs, according to these witnesses, can counteract these effects.

In its post-hearing brief, IDFA reiterated opposition for Proposal 7, writing that the proposed make allowance levels are inadequate and not grounded in observed data. IDFA stressed that make allowances are defined as covering the entire cost of converting raw milk to a given dairy product, not a portion. In its brief, IDFA pointed to NMPF's recognition that Proposal 7's make allowances do not fully cover actual costs but instead represent a balance dairy farmers can withstand. IDFA objected to the consideration of farm production costs when determining make allowance levels. IDFA reiterated FMMOs are not a price support or income support program, and the prices must reflect the market price of end-dairy products. IDFA explained manufacturers cannot raise the prices of commodity dairy products to offset higher manufacturing costs because the wholesale prices are captured in the NDPSR and would raise the reference price by the same amount. In its post-hearing brief, AMPI reiterated opposition for Proposal 7 as failing to reflect 2022 manufacturing costs. AMPI argued that USDA should not delay increasing make allowances on the possibility that legislation will give

USDA the authority to conduct a mandatory audited survey.

A witness from DIC testified in support of Proposals 8 and 9. The witness testified that setting minimum prices too high incentivizes excess milk production, while a low minimum price through higher make allowances allows for over-order premiums to set a competitive market price. The witness argued Class III and IV prices should allow manufacturing plants to clear the market and operate profitably.

The DIC witness entered data concerning its 2022 California dairy manufacturing cost forecast (2022 CA Forecast). The witness testified the 2022 CA Forecast used a combination of 2003–2016 California Department of Food and Agriculture (CDFA) data, state and national indices, and market developments to measure how changes in labor, utility, and other costs historically moved the actual CDFA cost data. The model then used that information to forecast California-specific 2017–2022 manufacturing costs, according to the witness. According to the witness, while the model forecasts costs, the range of actual costs around those forecasts could be relatively wide given the relatively few observations (14 years) used to estimate the model. For example, the expert witness elaborated, CDFA only collected dry whey costs until 2006, when they surveyed fewer than three dry whey plants, which is why the CA analysis did not forecast dry whey costs. The DIC witness opined the best approach to determine manufacturing allowance levels is using observed cost data but offered the 2022 CA Forecast as another methodology for use with the other cost surveys and testimony presented.

An IDFA witness testified in support of Proposals 8 and 9, stating make allowances should be updated to reflect increased costs in manufacturing dairy products. While end-product-prices change monthly to reflect the current market, the witness said, make allowances are fixed at 2006 cost levels, forcing dairy manufacturers to lose money or stop production. The witness stressed the need for relief from the current inadequate make allowances that do not reflect rising industry costs, adding losses are not sustainable for plants or dairy farmers who depend on these manufacturing outlets for their milk. The witness explained IDFA's proposed make allowances are simple averages of the 2023 survey and 2022 CA Forecast plus a \$0.0015 marketing cost.

The IDFA and WCMA witnesses asserted accurate make allowances need to be adopted quickly as current make

allowances are based on 2005/2006 cost data. The IDFA witness clarified their staggered implementation proposal, which would implement proposed year 1 levels shortly after the final decision is published. According to both IDFA and WCMA witnesses, the staggered implementation is designed to recognize the impact significant make allowance increases would have on producer prices. However, if there is any delay in implementing changes, both witnesses stressed the staggered implementation approach should be abandoned and the proposed year 4 levels should be implemented.

The WCMA witness stated the use of audited California manufacturing cost data in the 2022 CA Forecast should alleviate any data validity concerns; further, the 2023 survey methodology follows precedent used to determine the current make allowance levels. The witness noted the risk of using a simple average of the 2022 CA Forecast and the 2023 survey to determine proposed make allowances is the potential of the result being skewed towards California costs, since California plants are represented in both surveys.

A dairy farmer witness, who is a member of AMPI, testified on behalf of IDFA and expressed support of Proposals 8 and 9. The witness testified that AMPI, who participated in the 2023 survey, experienced cheese manufacturing costs close to the study average despite plant sizes that were smaller than the survey average plant size. According to the witness, their manufacturing costs of bulk cheese products are 47 percent higher and general plant expenses are up 62 percent in 2022, compared to 2008.

Several dairy manufacturer witnesses representing Hilmar Cheese Company (Hilmar), Glanbia, Saputo, and Leprino testified in support of Proposals 8 and 9. Hilmar is a cheese and whey manufacturer with processing locations in California and Texas. According to these witnesses, dairy processing costs have increased, particularly of late because of inflation, noting Hilmar's natural gas costs were 45.1 percent above the 20-year average. The Saputo witness echoed testimony on increasing costs, citing the St. Louis Federal Reserve data series for labor, energy, packaging, and maintenance costs. The witness said these costs, comprising 20 percent of the total cost to manufacture a finished cheese product, rose 60 percent, on average since 2006.

According to the Saputo witness, its manufacturing costs align with the 2021 and 2023 survey results. The Hilmar witness testified their manufacturing cost increases correlate with the results

of the 2022 CA Forecast. The Leprino witness stated the 2021 survey and 2023 survey had robust participation, and the 2022 CA Forecast, which used CDFA audited mandatory data, leveraged a widely accepted statistical modeling approach. All four witnesses stressed the urgency of updating make allowances. The manufacturer witnesses generally agreed that inaccurate make allowances distort pricing signals for farmers, processors, and ultimately consumers.

Witnesses representing Nasonville Dairy and Cedar Grove Cheese, two proprietary specialty and commodity cheese manufacturer members of WCMA, testified to rising manufacturing costs by outlining costs in a similar manner to the 2021 and 2023 surveys. According to the witnesses, their costs have risen \$0.3226 and \$0.77 per pound, respectively, far beyond the fully implemented Proposal 8 levels. The witnesses testified that insufficient make allowances negatively impact cheese processing investments and increase the production of higher-cost specialty products unable to play the same balancing or foodservice roles as commodity products. They added current make allowance levels impair the ability of proprietary manufacturers to participate in the FMMO pool and deprives producers the benefits of having their milk pooled.

In their post-hearing briefs, WCMA and IDFA reiterated their support for Proposals 8 and 9. IDFA wrote that USDA has consistently set make allowances to reflect the most recent and reliable actual cost data, using multiple surveys, as in Proposals 8 and 9. Further, IDFA stressed in its brief, the 2023 survey is the most robust of all of the author's previous surveys used to set make allowances. IDFA refuted the notion the 2022 CA Forecast is inappropriate to use for determining make allowances, explaining the underlying data is robust audited California manufacturing data and the econometric techniques are widely accepted. IDFA contended that the 2022 CA Forecast and 2023 survey averages are lower than the cooperative manufacturing costs shared on the record. Even if inflation has subsided since 2022, IDFA added in its brief, there would have to be deflation to arrive below pre-2022 levels.

IDFA clarified in its brief the proposed schedule for phasing in make allowance changes, which is designed to accommodate farmers. When addressing implementation timing, IDFA refuted the CME's points about incorporating risk management in the timing of implementation, arguing that CME's

interests do not necessarily align with those of the broader dairy industry because of the fee revenue they generate.

In its brief, IDFA emphasized the destabilizing effect of current make allowances on processors and farmers. IDFA shared charts from the hearing, showing how the Mailbox Price is in close proximity to FMMO blend price, which it says indicates FMMO prices are too high. IDFA refuted NMPF's argument that Proposals 8 and 9 will result in a \$1.42 per cwt decrease in the All-Milk Price because FMMO prices are minimum prices and don't reflect premiums received. Further, IDFA wrote in its brief that dairy farmers whose cooperatives own processing facilities are receiving depressed prices when make allowances are too low.

IDFA said the best method to update make allowances is through a mandatory and audited USDA survey; however, USDA does not currently have the authority and IDFA estimates it would take approximately five years before new make allowances could be adopted once the authority was granted. IDFA reiterated arguments that make allowances under-representing actual costs harm both dairy farmers and manufacturers.

In its post-hearing brief, AMPI reiterated support for the make allowance levels in Proposals 8 and 9, contending they accurately reflect the changes in costs. AMPI added it supports immediate implementation, rather than the phased 4-year approach. AMPI wrote the 2023 survey had the largest product volumes of any previous surveys and highlighted other manufacturing cooperative testimony describing increased manufacturing costs. AMPI opined continued high manufacturing costs and farm bill delays have made make allowance updates more urgent.

Leprino's post-hearing brief reiterated its support of Proposals 8 and 9, emphasizing the importance of implementing make allowance changes immediately. Leprino stressed 2023 cost levels have continued to climb and offered its own updated cost increases, compared to 2022: 11 percent for labor, 17 percent for property insurance, and 9 percent for liability insurance.

A witness representing the AFBF testified in opposition to Proposals 8 and 9, opining the 2021 and 2023 survey data may be biased due to its unaudited nature and the known potential to be used for rulemaking, stating the incentive to overestimate reported costs for commodity goods disqualifies this voluntary data. The witness testified only the 2016 CDFA

survey results can be verified as accurate enough to be used for determining make allowances. According to the witness, the relatively complicated 2022 CA Forecast model using a small number of observations (14 years) to forecast 2022 costs (6 years out from the actual data) could be overfitted to the 2000–2016 data and unreliable to predict future costs.

Numerous dairy farmer witnesses testified in opposition to Proposals 8 and 9, focusing on the negative effect significant make allowance increases would have on producer pay prices. A DFA farmer witness from New Mexico testified the make allowance increases contained in Proposals 8 and 9 would result in negative operating income over the next 10 years, making continued operation of their farm unsustainable. The witness said any make allowance increases would severely and disproportionately impact producers in the southwest due to the share of milk going into manufacturing products. A LOL dairy farmer testified significant increases in make allowances would be difficult for farms in California to absorb, where water scarcity has led to high forage costs. According to the witness, large make allowance increases would put adequate milk supply at risk, all the while guaranteeing profit for commodity manufacturers and leading to over production of manufactured dairy products.

Two dairy farmer witnesses, a member of the CDC and a small Maryland dairy farmer, testified against increases in make allowances due to the impact on producer pay prices and lack of accounting for dairy farm production costs. According to the witnesses, while processors can pass on costs to customers up the supply chain, producer margins are too thin to sustain substantial price decreases from increased make allowances. The witnesses testified that further declines to producer margins will cause more producer exits and disruption to the milk supply. According to a dairy farmer witness representing Edge, any change in make allowances should require a 15.5-month delay, be restrained by the impact on producer pay prices, and cover only the most efficient plants.

In its post-hearing brief, NMPF reiterated its arguments in opposition to Proposals 8 and 9. NMPF argued that these proposed changes would decrease dairy farmer milk prices by approximately \$1.45 per cwt, further narrowing producer margins and causing disorderly marketing.

NMPF cited ongoing plant investment as an indication current make

allowances are not too low as portrayed by proprietary manufacturers. NMPF emphasized proprietary manufacturers are not required to be regulated and, thus, can choose not to participate in the FMMO and avoid paying minimum prices they contend are too high because of inadequate make allowance levels. NMPF opined about the lack of evidence to merit raising make allowances to levels contained in Proposals 8 and 9.

In its brief, NMPF refuted the studies used as a basis for Proposals 8 and 9. NMPF cited hearing testimony regarding the insufficiency of some plant sample sizes in the 2023 survey. Further, NMPF argued the 2023 survey does not capture how manufacturing costs are skewed by plants that serve a balancing role. NMPF stated if make allowances are set too high, balancing plants would be incentivized to run at maximum capacity, rather than running at less than full capacity to provide critical balancing services to the market. NMPF voiced concerns with the 2022 CA Forecast, noting the proposed make allowances in Proposals 8 and 9 are duplicative since the 2023 survey included California data. Further, NMPF opined that the 2022 CA Forecast is of little utility as it did not account for basic changes to the California dairy manufacturing sector since 2016, such as plant openings and closings and productivity improvements.

In its post-hearing brief, Select also opposed Proposals 8 and 9, on the basis of the 2022 CA Forecast being inappropriate to use in determining make allowances. Select echoed NMPF's argument that use of the forecast would be duplicative of California data. Further, Select argued indexing does not account for improvements to plant efficiencies and the Department has not previously used indexing to determine make allowances.

In its brief, the AFBF opposed any increase to make allowances, instead advocating they only be increased once a mandatory, audited cost survey was administered by the Department. The AFBF opined that both the 2021 and 2023 surveys were biased because there was a clear intention the surveys would be used in a rulemaking proceeding. The AFBF opposed the use of indexing to set make allowances, as was done in the 2022 CA Forecast, because it fails to recognize productivity improvements over time. The AFBF echoed other brief arguments that continued processor investment is evidence that make allowances are not too low.

The Midwest Dairy Coalition (MDC), an alliance of six dairy farmer-owned cooperatives operating in the Midwest,

filed a post-hearing brief stating make allowance updates are long overdue, but took the position the Department should be granted legislative authority to conduct a mandatory and audited cost survey. MDC did not offer support or opposition to any make allowance related proposals. In its post-hearing brief, Edge also did not support or oppose any make allowance related proposals but cautioned against setting make allowances too high. Until there is a mandatory and audited USDA-administered survey, Edge stated, the Department should err on the side of caution to not subsidize commodity manufacturing.

In its post-hearing brief, Select offered an alternative methodology for determining the make allowance levels using what Select argued was the most reliable record data. Select suggested taking the average of the 2021 survey and 2023 survey, subtracting the current make allowance level, and taking half that difference to add to current make allowance levels. As a result, Select proposed the following: cheddar cheese, \$0.2281; butter, \$0.2004; NFDM, \$0.2260; and dry whey, \$0.2498.

In its post-hearing brief, CME noted any make allowance changes would be considered material changes, and USDA should consider an implementation timeframe that mitigates risks to those involved in futures and options trading.

b. Yield Factors

Submitted by Select, Proposal 10 seeks to amend the cheese price formula by increasing the butterfat recovery rate in the cheese yield, from 90 to 93 percent. A Select witness testified in support of Proposal 10 and clarified a butterfat recovery rate of 93 percent would also necessitate an increase in the butterfat yield factor in the protein price formula from 1.572 to 1.624. According to the witness, these changes would result in a modest increase in the Class III price, estimated at \$0.04 per cwt. The witness stressed USDA should not be guided by price impacts but rather by achieving formulas to better reflect manufacturing realities and the actual value of raw milk. Select reiterated support for this proposal in its post-hearing brief.

An independent expert witness, retained by Select, testified advancements in vat technology, coagulants, and curd handling have enabled manufacturers to achieve recovery rates higher than the currently assumed 90 percent. The witness described how modern, horizontal vats attain butterfat recoveries far exceeding both open and enclosed horizontal vats, and how most commodity cheddar

manufacturers use advancements in coagulants and curd handling to attain greater than 93 percent butterfat recovery. Additionally, the witness said, whey cream can be reintroduced into the cheesemaking vat to increase cheese yield and revenue, ultimately increasing butterfat recovery.

In its post-hearing brief, the AFBF wrote in support of Proposal 10 to increase the butterfat recovery factor. The AFBF pointed to evidence on the record of increasing plant efficiencies, justifying updating the butterfat recovery factor to the level in Proposal 10.

Six witnesses, representing Glanbia, Leprino, IDFA, CDI, DIC, and MPC, testified in opposition to Proposal 10. The Glanbia witness described a broad range of industry fat recovery based on plant age and processing techniques, and acknowledged many modern plants, including Glanbia plants, can achieve 93 percent cheddar fat recovery. The witness testified Proposal 10 is being offered to enhance prices while ignoring other parts of the formula that overvalue milk. The witness contended lost solids within the manufacturing plant and the discounted price of whey cream, should they be considered, outweigh the effects of Proposal 10 on milk prices. The Leprino witness testified any changes to the yield factor should only occur after a comprehensive review of all yield assumptions. The witness agreed 93 percent butterfat retention is achievable in some plants but does not believe it is possible across the entire industry.

The IDFA witness contended Proposal 10 takes a piecemeal approach to changes in the yield formula and selectively focuses on dairy farmer revenue enhancements only. The witness opined whey cream is overvalued in the current formula, as butterfat not going into cheese is currently valued as Grade AA butter despite regulation that whey cream cannot be used in Grade AA butter. According to the witness, whey cream is discounted 20 percent or more compared to fresh cream. In addition, the witness claimed, in-plant milkfat losses are not recognized in the current formula, something that should be considered when evaluating yield factor changes. The witness testified any decreases in the Class III prices that result from accurately accounting for both processing losses and whey cream values would more than offset the increases in Class III prices proposed by Select.

A witness from the Center for Dairy Research (CDR), appearing on behalf of IDFA, testified to observing improvements in butterfat retentions

over the past 40 years, mostly due to improved vat design and technology. The CDR, with a dairy plant on the University of Wisconsin-Madison campus, supports the U.S. dairy industry with expertise in cheese, dairy ingredients, cultured products, dairy beverages, quality/safety, and dairy processing. The witness noted a range of butterfat losses at the cutting stage including 9 to 10 percent fat loss in open vats, 7 percent fat loss in Double O vats, 6 percent fat loss in horizontal vats, and 5 percent fat loss in modern vats. While large modern plants are installing newer, more efficient vats, the witness claimed, old, less efficient vats are not leaving production, and are being repurposed and installed in medium and small plants throughout the country. The witness noted there is still a large variety of vats being used in the industry and stressed the latest vat design does not ensure optimal butterfat retention, as the experience of the cheesemaker and product handling practices could also lower butterfat recovery.

Based on current observations and work within the industry, the CDR witness provided best estimates for fat recoveries in cheddar cheesemaking as 91 to 93 percent retention in well-run factories with modern vats, 90 to 92 percent retention in well-run factories with vertical Double O vats, and 88 to 91 percent retention in factories with open vats. The witness said, based on their experience, 91 percent could be considered the industry average butterfat recovery for cheddar cheese plants.

A CDI witness, appearing on behalf of NMPF, testified to the lack of yield data available to support the proposed recovery rate contained in Proposal 10. The witness supported a tempered update to the cheese make allowance that does not include an update to the yield factor. A witness representing DIC testified the current 90 percent butterfat recovery rate is reasonable because, despite some newer, more efficient plants achieving higher fat recovery, older plants may not be able to achieve the higher rates. The DIC witness stated fat recovery data is lacking across the industry and further asserted the current 90 percent butterfat recovery should be retained. The witness representing MPC testified the current formula should remain in place until the industry tackles the mechanics of the Class III formula, and the big issue is how butterfat not being retained in the cheesemaking process is valued.

A witness representing AMPI provided testimony supporting the improvement seen in butterfat recovery

due to new vat technology. According to the witness, AMPI installed cheesemaking equipment that facilitates the recovery of fat; however, they did not provide specific data.

Submitted by Select, Proposal 11 seeks to eliminate farm-to-plant shrinkage from the yield factors in the FMMO Class III and IV price formulas. A witness appearing on behalf of Select testified USDA's decision to include shrinkage in the formula was premised on the concept that such losses were not in the handler's control and are unavoidable and common. The Select witness opined that producers, cooperatives, and handlers do have the ability to address and stem losses in the transportation of milk from the farm to the plant. The witness said, historically, as the number of farms on a milk route increased, the probability for discrepancies between farm weights and plant weights also increased, as each stop offered potential for spillage, loss within piping, and errors in measurement. The witness shared statistics on the increasing size of U.S. dairy farms, stating that in 2016, three-quarters of all U.S. milk production came from farms that could fill a full tanker, whereas in 2000, less than half of U.S. production came from farms filling a full tanker. The witness estimated 80 percent of the current milk volume in the U.S. comes from farms able to fill full tankers on every-other-day pickup schedules. Consequently, the witness said, the occurrence of shrinkage is decreasing. As an example, the witness explained, Select's members are large enough to ship full tanker loads of milk, meaning Select does not experience the same risks of milk loss which occur on multi-stop routes.

Other than milk losses occurring with hoses, the Select witness was unaware of any inherent, unavoidable, farm-to-plant losses that could occur within the pick-up process. The witness said even farms without the ability to fill a tanker can adopt farm scales, flow measurement, and other technologies to minimize imprecision and inaccuracy. The witness testified the cost of implementing these improvements would be offset by the anticipated price impacts of adopting Proposal 11, which the witness estimated to be \$0.07 per cwt.

A second Select witness presented an analysis of Select plant data from August 2022 to July 2023, representing 171,240 milk shipments and a total of 9.8 billion pounds. The witness stated approximately half of their customers do not report plant weights back to Select. For those plants who do report, the witness said reported plant weights

exceeded farm weights about half of the time. The witness stated non-shrink factors, such as scale calibration or weather, typically cause the large discrepancy between farm and plant weights. The witness concluded that for the subset of loads where differences occurred between farm and plant weights, the net variance across all loads was less than 0.1 percent.

A witness testifying on behalf of Continental Dairy Facilities (CDF) and Continental Dairy Facilities Southwest (CDF SW), two wholly owned subsidiary plants of Select in Michigan and Texas, manufacturing NFDM, butter, and buttermilk powder, presented farm-to-plant loss data to support Proposal 11. The witness analyzed farm-to-plant losses in milk deliveries to the two CDF facilities from August 2022 through July 2023, comprised of both single and multi-farm pickups. The witness stated that in total, plant weights averaged 0.15 percent lower than farm weights for CDF and 0.10 percent lower for CDF SW. The discrepancies ranged from a negative 0.32 percent (plant weights were 0.32 percent lower than farm weights) to 0.67 percent (plants weights were 0.67 percent lower than farm weights). Since many of the non-Select shipments to CDF are multi-farm pickups, the witness said management for farm-to-plant shrink is not unique to Select or larger farms, generally. The witness described improperly calibrated scales, input or transposition errors by milk haulers, changes in equipment or personnel when weighing loads, or snow settled on scales or tanks when weighing, as reasons for weight discrepancies. The witness testified these variances are not inherent and can be addressed. Select reiterated its arguments supporting Proposal 11 in its post-hearing brief.

The AFBF expressed support for Proposal 11 in its post-hearing brief. The AFBF contended that data on farm-to-plant shrinkage contained in evidence is similar to what was used to determine the original farm-to-plant shrinkage factor. The AFBF argued that this issue does not merit a formal data collection, but a one-time adjustment to reflect that farm-to-plant shrinkage is much less significant than it used to be.

Five witnesses representing IDFA, Leprino, CDI, DIC, and MPC testified in opposition to Proposal 11. The witnesses asserted Select's minimal farm-to-plant shrinkage is not the reality for much of the dairy industry, noting the lack of industry-wide data on farm-to-plant shrinkage and the differing nature of measuring components at the farm, rather than at the plant, are reasons Proposal 11 should not be

adopted. The witnesses further testified FMMO yield factors should not be based on one company's experience, especially one, they argued, that was an industry leader in this area.

The Leprino witness testified that while Select has been able to limit their own farm-to-plant loss through increasing herd sizes and improvements in milk weighing and sampling, this is not a representation of the nationwide dairy industry. Additionally, the witness argued that the scientific characteristic of milk fat clinging to the walls of stainless steel has not changed; as such, volume and fat loss still occur, even at the most innovative plants. The IDFA witness claimed less than 10 percent of all farms produce enough milk to fill entire tanker loads, so it is reasonable to conclude the losses experienced when the formulas were adopted are still happening today. According to the witness, failure to account for the diversity of farm size may further incentivize manufacturers to prefer larger farms over smaller farms.

Submitted by Select, Proposal 12 recommends amending the nonfat solids price formula by increasing the NFDM yield factor from 0.99 to 1.03. A Select witness, testifying in support of Proposal 12, said it would correct the NFS yield factor by including the value of milk solids utilized in buttermilk powder, as they said producers are not currently paid accurately from a price calculated on NFDM prices alone. According to the witness, a proper yield factor for NFDM should account for all milk solids, including the milk solids remaining in cream after separation and used in butter or buttermilk. The witness stressed the initial NFS formula, correctly adopted in 2000, included buttermilk powder.

A witness for CDF and CDF SW testified on price alignment and processing differences between NFDM and buttermilk powder. The witness stated sales and regional prices observed at the two plants for buttermilk powder and low-heat NFDM are closely aligned, as well as consistent with prices reported by AMS' Dairy Market News (DMN) from January 2023 through June 2023. Further, according to the witness, the process of drying buttermilk utilizes the same equipment as that of drying skim milk but requires a thorough cleaning of equipment when changing product lines, higher temperature, and additional drying time due to buttermilk's higher butterfat content. The witness said this leads to increased utility costs of approximately \$0.02. The witness testified the NFS yield factor should consider all powder products, including buttermilk powder whose

yield is lower than NFDM. Select reiterated its arguments in support of Proposal 12 in its post-hearing brief.

In its post-hearing brief, the AFBF expressed support for Proposal 12 as it believes it reflects the long-term market shift toward valuing buttermilk near the NFDM price. The AFBF stated that a formal extensive data collection is not necessary for this proposal to be adopted because there is a clear record of buttermilk values.

Two witnesses, representing Leprino and IDFA, testified in opposition to Proposal 12. The witnesses testified Proposal 12 is based upon a theoretical yield approach which assumes a perfect system with no in-plant component losses in the conversion of NFS to NFDM. The witness said in-plant losses exist even in the most modern and efficient manufacturing facilities and should be recognized in the price formulas. The witnesses gave an example of the portion of NFS remaining in cream after separation, which cannot be processed into NFDM. The Leprino witness argued the FMMO system is predicated on the notion processors should pay for milk based on the revenue they can derive from selling products manufactured from that milk. The witness said milk routinely lost in processing does not end up in finished products, which should continue to be accounted for in the formulas. The IDFA witness testified product yields should incorporate manufacturing losses, and overestimating the quantity of NFDM manufactured from NFS by accounting for buttermilk powder would overvalue the market-clearing of NFDM and contribute to disorderly marketing.

A witness from CDI testified on behalf of NMPF in opposition to Proposal 12. The witness testified CDI supports evaluating all factors in the Class III and IV formulas, and yield factors should only be updated once industry-wide data on product yields are available. The witness stated the NFS price formula is based on NFDM and the yield factor correctly reflects the yield of NFDM only, without an adjustment for buttermilk powder. The witness said Proposal 12 would adjust the NFDM yield factor to represent a composite yield for multiple products which differ in terms of component composition, uses, cost of manufacture, and market prices. While acknowledging buttermilk powder's processing costs are likely higher than NFDM's, the CDI witness testified there was not enough data to quantify the difference in processing costs; further, data presented from DMN and by Select witnesses are not sufficient to determine the alignment of prices between buttermilk powder and

NFDM. The witness clarified that buyers of butterfat and NFS must account for all solids utilized at the minimum component prices, regardless of whether the solids are used in the surveyed products of butter and NFDM or in other Class IV products such as buttermilk powder.

A witness from the DIC testified in opposition to Proposal 12. According to the witness, while NFDM yields are likely higher than the current yield factor of 0.99, not all NFS in producer milk end up in NFDM, with some NFS from cream remaining in buttermilk. The DIC witness claimed the lower yield factor is to compensate for generally lower buttermilk powder prices compared to NFDM but acknowledged DMN data suggested a buttermilk powder price discount relative to NFDM narrowing in recent years. A witness from MPC testified in opposition to Proposal 12, stating they were opposed largely due to a lack of adequate data.

In their post-hearing briefs, IDFA and NMPF opposed Proposals 10, 11, and 12. IDFA argued the three proposals are not representative of industry-wide experience, but rather on what is possible given modern technology and equipment. NMPF echoed IDFA's opposition in its brief, citing insufficient data to justify the proposed changes. IDFA specifically objected to Proposal 11, stating it would place an unfair burden on small farms that cannot fill a tanker and, thus, continue to experience shrinkage. Proposal 11 was also opposed by WCMA in its post-hearing brief. Lastly, IDFA contended Proposal 12 should be rejected because it overvalues buttermilk powder.

Base Class I Skim Milk Price

Six proposals to amend the base Class I skim milk price were considered in this proceeding. Proposal 13, submitted by NMPF, seeks to return the base Class I skim milk price to the higher-of the Class III or Class IV advanced skim milk price, referred to as the "higher-of" mover. Proposal 14, submitted by IDFA, would use an average of the advanced Class III and Class IV skim milk prices, plus an adjuster that resets every January. The adjuster would be the higher of either: (1) \$0.74; or (2) the 24-month average difference between the higher-of and the average-of the advanced Class III and Class IV skim milk pricing factors. The 24-month calculation would run from August of the three years prior to July of the previous year. Proposal 15, submitted by MIG, would amend the current average-of mover from a \$0.74 adjuster to a monthly rolling average adjuster

calculated as the difference between the higher-of and the average-of, for 24 months, with a 12-month lag.

Proposal 16, referred to as "Class III plus," submitted by Edge, would start with the announced Class III price and incorporate a 36-month rolling adjuster averaging the monthly differences between the higher-of the advanced Class III or advanced Class IV skim milk prices, and the Class III skim milk price. The proposal would eliminate advanced prices. Proposal 17, also submitted by Edge, would return to the higher-of mover but would use announced rather than advanced prices. Proposal 18, submitted by the AFBF, would return to the higher-of mover and would eliminate the advanced pricing of Class I skim milk, Class I butterfat and Class II skim milk.

An NMPF witness testified in support of Proposal 13. The witness reviewed the 2000 Federal Order Reform (Order Reform) rulemaking and summarized the higher-of methodology as accurately reflecting the value of the different milk use categories and ensuring shifts in demand for any one manufactured product does not lower Class I prices. The witness said the Department determined during Order Reform that the higher-of mover addresses disorderly marketing by reducing volatility in milk prices, reducing class price inversions and depooling, and assisting Class I handlers in competing for a milk supply.

The NMPF witness testified the 2019 change to the average-of was designed to facilitate price risk management strategies for fluid milk processors, which, the witness stated, is not an objective of FMMOs. The witness said the intent of the change was to be roughly revenue neutral, while allowing handlers to better manage volatility in monthly Class I skim milk prices using Class III and Class IV milk futures and options contracts. The witness claimed the 2019 change has not functioned as intended or anticipated by NMPF, has exacerbated disorderly marketing conditions, has not been revenue neutral, and will continue to have deleterious effects on the dairy industry. The witness described the asymmetrical risk to producers which was not anticipated when the mover change occurred. The witness explained the higher-of exceeds the average-of calculation whenever the Class III and IV advanced skim milk pricing factors differ by more than \$1.48 per cwt, regardless of which factor is higher. The witness noted the reverse is true when the advanced skim pricing factors differ by less than \$1.48 per cwt.

A witness from Southeast Milk, Inc. (SMI), an NMPF cooperative member with 114 dairy farmer members, testified that when the two advanced skim milk pricing factors are equal, the maximum amount by which the average-of can exceed the higher-of Class I mover is \$0.74 per cwt, but there is no limit by which the average-of can fall below the higher-of Class I mover. The NMPF witness testified that in 2020 and 2022, there were instances when the average-of mover fell below what the higher-of mover would have been, in which the difference was at times significant. The witnesses testified the maximum divergence recorded between the current average-of mover and the higher-of mover was a \$5.19 lower average-of mover in December 2020, when Classes II, III, and IV skim prices differed by approximately \$11 per cwt. In comparison, the witness said, the maximum gain during that time was capped at \$0.74. The SMI witness said because the upside is capped, but the downside is not, it is difficult to ever return to revenue neutrality under the average-of mover.

The SMI witness testified the average-of mover has lowered dairy farmer revenue compared to what they would have received under the higher-of mover, with estimated cumulative market losses totaling \$998.3 million from May 2019 through August 2023. The witness said that for the same period, the average-of mover decreased revenue to the southeastern FMMO producers by more than \$192 million. The NMPF witness reviewed data during periods of relative price stability, revealing the average-of mover generated modest gains over the higher-of mover. However, in periods of price volatility, there were substantial revenue losses in months when the average-of mover was less than the calculated higher-of mover, which resulted in significant cumulative losses to producers over time.

The NMPF witness claimed the change to the average-of mover increased disorderly marketing by reducing Class I prices relative to the other classes and creating greater incentives for handlers to depool milk. The witness said that in 2020, the enhanced demand for cheese relative to the demand for butter and NFDM widened the spread between Classes III and IV well beyond \$1.48, substantially lowering Class I prices compared to what they would have been under the higher-of mover. The SMI witness testified that between May 2019 and June 2023, the Class III skim value exceeded the Class IV skim value by over \$1.48 per cwt in 16 months, and

the Class IV skim value exceed Class III skim value by \$1.48 or more per cwt in 11 months. In 2023, according to the SMI witness, the average-of continued to be lower than the higher-of in some months, which had a more significant impact to dairy farmers because it occurred during a time of extremely low dairy farm margins. The witness said they expect to see more volatility and larger spreads between Class III and Class IV prices in the future because of anticipated higher butterfat prices which will lower the Class III skim value.

The NMPF witness testified that adoption of the average-of mover created class price inversions and resulted in significant volumes of depooled Class III milk during the second half of 2020. Class price inversions occurred again in 2022 and 2023, said the witness, resulting in price volatility and substantial depooling of Class IV milk. The witness opined a wide variety of market conditions have proven capable of generating market volatility, driving a wedge between Class III and IV skim milk prices, and resulting in an average-of mover of more than \$1 per cwt below what the higher-of mover calculation would have been.

The NMPF witness said the average-of mover has not resulted in increased risk management activity at a value to handlers anywhere near the losses experienced by dairy farmers.

Numerous witnesses testified their fluid milk customers have shown very little interest in hedging milk since the average-of mover was implemented.

NMPF witnesses testified other Class I mover proposals under consideration in this proceeding use the higher-of mover calculation as the benchmark for determining adequate Class I skim milk price revenue. They testified those proposals provide producers revenue in an after-the-fact-manner that fails to maintain the maximum monthly separation between advanced Class I prices and the manufacturing class prices, a goal expressed by the Department when it recommended the higher-of mover during Order Reform.

The SMI witness testified that because of the change to the average-of mover, the southeastern FMMOs experienced disproportionately large reductions in blend prices due to the higher Class I utilization in the region, making it harder to attract supplemental milk the region requires to meet fluid demand. The witness noted that using an average-of mover to establish a Class I skim price makes it more difficult for Class I handlers to procure milk from plants with higher-value manufactured products because the price difference is

not large enough to draw milk away from manufacturing. The witness opined a Class I skim mover should provide for orderly marketing by ensuring an adequate supply of raw milk for fluid plants, producer price equity including prompt and uniform payments to farmers and cooperatives, and stability for dairy farms. The witness argued the current average-of mover makes it more difficult for FMMOs to achieve those purposes.

An NMPF consultant witness testified the higher-of mover is necessary to transmit market signals in real time. The witness said a higher Class I milk price relative to other class prices sends market signals to move milk from surplus to deficit regions to ensure adequate fluid milk supplies.

Additionally, the witness continued, disorderly marketing caused by prolonged depooling occurs when the Class I price is lower than Class II, III, or IV prices. The witness asserted prolonged periods of depooling create market disorder. Since the change in 2019, claimed the witness, the Class I mover has facilitated persistent long-term periods of depooling because there is no guarantee Class I prices will exceed the other class prices over time. In contrast, the witness asserted that under the higher-of mover, if Class III and IV advance skim prices increased, the Class I price would remain higher and depooling would moderate.

The NMPF witness presented data to demonstrate the objective of adopting the average-of mover, to allow for greater risk management, has not been accomplished, and prolonged periods of depooling have made it difficult for producers to hedge their farm margins. The witness stated that when milk is not pooled, producer hedging losses cannot be offset by gains on milk checks because revenue from the higher valued manufacturing milk is not shared with the marketwide pool. The witness asserted risk-management performance is relatively similar under the higher-of and average-of movers, entering data they believed showed how Class III futures contracts would similarly mitigate risk. The witness contended other proposals do not adequately replicate the higher-of price in future periods; nor do they share equally among dairy producers and others, necessitating periodic recalibration. Rather than recognize the average-of limitations, the witness said, other proposals seek to align the average-of and higher-of performance. The witness testified an average-of mover with an adjuster causes past market conditions to influence current prices, sending pricing misinformation to the market

and causing disorderly marketing. The witness concluded that without immediate market signals from the advanced Class III and IV milk prices, any of the average-of or Class III plus movers would struggle to replicate the higher-of mover performance.

An NMPF witness representing Prairie Farms testified producer revenue has been significantly reduced, without recovery, since the change to the average-of mover. Prairie Farms is an Illinois based farmer-owned milk cooperative with over 600 dairy farmer members operating fluid milk processing and manufacturing facilities that produce a variety of fluid and manufactured dairy products. Increased depooling in the last few years because of the average-of mover has resulted in increased price volatility, the witness said. The witness testified that with the average-of mover either Class III or Class IV milk is not pooled, depending on which class is higher, because the manufacturer is able to keep the additional market revenue instead of sharing it among pooled producers.

The Prairie Farms witness testified dairy producers want a pricing system that gives real-time market signals, which is accomplished with the higher-of mover. The witness testified Prairie Farms supported the change to the average-of mover believing it would facilitate their customers' ability to hedge Class I milk. However, Class I processors have generally not increased their use of hedging, said the witness, while dairy producers have taken on additional risk by giving up a higher Class I price. The witness stated one reason they believe their customers do not utilize hedging is because of fear of incurring a price disadvantage compared to their competitor. The witness added that of the Prairie Farms dairy farmer members engaged in risk management, there has been a decrease in the use of forward contracting since the implementation of the average-of mover because of negative PPDs, as they create a negative basis dairy producers are unable to account for in their risk management decisions. The witness presented data showing negative PPDs have become larger and more frequent under the average-of mover, which has increased the volume of depooled milk and significantly reduced revenue to farmers.

Another NMPF witness representing Upstate Niagara Cooperative (Upstate Niagara) testified the average-of mover has not operated as intended, has negatively impacted producer revenue, and has exacerbated disorderly conditions. Upstate Niagara is a dairy farmer-owned cooperative marketing the

milk of approximately 250 members and operating eight fluid processing and manufacturing plants in New York and Pennsylvania. According to the witness, under the average-of mover, producers pooled on FMMOs with higher Class I utilization were most severely impacted due to the depressed Class I milk prices and no ability to benefit from the higher priced manufacturing milk. Similar to other witnesses, the Upstate Niagara witness described the asymmetric price risk of the average-of mover.

From interactions with fluid milk customers, the Upstate Niagara witness said there is widespread acceptance of prices based on FMMO monthly price announcements by their conventional customers. The witness said conventional customers have been less interested in pursuing a fixed price if there was any chance it could result in a competitive disadvantage in any given month. The witness recognized there may be some processors or end users in specialized Class I product channels that may utilize hedging but contended it is a relatively small portion of total Class I sales.

A University of Missouri professor testifying on behalf of NMPF presented results of an analysis conducted to evaluate the impact of adopting Proposal 13. The witness testified, under the higher-of mover, Class I prices would increase every year between \$0.32 and \$0.50 per cwt; the Class II price would be between \$0.08 and \$0.12 per cwt less annually; the Class III price would be between \$0.06 and \$0.13 per cwt less annually; the Class IV price would be between \$0.08 and \$0.12 per cwt less annually; and the all-milk price would be between \$0.01 or \$0.02 per cwt higher annually, except for a more significant increase of \$0.06 per cwt in the first year. The witness said the model forecasted the effect on the all-milk price to moderate over time as production expands.

Twenty dairy farmers testified in support of Proposal 13. Many dairy farmers testified blend prices have been lower and their milk prices have been reduced since the average-of mover was implemented. They said only when Class III and Class IV prices are within a narrow range of each other is the average-of mover equal to or outperforming the higher-of mover. The witnesses said their experience supports NMPF's assertion that farmers' milk prices have been reduced by \$950 million, and the reduction is not just a COVID-era anomaly. Dairy farmer witnesses said the losses demonstrate the goal of revenue neutrality with the change to the average-of has not been achieved. One witness asserted that in

29 of the 52 months since the average-of was adopted, Class I prices averaged \$1.30 per cwt less than what the price would have been under the higher-of mover. In comparison, said the witness, in the remaining 23 of the 52 months the average-of returned a price only \$0.42 higher per cwt. The witnesses testified to near-universal support by dairy farmers for a return to either the higher-of or, under the average-of, a mechanism to be equal to the higher-of over a period of time, such as 24 months.

Several dairy farmers urged a return to the higher-of mover, claiming a need for financial relief as dramatic shifts in milk markets since implementation of the average-of mover have caused significant financial losses to dairy farmers. Dairy farmers reiterated the average-of mover change affects 100 percent of pooled producer milk while it is unlikely fluid milk processors are covering 100 percent of their products with risk management tools. A dairy farmer testified they were assured the change to the average-of would be net neutral or net positive, but it has not been. Many dairy farmer witnesses described losses to dairy farmers under the average-of compared to what the Class I mover would have been under the higher-of and testified to receiving lower blend prices. The dairy farmers were concerned about receiving a delayed value of milk from a Class I mover with a rolling average methodology because they believe they cannot afford to wait months or years for the added revenue. They testified restoring the higher-of mover through adoption of Proposal 13 would help to reduce the volatility in monthly milk prices, bringing more stability and predictability to farmer income.

Dairy farmers of all sizes testified to relying on risk-management tools, such as Dairy Margin Coverage (DMC), Dairy Revenue Protection (DRP), and CME futures and options markets because it is difficult to manage their farms through periods of significant price volatility. Dairy farmers' testimonies described a range of contract periods, anywhere from 3–18 months, depending on the individual farmers' risk-management strategy and risk tolerance. In its post-hearing brief, NMPF reiterated hearing testimony arguing the average-of mover does not meet the standards set forth in Order Reform, and the change has not been revenue neutral as originally assumed. NMPF restated that under the average-of mover, price inversions, volatility, and depooling have increased, and Class I prices have been less effective at incenting milk to fluid processors relative to

manufacturing. NMPF reiterated the asymmetrical risk borne by dairy farmers with the average-of mover and the frequency of which the difference between Class III and IV prices exceeded \$1.48 per cwt, effectuating that risk.

NMPF reiterated the average-of mover failed to send appropriate market signals to participants because the fixed adjuster could not maintain the maximum monthly separation between the advanced Class I and the manufacturing class prices. NMPF wrote this increased the likelihood manufacturing classes would have a higher value than milk used in Class I and resulted in increased volumes of depooled milk. Under the higher-of mover on the other hand, NMPF argued, when a particular manufacturing class price is rising, the Class I price also rises and tends to maintain Class I as the highest priced class. To dampen the effect volatility in the manufacturing classes has on Class I, the highest priced manufacturing class should provide the foundation for ensuring the Class I price remains above the manufacturing classes almost every month, reducing the incentive to depool, which is disorderly.

The demand for Class I hedging is not clear, NMPF asserted in its brief, and no evidence was presented to suggest more than a small minority of the overall fluid market utilizes hedging, especially beyond ESL handlers. NMPF argued in its brief that while facilitating risk management for fluid processors may have merit, it is not an objective of FMMOs. In regulating processors, the AMAA only considers price uniformity to processors, NMPF asserted. Finally, NMPF restated in its brief the widespread support of producers for a return to the higher-of mover.

The Dairy Cooperative Marketing Association, Inc. (DCMA), a Capper-Volstead Marketing Agency in Common with nine cooperative members in the southeastern U.S., submitted a post-hearing brief in support of Proposal 13. In its brief, DCMA argued the change to the average-of mover has not been revenue neutral to dairy farmers, nor provided benefits to the industry as originally intended. According to DCMA, the hearing record demonstrates that little Class I hedging occurs, especially on HTST milk, and includes no evidence that the use of hedging is more prevalent now than prior to the change. DCMA stated most testimony demonstrated HTST milk is sold based on FMMO announced prices each month plus a fixed margin. Because revenue on packaged milk sales flows back to the processor in step with the

monthly changes in the FMMO announced prices, there is no price risk to the Class I processor under this system, according to DCMA. In its brief, DCMA described the pronounced losses in the southeastern region as a result of the change to the average-of mover.

The MDC submitted a post-hearing brief in support of Proposal 13, expressing the importance of making the changes as part of the FMMO reform process underway. MDC conveyed in its brief the importance of ensuring all reforms are considered in concert since all changes have ripple effects throughout the entire system and across all classes of milk.

In its post-hearing brief in support of Proposal 13, Select reiterated the proposal would support the priorities expressed by the Department in Order Reform, the rationales of which remain true today. Select cited billions of dollars lost to producers, an increase in depooling, and a lack of Class I handlers hedging their milk costs as reasons the average-of has failed.

In both witness testimony and briefs, IDFA and MIG strongly opposed a return to a higher-of mover. A majority of their opposition was contained in supporting testimony and evidence for Proposals 14 and 15, as detailed below.

A witness representing IDFA testified in support of Proposal 14. The witness said the goal of Proposal 14 is to keep producer Class I revenue consistent with what would be experienced under the previous higher-of mover, while allowing for effective and affordable Class I risk-management strategies.

The IDFA witness claimed that in the long-run, the proposed Class I mover would never fall below what the Class I skim milk price would have been under the higher-of mover. According to the witness, Proposal 14 would have paid more than the higher-of mover in 13 of the past 21 years. The witness asserted dairy farmers are “made whole” as compared to the higher-of mover over time through the annual adjuster calculation. The witness presented data from 2003 through 2019 showing Proposal 14 would have yielded a Class I price \$0.08 greater than the higher-of mover. For 2004 through 2023, the witness said Proposal 14 would have yielded a Class I price \$0.05 higher, due to the \$0.74 floor.

The IDFA witness entered data and analysis to show the volume of milk not pooled would be slightly less under Proposal 14 than Proposal 13, and the Class I price would be lower than Class III or Class IV prices in nearly the same number of months under both proposals. The IDFA witness presented an analysis showing Proposal 14 would

have reduced price volatility with the only exception of very high cheese prices in 2020. According to the witness, volatility equates to greater price risk, which increases hedging costs, and ultimately higher consumer prices.

The IDFA witness countered claims the higher-of mover sends important price signals to dairy farmers through the Class I price, instead claiming the blend price sends more important price signals because it is the price farmers receive. The witness alleged there is little difference between signals sent by the blend price under Proposals 13 and 14, arguing that from 2012 to 2022, Proposal 13 would average 31.9 percent of the Class I value in the blend price while Proposal 14 would average 31.8 percent. As the impact on the blend prices is very similar, over time there is little difference in price signals between the proposals, the witness said.

Regarding the delay incorporated by the rolling adjuster and farmers possibly not receiving the make-up payments, the IDFA witness noted farmers go out of business for many reasons, and some may go into the business or expand and benefit from higher payments. The witness said this issue is no different than handlers going out of business before the make allowances are raised.

The IDFA witness testified hedging is a critical tool for the subset of innovation and value-added milk manufacturers to remain competitive with alternative beverages. In the few growing segments of the milk market, especially ESL and higher value-added products, retailers are demanding processors provide long-term fixed price contracts, rather than contracts with fluctuating monthly prices, the witness said. Since processors cannot enter into a fixed purchase price for raw milk with their milk suppliers, hedging allows processors to take on the risk of entering into a fixed sales price for its finished products and cover the risk of raw milk prices rising during the contract period, the witness testified.

The IDFA witness noted several ESL processors formed and quickly implemented risk management plans in anticipation of the change to the average-of mover. The witness noted ESL processors are interested in hedging because of the longer product shelf-life. According to the witness, a risk management plan allows a processor to level out what could otherwise be very different costs of milk products that could have been produced at significantly different times but are being sold to the customer at the same point in time. The witness noted more hedging of HTST products is done by

end users, such as foodservice customers, not processors. The witness testified that while risk management is not a stated objective of the AMAA, a stable price, promotion, and growth of the sale of milk are, and the ability to use risk management tools results in stable prices and increased sales.

The witness testified IDFA would support a rolling average longer or shorter than 24 months, but the 12-month implementation lag is essential to allow for hedging. The witness testified Proposal 14 calculates the adjuster from August through July because long term Class I sales contracts between processors and retailers are often negotiated and entered into during the final months of the calendar year. To allow for effective hedging for those contracts, Class I processors would need to know at the time of the contract negotiations what the adjuster would be for the next calendar year. The witness supported Proposal 15 as an acceptable alternative to Proposal 14.

A dairy processor witness representing Schreiber Foods (Schreiber) testified in support of Proposal 14 or 15. Schreiber is a fluid milk processor primarily manufacturing Class II and Class III products, with approximately 5 percent of their products sold as ESL Class I products. The witness testified that over the past 20 years risk management has become a necessary tool for companies with exposure to dairy market volatility. The witness said that only since the change to the average-of mover in 2019 have milk processors had a viable way to manage risk. The witness testified that, in response to requests from foodservice and retail customers to manage Class I costs, Schreiber has offered Class I forward contracts since 2019. Prior to 2019, the witness said creating an effective hedge for Class I milk was challenging as it was unknown whether Class III or Class IV would be the mover. The witness stressed the change to the average-of allows purchasers to use a combination of Class III and Class IV hedge positions, which gives everyone in the supply chain the ability to control their market risk in a way that was not previously possible under the higher-of.

According to the witness, Schreiber hedges price risk for its ESL production through a combination of Class III and IV futures and swaps, and Class I swaps, which typically go out 12 to 18 months. Under Proposal 14, the witness explained, market participants will know the fixed adjuster in advance of the calendar year in order to conduct their hedging analyses for the coming year. If the Class I mover were to revert to the higher-of, the witness testified

they would have to either find a different way to hedge or cease offering forward contracts on their ESL products.

A witness representing Nestlé USA (Nestlé) testified in support of Proposal 14. Nestlé is a fluid milk processor operating one plant regulated by the FMMO system. The witness testified that Nestlé procures milk from cooperatives using contract agreements and offers its customers an annual fixed price contract for their primary Class I product, an ESL product. The witness stressed the importance of hedging to manage risk and compete in the market against nondairy beverages. The witness stated Nestlé did not use hedging for Class I under the higher-of mover because not knowing which class price would be higher caused uncertainty. The witness testified Nestlé currently hedges all its Class I milk purchases using Classes III and IV futures contracts, and while they have an 18-month outlook they typically hedge Class I milk 6 months out. If USDA returns to the higher-of mover, the witness testified, Nestlé would not be able to continue hedging its Class I milk. The witness testified price volatility has specific impacts on ESL products, as it is challenging for retailers to set different prices due to monthly milk price fluctuations for two identical products sold at the same time but produced in different months.

A witness representing Lamers testified in support of Proposals 14 and 15 stating those proposals would help smooth out the volatility in the pricing of Class III and Class IV.

In its post-hearing brief, IDFA reiterated the importance of hedging to processors for managing price risk and volatility and claimed effective hedging could only be achieved with an average-of mover. IDFA noted that when price uncertainty does not allow fluid milk processors to manage risk 6 to 12 months out, they risk losing shelf space to plant-based and other alternative beverage products that can offer fixed prices. IDFA argued that the choice for a fluid milk processor, especially with respect to ESL products, higher value-added products, and foodservice, is increasingly between offering stable pricing and long-term contracts demanded by customers or losing shelf space to competing beverages. Pricing stability and long-term contracting are facilitated by hedging, according to IDFA. IDFA stressed the growing need for Class I hedging because of increased volatility between the manufacturing classes.

In response to criticism of Proposal 14, IDFA wrote the average-of mover does not create price inversions or lead

to milk not being pooled, arguing depooling occurs because of the price relationships between classes, and is caused by negative PPDs and pooling requirements. IDFA also wrote that the average-of mover does not increase price volatility, unlike a higher-of mover which routinely and unpredictably switches between Class III and Class IV. Finally, IDFA asserted the value of Class I products is not necessarily related to the value of Class III or IV products, thus, the higher-of does not better reflect the value of milk than the average-of mover.

NAJ submitted a post-hearing brief in support of Proposal 14, arguing it better protects long-term producer milk revenue, provides less Class I price volatility, and preserves equitable risk-management opportunities for Class I handlers who are required to participate in the FMMO system. NAJ noted the perception a return to the higher-of mover would produce higher producer Class I revenues is based on highly divergent Class III and IV price movers and an expectation this will continue in the future. However, NAJ argued in its brief this price divergence analysis does not account for composition factor amendments nor potential Class I differential amendments. With revised composition factors, NAJ asserted, a restored manufacturing to Class I price spread would mitigate price inversion and depooling.

A MIG witness testified in support of Proposal 15 seeking to amend the average-of mover from a \$0.74 adjuster to a rolling 24-month adjuster with a 12-month lag. The witness claimed the movers contained in Proposals 14 and 15 provide similar base Class I skim milk prices and have similar effects on producer prices. The witness explained in certain years Proposal 15 would return more money to farmers than the higher-of, and even if farmers do not experience the benefits of a high manufacturing price immediately, they will over time through the lagged adjuster. The witness presented data comparing the monthly average base Class I skim milk price calculated under the current mover, the higher-of mover, and Proposal 15 from 2003 to 2022 to show Proposal 15 would be revenue neutral in the long run.

The MIG witness testified Proposal 15 preserves risk-management opportunities for both producers and Class I processors, which is part of orderly marketing. The ability to hedge Class I milk became effective in 2019, followed by the pandemic and regulatory uncertainty as to whether the average-of would remain, and time, resources, and lack of knowledge

slowed the adoption of Class I risk-management strategies, the witness testified.

Five MIG member witnesses representing fairlife, HP Hood, Turner Dairy, Shehadey, and Crystal Creamery testified on the importance of hedging Class I milk. The fairlife and HP Hood witnesses said they primarily process ESL products, which they hedge using CME Class III and IV component and commodity futures. The HP Hood witness stated they do not hedge HTST milk because it is primarily sold through direct store delivery where the standard business practice is monthly pricing. However, ESL products are distributed primarily through grocery warehouses and buyers expect 60 to 90 days' notice for any price changes, the witness said. The HP Hood witness stated the ability to hedge has not changed their ESL pricing strategy but has allowed for fewer price increases. In earlier testimony a witness representing Shamrock, also a MIG member, said they manufacture both HTST and ESL products and hedge milk used in their ESL products.

A processor witness representing Shehadey testified contracts with retailers such as grocery stores use a fixed formula that changes monthly, quarterly, or semi-annually, and are based on FMMO prices. The witness testified Shehadey has only HTST Class I milk products and they do not use any form of risk-management tools to hedge their risk. The Turner Dairy and Crystal Creamery witnesses said their companies primarily process HTST Class I milk products which they currently do not hedge. Both witnesses expressed value in hedging HTST milk sold to foodservice, as foodservice customers prefer to know prices months to years in advance. The fairlife and HP Hood witnesses testified hedging under the higher-of mover was difficult due to price volatility and uncertainty, but the average-of mover allows them to offset the risk. The witnesses also testified it takes time to develop a robust hedging program. The HP Hood witness stated Class I hedging is primarily used by more sophisticated operators, but as Class I hedging becomes more accepted, the market should become more liquid, and more processors will likely use this risk-management tool. The fairlife witness said fairlife typically hedges its ESL Class I products, mainly 0 to 6 months out, but contracts could extend up to 12 months.

A MIG witness explained that the adoption of Proposal 15 would allow for less price volatility throughout the market and support industry growth by stabilizing the cost of milk for retailers

and consumers. Hedging, the witness said, is important to offering customers and consumers a more stable price, which could stem the declines in fluid milk as fluid milk competes with many beverages in the market. The fairlife witness testified that price certainty translates to price stability for both the retailer and the consumer. The HP Hood witness testified the goal of hedging is not to make a higher return, but instead to act as price risk insurance by removing some input price volatility and increasing margin certainty for end-product sales. The Turner Dairy witness testified the average-of mover results in more price stability which is beneficial to the Class I market. The witness said under the higher-of formula, the Class I price went up with every spike in butter, cheese, or powder markets, even though short-term changes in those product prices have no direct effect on the actual Class I market. The witness argued the price spikes necessitated raising prices to cover cost, without a market-based explanation to provide to customers.

The MIG and fairlife witnesses testified in support of the 12-month lagged adjuster contained in Proposal 15, stating it is critical to allow Class I processors to mitigate risk and hedge successfully. Knowing the adjuster 12 months in advance allows companies who hedge to reduce or eliminate basis risk, the witness said, while the 24-month rolling adjuster updates and provides dynamic market signals. The witnesses said Proposal 15 would stabilize prices by moving gradually and make fluid milk products a more reliable and steady purchase for customers. Proposal 15 has no floor or ceiling, as the witness testified MIG members believe floors and ceilings can create price distortions. The witnesses testified a lookback of less than 24 months would create more volatility, while a longer lookback does not transfer market signals well over time. The fairlife witness testified the 12-month lag is necessary to be able to buy futures 12 months out. The 24-month rolling average adjuster allows the system to recognize the difference between Class III and Class IV prices and what the higher-of mover would have been, the witness said, allowing the industry to know definitively what the premium structure is going to look like associated with the adjuster 12 months into the future.

In its post-hearing brief in support of Proposal 15, MIG argued USDA should first assess whether the current average-of formula has resulted in disorderly marketing. MIG wrote the current average-of mover ensures the market has

sufficient milk for both fluid and manufacturing uses and there is not disorderly competition for fluid market access. MIG argued a return to the higher-of under Proposal 13 would not provide higher returns to farmers, estimating a minimal impact of a \$0.01 to \$0.02 per cwt increase in the long term. However, MIG argued in its brief, the return to the higher-of mover would have significant negative impacts on the Class I market and the entire dairy industry. There is no asymmetrical risk inherent in Proposal 15, MIG argued in its brief, unlike the present average-of mover formula.

According to MIG, the use of risk management developed primarily after the average-of formula was adopted and is likely to grow in the future. MIG stated Class I processors do currently use risk-management tools to hedge ESL products, as this sector has historically utilized more fixed pricing, meaning hedging can be more easily adopted. MIG stated many HTST customers, such as grocery stores, have become accustomed to the monthly fluctuations of pass-through pricing, but HTST customers, such as school lunch programs or USDA feeding programs, would benefit from the increased price certainty that comes with an average-of calculated mover. The industry has not yet had time to widely adopt risk management, MIG reiterated in its brief, and regulatory uncertainty due to this proceeding has caused processors to hesitate further use of risk-management tools.

MIG noted in its brief that even though the AMAA does not specifically provide for hedging, a Class I formula that supports hedging helps serve the enumerated purpose of the AMAA of avoiding unreasonable price fluctuations and reducing milk price volatility. When Class I processors can better manage risk, they can offer more stable prices to customers and consumers, MIG argued in its brief.

In its brief, MIG reiterated hearing testimony that use of an average-of mover best ensures an orderly market, and sufficient supply of milk for fluid use, including the most accurate pricing signals for dairy farmers in a longer, and more appropriate, time. MIG took exception to arguments that the Class I price be used to address price inversions and depooling. Using a California pool example, MIG argued that record evidence shows the Department would have to increase the Class I price an impractical amount to incentivize both manufacturing classes to remain pooled. MIG reiterated many factors cause depooling and negative PPDs, and neither the Class I price nor

use of an average-of mover drive those results. Rather, according to MIG, the main drivers of depooling in the months reviewed in testimony were the Class III/IV spread and advanced pricing.

In its brief, MIG argued a return to the higher-of mover will not help Class I handlers in competing for milk supply as a higher pool obligation detracts from the incentive to service Class I plants. MIG reiterated hearing testimony that the current marketplace is sufficiently served using an average-of formula.

Lamers submitted a post-hearing brief in support of retaining an average-of mover. Lamers argued that because of the small percentage of Class IV use in the market, Class IV prices should not be a main driver for setting the Class I price, as an average-of mover is more representative of the entire manufacturing market. Lamers preferred the lower of the Class III and IV prices should be used when setting the mover as they believe the higher-of artificially raises Class I prices to consumers.

NMPF presented numerous witnesses who testified in opposition to the continuation of the average-of mover, embedded in the summary of their testimony and post-hearing brief presented above. An SMI witness opposed a modified average-of mover, testifying it would result in revenue losses to dairy farmers because the Class I price is paid back to dairy farmers over time and would not compensate dairy farmers that have exited the business.

Select expressed opposition to Proposals 14, 15, and 16 in its post-hearing brief. Select wrote that the higher-of more accurately reflects the value of milk in manufacturing classes, better manages shifts in demand for any one manufactured product, helps reduce milk price volatility, better addresses class price inversions and depooling, and makes it more difficult to draw milk away from Class I uses for manufacturing. Select noted most Class I handlers have not engaged in milk hedging under the average-of mover, and the average-of mover creates and exacerbates opportunistic depooling when Class III and IV prices diverge significantly. Select opined the average-of mover results in market disorder which they believe would continue until the higher-of mover is restored.

In its post-hearing brief, the AFBF opposed Proposals 14 and 15, arguing they do not address the key issue of class price misalignment. The AFBF believes handlers of all sizes can find alternative methods of managing risk under a higher-of mover.

A witness representing Edge testified in support of Proposals 16 and 17. The witness advocated for the adoption of

Proposal 16, referred to as a Class III plus proposal, because the Class III price is typically higher than the Class IV milk price. In times of rapidly declining dairy prices brought on by a decrease in demand, the witness said, government recovery efforts typically prioritize more perishable products, usually Class III. The witness said this would result in higher Class III prices in relation to Class IV, and consequently a base Class I skim price under Proposal 16 approximately equal to the higher-of mover. According to the witness, in situations where the Class IV skim milk price is higher than the Class III skim milk price, any lost revenue would be redistributed to producers over the next three years through the adjuster and would better support dairy farmers during years of lower profitability. The witness testified risk management under Proposal 16 is easy to implement and less expensive due to high liquidity of Class III milk futures, creating more predictable prices and making fluid milk products competitive with plant-based beverages. The witness testified Edge would support a monthly rolling adjuster in place of an annual adjuster.

The Edge witness testified that as Class I utilization rates continue to fall, advanced pricing would continue to cause disorderly marketing conditions such as opportunistic depooling. The witness said advanced prices are antiquated and anti-competitive and their elimination would encourage fluid plants to use risk management. The Edge witness entered data showing the contribution of various factors to negative PPDs. The witness testified that while the change to the average-of mover tended to make PPDs more negative, advanced prices and the spread between Class III and IV influenced pooling decisions, not the adoption of the average-of mover. The witness testified that if the Class I price was announced at the same time as the Class III and Class IV prices, it would prevent a for-profit Class I trading relationship between Class III and Class IV, and the CME group would be more likely to create a Class I futures contract. The witness expressed a strong preference for Proposal 16, which they argue balances producer, processor, and consumer needs and supports risk management which they said was critical for the success of the nation's dairy farmers, particularly fluid sector innovators.

The Edge witness also testified in support of Proposal 17, returning to the higher-of mover without advanced pricing. The witness said the proposal would allow the Class I futures price to be equal to the greater of the Class III

futures price and the Class IV futures price. Risk management players would have minimal risk in providing liquidity to Class I hedgers by spreading their position between Class I and the higher-of Class III or IV futures. The witness testified dairy producers may prefer the higher-of mover without advanced pricing, such as Proposal 17, as it provides real-time maximum income for Class I milk, whereas Proposal 16 is more of a compromise.

The Edge witness stated that since 2010, total fluid milk sales have been steadily declining, adding more instability and difficulties hedging under the higher-of mover. The witness entered data showing how much more risk and costs were involved to hedge under the higher-of mover than the average-of mover. The witness concluded a person hedging with futures contracts under the higher-of mover would have significant difficulties, but hedging under the average-of mover meets effectiveness standards required for hedge accounting.

Nine dairy farmer witnesses, located in Wisconsin, Minnesota, Iowa, and South Dakota, testified in support of Proposals 16 and 17. The dairy farmers opined Proposals 16 and 17 would decrease the frequency of negative PPDs and depooling and enhance their ability to manage price risk through hedging and other risk-management programs. One witness said using only the Class III skim price to set the Class I skim price is the best option because Class III milk futures carry more liquidity than Class IV and better represent Class I prices. The witnesses testified Proposal 16 would help keep prices steady, benefitting both plants and customers.

In its post-hearing brief, Edge objected to what it believes are goals of some proponents to maximize FMMO Class I handler obligations in order for the additional revenue to be used to offset the negative producer impact of increasing make allowances. Edge argued the Department should consider the following factors in its decision: there have not been any significant shortages in the supply of beverage milk to retail stores; Congress' reason for changing to the average-of mover to facilitate risk management by fluid milk processors which fluid milk processors testified is still relevant; advanced pricing is outdated and no longer necessary to facilitate supply chain coordination but instead facilitates opportunistic depooling; a mover resulting in the highest fluid milk price when the Class IV price substantially exceeds Class III is not in the best interest of consumers; and a mover

resulting in the highest fluid milk price when the Class IV price substantially exceeds Class III is not in the best interest of all dairy farmers. Edge argued dairy farmers located where Class I utilization is low may be worse off under a higher-of mover than an average-of or Class III-based pricing as proposed by Edge.

Edge reiterated Proposal 16 would facilitate risk management by fluid milk manufacturers and large commercial buyers, eliminate outdated advanced pricing and reduce the incidence and magnitude of opportunistic depooling, and best serve both producer and consumer interests.

A witness representing the AFBF testified in support of Proposal 18. The witness said the AFBF believes orderly pooling is the key to orderly marketing, and this is best accomplished by the proper alignment of the four class prices. The witness claimed advanced Class I pricing leads to increased Class III component values, a common factor contributing to negative PPDs. The witness said advanced prices reflect market conditions that are 25 to 40 days older than final prices, which are announced after the close of the month. When a market rally occurs between the announcement of advanced and final prices, the witness said it leads to low or negative PPDs and creates incentives for handlers to depool milk. The witness stated depooling results in elevated component prices not being shared with the pool, further depressing the PPD and undermining the FMMO principle of uniform producer prices. The witness testified advanced pricing may also cause price inversions when manufacturing prices are rising rapidly, making it difficult for Class I handlers to attract adequate milk supplies. The witness entered data showing the effects of advanced pricing on class price alignment from May 2019 to May 2023 under the current average-of, and under Proposals 13, 17, and 18. The witness said this data showed many months under the current average-of mover and Proposal 13 in which the manufacturing class prices exceeded the Class I price, testifying this created disorderly marketing conditions. On the other hand, according to the witness, the data showed elimination of advanced pricing under Proposals 17 and 18 resulted in more consistent alignment of class prices.

The AFBF witness testified the frequency of published commodity data allows handlers to estimate price changes regardless of when prices are announced, and as more products are available on the CME or other exchanges, processors and

manufacturers will have information needed to hedge and manage risk. The witness opined that the elimination of advanced pricing would allow for the introduction of Class III and IV spread options, providing an additional way to hedge Class I milk when both are used in combination. Three dairy farmers testified in support of Proposal 18, stating the proposal would reduce the incentive to depool brought on by low and negative PPDs.

The AFBF witness also testified that while they support the elimination of advanced pricing, they oppose Proposal 16 because it would delink Class I prices from Class IV prices, which they anticipate being higher than Class III in the future due to better export markets. The witness said tying the Class I price to only the Class III price could operate more like a "lower-of" formula. The witness stated the AFBF supports Proposal 17 because it is identical to Proposal 18 if combined with Proposal 13.

In its post-hearing brief, the AFBF reiterated its support for a return to the higher-of mover, which it argued would support class price alignment and substantially decrease negative PPDs and depooling.

The AFBF reiterated its hearing testimony that volatility has and continues to increase, contributing to price inversions and rapidly changing markets, resulting in competitive inequalities among dairy farmers. The AFBF said the CME has indicated a willingness to provide contracts catering to industry demand, and the fact that the industry is used to advanced pricing should not be a driving reason for its retention. The AFBF argued disorderly marketing conditions are present when producers do not receive uniform prices because of frequent depooling, and its proposals lead to the realignment of class prices, which encourage consistent pooling and uniform pricing.

An SMI witness, appearing on behalf of NMPF, testified in opposition to elimination of advanced pricing as contained in Proposals 16, 17, and 18. The witness said 90 percent of packaged fluid milk is highly perishable HTST milk which is processed, packaged, distributed, and sold in a relatively short period. The witness said these marketing characteristics require the price of the product to be known at the time of purchase, which advanced pricing of Class I milk provides. According to the witness, most HTST packaged fluid milk is priced monthly by fluid processors to their customers based on monthly FMMO Class I prices. This is materially different from cheese and butter products, the witness said,

the prices of which are typically based on CME daily cash prices. According to the witness, advanced pricing enables retailers to set store milk prices at the beginning of a month, allowing the fluid processor to know the price the plant would receive for the packaged fluid milk prior to the raw milk being processed, packaged, and sold.

The SMI witness also testified that if advanced pricing was eliminated, retailers would not know their fluid milk costs until the end of the month when FMMO Class I prices are announced. This would mean most fluid milk purchased by retailers would be sold during the month without knowing its minimum regulated price which, the witness said, from a retailer's perspective is not orderly marketing. The witness claimed that if there were significant month-to-month increases in the Class I price, retailers could seek price relief from the processor, and ultimately, cooperative suppliers, opening the potential for fluid milk processors in the same marketing area to have inequitable raw milk costs and non-uniform payments to producers. In its post-hearing brief, NMPF reiterated its opposition to the elimination of advanced pricing.

A witness representing IDFA opposed Proposals 16, 17 and 18. The witness objected to the elimination of advanced pricing as it would result in Class I handlers pricing milk products to their customer before knowing the minimum regulated milk price and impact a handler's ability to hedge. In its post-hearing brief, IDFA supported the feature of Proposal 16 that would create a predictable Class I price that could be hedged based off a hedged Class III price plus a known adjuster. However, IDFA maintained its opposition to the elimination of advanced pricing, arguing it is essential for non-hedging Class I handlers to know their milk cost before the start of the month. It is also an important part of planning for fluid milk retail customers to market milk, IDFA stated. IDFA noted in its brief that traditional fluid milk retail customers are not yet using hedging sufficiently to permit a regulatory change eliminating advanced pricing. IDFA reiterated their total opposition to Proposals 17 and 18 in that they would return to a higher-of mover and, according to the brief, eliminate any practical ability to hedge.

A MIG witness testified in opposition to eliminating advanced pricing. The witness said the industry is not yet using hedging sufficiently to permit this regulatory change, as advanced pricing remains critical for the dominant share of the fluid market as retailers expect to know the price in advance. The witness

also opposed Proposal 16, which would price Class I milk solely off the Class III price. The witness said the proposal would delink the fluid milk supply and demand from Class IV which MIG believes is critical for balancing. The witness opposed Proposals 17 and 18 as they limit risk-management opportunities for Class I processors. In its post-hearing brief, MIG reiterated its opposition to any proposal (Proposals 16, 17, and 18) seeking to eliminate advanced pricing, which MIG claimed is critical to Class I processors. MIG further argued that eliminating advanced pricing would negatively impact those market segments. With respect to Proposal 16, MIG expressed concern with pricing Class I milk solely off Class III prices as it would be a significant departure from the current practice and completely divorce fluid milk supply and demand from the Class IV market. According to MIG, the record contains testimony from cooperatives that Class IV remains the ultimate balancing utilization.

In testimony and in its post-hearing brief, MIG opposed a return to the higher-of mover under Proposals 13, 17, and 18 as it would severely limit risk-management opportunities. MIG argued in its brief that a return to the higher-of is unnecessary and not supported by the facts as the industry has acknowledged the higher-of does not work. Dairy farmers' concerns are not about the average-of, MIG asserted, but rather the fixed \$0.74 addition. USDA should support moving the industry forward, not revert to an outdated policy because it is familiar, MIG stated.

MIG argued NMPF introduced no evidence the average-of mover hinders a sufficient supply of milk for fluid uses. Rather, MIG wrote, a return to the higher-of mover would result in disorderly marketing as larger spreads between Classes III and IV would lead to higher prices under the higher-of mover and raise the uniform price, incentivizing the lower-priced manufacturing milk to remain pooled. In that situation, MIG argued, FMMOs should not be raising the uniform price paid out to the lower-priced manufacturing class, thus, encouraging it to remain pooled. This compensation, argued MIG, overvalues the lower-priced manufacturing milk in the marketplace and incentivizes milk to move to the lower manufacturing class instead of to a higher performing class. According to MIG, the average-of mover would better move milk between the manufacturing classes as the market needs. MIG argued the FMMOs are designed to ensure processors have sufficient milk supplies for fluid use,

but FMMOs should not be drawing milk away from Class III or IV when a manufacturing use would be the highest and best value for the milk. According to MIG, Class I does not need more milk, and FMMOs should not be disrupting the market to pull milk for fluid utilization. MIG argued in its brief that revenue neutrality is not a valid policy consideration without evidence to establish revenue neutrality is necessary to ensure a sufficient supply of fluid milk.

A witness representing Lamers testified in opposition to the elimination of advanced pricing in Proposals 16, 17, and 18. The witness stated Class I handlers need to know prices in advance so they can set wholesale pricing with their retail customers.

In its post-hearing brief, Select opposed the elimination of advanced pricing set forth in Proposals 17 and 18, arguing that testimony at the hearing made clear that the majority of producers prefer using the higher-of, and the majority of handlers prefer to maintain advanced pricing which Select believes is in the best interest of stability in the Class I market.

Class I and Class II Differentials

Numerous witnesses appeared on behalf of NMPF testifying in support of increasing the Class I differentials as provided for in Proposal 19. Witness testimony centered around the themes of increased hauling costs, changes in milk supply and demand locations, changes in supply patterns resulting in longer hauls, and insufficient over-order premiums to cover the full cost of servicing the Class I market. The witnesses said the outdated assumptions embedded in the current Class I differentials threaten the willingness of milk suppliers to serve the Class I market.

An NMPF witness argued current differentials are antiquated, since, other than the three southeast FMMOs, they have not been updated in almost 25 years. In that time, they said, fuel costs and hauling distances have increased due to changes in supply and demand locations. The witness stressed over-order premiums should not be considered an effective substitute for FMMO prices because they are very difficult to obtain and maintain at levels adequate to cover the cost of servicing the Class I market. The witness argued inadequate Class I differentials contribute to price inversions and incentives to depool, which further jeopardize the availability of milk to meet Class I demand.

The NMPF witness described the methodology used to arrive at the

proposed differential levels. According to the witness, NMPF requested an update of the U.S. Dairy Sector Simulator Model (USDSS) which was used during Order Reform as a basis for the differential levels adopted on January 1, 2000.

The USDSS model owners testified on the methodology, the updated data and parameters, and explained the results. They explained the USDSS model evaluates the geographic value of milk at fluid milk processing plants across the U.S. by finding the lowest cost solution of assembling milk at farms and delivering it to plants. They said the model accounts for approximately 90 percent of the U.S. dairy processing and manufacturing plant capacity, and considers such factors as milk supply locations, transportation costs (both variable and fixed) associated with raw milk assembly, final and intermediate product distribution, per capita demand by county population, and road weight limits. In the model, plant capacity, products produced, and milk components demanded at each plant are constrained by a variety of government and private sources. The resulting values, said the witnesses, represent the value of an additional load of milk at a specific plant location (otherwise known as the "marginal value").

The witnesses said two sets of USDSS model results were provided to NMPF, May and October 2021, to provide marginal values for both flush and deficit months. According to the witnesses, the results suggest considerable differences between the values of milk at fluid plants derived from spatial economic modeling and current Class I differential values, with differences as large as \$3.00 per cwt in some locations. The witnesses attributed these differences to changes in the location of milk production, the composition of dairy product demand, changes in the location of dairy product demand from regional population shifts, and the cost of transportation. Both witnesses discussed how modeling, even though complex, is a simplification of reality and that there may be unaccounted factors in some areas that would justify deviations from the model results, including local traffic congestion, geography, infrastructure restrictions, and price alignment across orders. The witnesses said the model does not account for other factors, such as existing business relationships and FMMO regulations, because they could cause a departure from a market efficient solution. Lastly, the witnesses noted the USDSS model does not produce a base differential value; it merely provides the additional value

needed to move milk to a particular location.

While NMPF cooperative member witnesses testified on how they used the USDSS model results to arrive at the proposed differentials, NMPF witnesses stated they followed the same iterative process applied during Order Reform, starting with the model results and adjusting for milk movements, plant locations and historic price relationships.

One witness explained that NMPF started with a base differential assumption of \$1.60 per cwt, as currently contained in the Class I differentials. The witness said the costs embedded in the base differential (Grade A maintenance, balancing, and a competitive factor) are still applicable and those costs have not decreased over the past 25 years. The witness said the base differential should also serve to limit class price inversions, incentivize Class I milk deliveries, and ensure class price alignment. To accomplish these goals, the witness said that in some parts of the country the base differential is recommended to increase to \$2.20 per cwt.

One NMPF witness testified regarding the cost to dairy farmers to maintain Grade A status. The witness said that in order to participate in the FMMO program, dairy farmers incur costs associated with obtaining and maintaining Grade A licenses. The witness was of the opinion partial cost reimbursement for maintaining a Grade A license, which currently represent \$0.40 per cwt in the base differential, should continue to be provided. The witness detailed standards for maintaining Grade A status, which include various infrastructure maintenance and sanitation requirements, and estimated a total current cost of \$1.30 per cwt to meet those requirements.

A series of NMPF witnesses testified on the regional considerations factored into the proposed Class I differentials contained in Proposal 19. During their testimony they also touched on balancing costs faced by NMPF cooperative members and the continued need to include a competitive factor in the base differential. One witness described how the average of the May and October 2021 results was used as a starting point. From there, NMPF formed regional committees to evaluate the USDSS model's average results and use their local market knowledge to derive the final proposed differential values. According to the witness, a series of 19 anchor cities were selected for their proximity near the border of where two regions abutted. The regional

committees used these anchor cities as common starting points to design a final Class I differential surface that ensured price alignment between orders. Each committee looked at current price relationships between plant locations and consumer demand areas, compared those to the USDSS model's averages, and designed a Class I differential structure that accounted for factors NMPF members thought were not adequately addressed in the model's results.

Northeast

A DFA witness testifying on behalf of NMPF discussed the changes in the northeast marketing area, including increased hauling costs, changes in the milk production and location of farm and fluid processing plants, and an overall increase in production costs. The witness said milk production in 11 of the 12 northeast states declined from 2000 to 2022, except for New York which saw a 31.4 percent increase, resulting in a small overall increase in the region's milk production of 2.2 percent. During this time, the witness said the resident population increased by 9.1 percent. The witness noted the geographic shift in where milk is processed due to the closure of fluid plants in urban areas since 2000. The witness surmised local milk supplies in the northeast are used to meet increasing Class II and Class III needs, necessitating milk to travel farther distances to meet fluid demand. The witness estimated transportation costs paid by producers in the region have increased \$0.70 per cwt.

An Agri-Mark witness also testified regarding the changing marketing conditions in the northeast region and described some of the proposed differential differences from the USDSS model. The witness opined that if the USDSS model's averages were adopted for Maine, it would incentivize producers in Maine to supply Massachusetts, instead of remaining available to meet local demand. Therefore, the witness said NMPF proposed to flatten the differentials in Maine to maintain current competitive relationships. NMPF also proposed lower differentials in northern Vermont and New York in order to incentivize milk movements south and east. The witness said these changes from the USDSS model's average results are needed to preserve current milk movements and to maintain competitive relationships.

Mid-Atlantic

An MDVA witness representing NMPF testified regarding the proposed

differentials in the Mid-Atlantic region. The witness said MDVA operates two balancing plants in the region that help balance the market's reserves in both the Northeast and Appalachian FMMOs. According to the witness, there are large seasonal swings in milk delivered to those balancing plants, which result in significant costs to the cooperative and its members. The witness was of the opinion the base Class I differential should provide some balancing cost reimbursement to its members through its distribution through the marketwide pool. Transportation costs have also increased significantly, the witness said, to a point where Class I differentials are less effective in attracting milk from reserve supply areas to Class I plants. In order to meet fluid demand, the witness said cooperative members must pay for the additional cost through milk check deductions without any additional compensation through the Class I differential.

The MDVA witness compared current and USDSS model average values for multiple plant locations in the region. According to the witness, the regional committee focused on the need to cover additional transportation costs of servicing the fluid market and maintaining current price relationships as principles when determining deviations from the USDSS model's average results. One example cited two plants in Landover, Maryland and Frederick, Maryland, located approximately 55 miles apart with a current difference in differential values of \$0.10. The witness said the USDSS model's average values would have resulted in a \$0.35 difference and created an artificial regulated cost advantage for the lower zoned plant in Frederick, Maryland. Another example was in the southeastern region where two Virginia plants located 15 miles apart and currently in the same differential zone would have seen a \$0.10 differential difference under the USDSS model's average scenario. In this case, said the witness, the committee decided to propose the same differential value for the two plants in order to preserve their competitive relationship.

Southeast

A DFA witness representing NMPF testified on the proposed differentials in the southeast region. Similar to other witnesses, their testimony centered on the decline in dairy farmers and the closure of fluid processing plants which necessitate longer milk hauls at a greater expense to dairy farmers, particularly cooperative members. The witness spoke to the unique marketing conditions in the southeast region, with

a growing population, local fluid demand, and a significant milk supply deficit requiring supplemental milk supplies to be acquired from outside the region. The witness said the supplemental milk supplies are obtained at great expense to DFA cooperative members. The witness stated it is typical for supplemental loads to travel between 500–650 miles or more, and while the transportation credits in the Southeast FMMO provide partial reimbursement, the fund is inadequate to cover the full cost. The witness said the proposed differentials contained in Proposal 19 would assist in covering transportation costs and support dairy farmers who supply the region.

Florida

An SMI witness representing NMPF testified on the proposed differential for the Florida FMMO. The witness said there is an inadequate milk supply available in Florida to meet its Class I needs, necessitating significant volumes of milk deliveries from outside the marketing area from Georgia, for example. According to the witness, Florida milk production is quickly shrinking, declining more than 10.9 percent in 2022, and necessitating more than 24 percent of its milk needs to come from other states.

The witness discussed Florida's significant population increase and high Class I utilization, which has averaged greater than 82 percent since 2000. The witness described significant seasonal swings in fluid milk needs and SMI's efforts to balance those needs through purchasing additional milk tankers, marketing milk to non-pool plants at below FMMO values when needed and buying supplemental loads at above FMMO values during other times of the year. The witness said weather and the seasonal population influxes also complicate the region's milk balancing efforts. These dynamics make supplying the Florida region particularly expensive, estimating that SMI balancing costs for the first half of 2023 were \$1.33 per cwt.

The SMI witness testified the proposed Florida differentials maintain the historical differential slope while more adequately reimbursing for transportation costs, which the witness estimated has more than doubled in the past 20 years, from \$2.31 in 2002 to \$5.98 in May 2023. The witness said the Florida differentials contained in Proposal 19 are similar to the averages of the May and October 2021 USDSS model results but were adjusted to preserve current competitive relationships. As a result, the witness

concluded the region would be assured an adequate supply of milk for fluid use and fluid milk buyers would be better assured of equal raw product costs.

The SMI witness was of the opinion the differentials should not be adjusted to reflect recently enacted Distributing Plant Delivery Credits in the Florida FMMO, as both are needed to ensure adequate supplies of fluid milk for the region.

Southeast/Southwest

A Lone Star witness representing NMPF testified regarding the differentials between the southwest and southeast regions. The witness said the eastern portion of the Southwest FMMO and the three southeastern FMMOs are milk deficit regions. The witness emphasized the differential recommendations are designed to provide proper financial incentives through a steeper differential slope to move milk into and within those regions. The witness said other factors considered included keeping current city-to-city price relationships as well as competitive relationships between plants often clustered around metropolitan areas. While differentials in some areas were increased relative to the USDSS model's average to reflect NMPF member knowledge of milk movements and related transportation costs in the region, other differentials were lowered. The witness noted NMPF members believe the model overestimated balancing costs for parts of Virginia and the Carolinas, and subsequently is proposing muted differential increases for those regions.

Regarding Florida, the witness said the NMPF members accepted the USDSS model average output of \$7.90 as the differential for Miami, Florida. They then worked up through the state with a priority of maintaining competitive relationships between plants. The only deviation the witness noted was Myakka City, Florida, whose current differential is \$0.40 higher than plants in the Tampa-Orlando corridor. The witness was of the opinion the spread was too large, and, consequently, Proposal 19 recommended the spread be reduced to \$0.20.

In the southwest region, the Lone Star witness said, milk must move significant distances from the supply region in the Texas panhandle and eastern New Mexico to the demand centers in east Texas. The witness said milk routinely travels anywhere from 400–650 miles to service the fluid needs of the state and stressed the current differentials in the region are inadequate in covering transportation costs for these routine milk movements.

Consequently, Proposal 19 generally contained higher proposed differentials than the USDSS model average, with greater increases moving northwest to southeast to incentivize milk to move where needed. The witness added there is a single differential level proposed for New Mexico, reflecting what the witness described as primarily a captive in-state market for milk.

Mideast

A DFA witness representing NMPF testified in detail on hauling assembly costs associated with the Mideast marketing area. The witness described the region's principal supply areas as central and northeast Michigan, northern Indiana and northwestern Ohio, and fluid demand areas centering around the region's large cities of Detroit, Grand Rapids, Indianapolis, Columbus, and Pittsburgh. The fluid plants compete for a milk supply with the numerous small to medium-sized cheese plants in northeast Ohio, two large cheese plants in central and western Michigan and one large cheese plant in western Pennsylvania, explained the witness.

The DFA witness testified the Mideast region has increased milk production 20 percent over the last 23 years, while simultaneously seeing a 66 percent reduction in dairy farms. The region's Class I utilization was 37 percent in 2022, supplied by approximately 33 distributing plants, down from 57 in 2000. The consolidation in both the supply and demand sectors, increased hauling distances to fluid plants, along with a robust manufacturing sector, has created challenges in encouraging milk to meet fluid demand.

The DFA witness estimated that Ohio assembly and delivery costs have increased approximately 69 percent from 2006 to 2023, attributing most of the increase to fuel, labor and equipment costs. The witness said current differentials do not provide enough financial incentive to move milk from supply regions to Class I plants. As a result, said the witness, the cost of supplying fluid milk needs is largely borne by cooperatives and their members.

For the Mideast area, the DFA witness said the committee concentrated on a select group of larger cities in the region to analyze the relative value differences. The overall objective was to determine the value needed to encourage milk to move from milk supply areas in the north and west to areas of demand. The committee started with Chicago, Illinois, and determined that even though no fluid plants operated in the Chicago region, its differential should align with

prices of locations that supply packaged milk, which are Grand Rapids, Michigan, Cedarburg Wisconsin, Rockford, Illinois, and Dubuque, Iowa. The committee ultimately determined a \$3.10 differential appropriate for Chicago (Cook County). From there, the witness reviewed a series of city pairs and provided justification for why the proposed differentials were adjusted from the USDSS model average. Reasons given for the changes centered on distance from larger population centers and/or milk supply areas and providing enough financial incentive, in the committee's opinion, to encourage milk to move where needed. The witness mentioned another consideration was the willingness of milk haulers to deliver, referring to resistance of milk haulers to make the long hauls needed to deliver milk to central Ohio, for example.

The DFA witness also detailed considerations for proposed differentials in western Pennsylvania, centering around plants in the Pittsburgh area, and plants in southwest Ohio and eastern Indiana. They said differentials were adjusted in those areas to account for what the committee believed were current competitive relationships. The witness said that, ultimately, the committee recommended more slope than the USDSS model by reducing the differential increases in the milk surplus areas of Michigan and increasing the slope when moving to the south and east.

Another DFA witness spoke to increased hauling costs in the Mideast area. The witness said that as the number of dairy farms in the area has declined, so has the number of available milk haulers. Compounding the issue is competition with other industries who also rely on commercial haulers. As a result, milk hauling rates have increased as the fewer number of milk haulers must travel farther distances to assemble and deliver milk loads. The witness presented data on various factors that contribute to overall transportation costs, such as wages, diesel fuel prices, and equipment purchase costs.

A witness from the Michigan Milk Producers Association (MMPA) testified on the unique Michigan marketing conditions that resulted in deviations from the USDSS model output. The witness said Michigan has experienced significant milk production growth, accounting for 68 percent of the region's growth. Michigan milk production serves as a reserve supply for states south and east, which are considerably longer routes than when the differentials were adopted in 2000, said the witness. They testified current

differentials are no longer adequate to cover current transportation costs and highlighted how the large flat differential zone in Michigan, covering 525 miles, makes it difficult to encourage milk to travel farther distances to supply fluid demand instead of satisfying local manufacturing plant demand. Therefore, NMPF proposed more, smaller pricing zones within the state to better reflect the cost to move milk. The witness estimated MMPA's hauling cost for transporting milk from mid-Michigan to eastern Ohio, approximately 287 miles, was \$1.06 per cwt per 100 miles.

The MMPA witness testified that it has been more difficult to obtain over-order premiums to cover increased costs because national retailers with more bargaining power have replaced local independent stores. Consequently, the witness said, national retailers with a wider geographic footprint and higher milk volume needs have put downward pressure on premiums. The witness concluded that increasing Class I differentials to better reflect the cost of supplying the fluid market would be more equitable than an increasing reliance on a dairy farmer's ability to negotiate over-order premiums in a magnitude large enough to fully cover costs.

Upper Midwest

A Prairie Farms witness representing NMPF discussed the proposed Minnesota and Wisconsin differentials. The witness said the USDSS model results had too much slope between the states that would have created too much financial incentive to move milk out of Minnesota, creating difficulties for Minnesota plants to compete for a milk supply. Consequently, the witness said NMPF is proposing fewer differential zones in the Upper Midwest FMMO region to ensure a local supply could be maintained. Further, in that region, NMPF was cognizant to propose differential levels that would minimize negative impacts on producer blend prices. This witness opined the differentials contained in Proposal 19 would not fully cover the cost of moving milk the long distances required to service the fluid market in regions where they operate. However, they said, the proposed differentials would encourage the availability of adequate milk supplies to support milk demand in distant markets.

Central

The Prairie Farms witness also testified on the proposed Class I differentials in the Illinois, Iowa, Missouri, and Nebraska areas. The

witness said that in the last 20 years the cooperative has become more dependent on supplemental milk supplies to serve markets in Illinois and Missouri, while Iowa has lost milk processing capacity in the eastern half of the state due to plant closures. In addition, the decline of milk production in southeast Iowa has made it more difficult for Prairie Farms to supply milk into the Appalachian and Southeast FMMOs to meet its supplemental milk needs. All these factors have contributed to changes in the region's milk movements and increased producer hauling costs, stressed the witness. The witness reviewed several equidistant Prairie Farms hauling routes and highlighted the disparity in differential gains. For example, some routes traveling approximately 300 miles may see a differential gain of \$0.90, while other routes traveling a similar distance may only see a gain of \$0.25. The witness stated the region's differentials need to be adjusted to remove some of the disparity and provide adequate financial incentive to supply fluid plants located in the south and east. The Prairie Farms witness said their cost to move milk to its four southern and southeastern fluid plants was approximately \$5.25 to \$5.50 per loaded mile, and costs to supply plants in central Illinois was similar.

A DFA witness also testified to differentials proposed for the Central FMMO region. The witness echoed other testimony regarding decreased farm numbers, longer distances traveled, and increased hauling expenses. The witness estimated DFA hauling costs in the region have increased 151 percent from 2005 to 2022. The witness spoke to the proposed differential increases in the region and explained that Proposal 19 would increase the current differential values by \$1.35 in Kansas City, \$1.15 in Omaha and \$1.65 in Wichita. The witness elaborated that the higher increase in Wichita reflects the area's lack of an adequate local milk supply. More specifically, the witness stated that only 27 percent of Wichita's demand is delivered from within a 150-mile radius, while in Kansas City and Omaha, 47 percent and 55 percent, respectively, comes from within 150 miles.

Numerous NMPF witnesses testified about the proposed Colorado differentials. One DFA witness testified the USDSS model overestimated the amount of milk in Colorado available to meet the State's fluid needs because of private contractual relationships with manufacturing plants. Consequently, NMPF recommends deviations from the model to recognize current competitive

relationships, said the witness. The witness also discussed population, milk production, and fluid demand similarities between Denver and other regional cities to justify increasing the Denver area differentials to more closely align with differentials in those cities. The witness said adoption of the USDSS model output for Colorado, without adjustments, when combined with other changes that could result from this rulemaking would result in significant, unsustainable decreases in producer pay prices and, thus, blend price equity must be considered when making differential adjustments.

Other DFA witnesses spoke in more detail on the potential producer price impact on Colorado dairy farmers. The witnesses testified hauling and feed costs in Colorado are higher than other parts of the region, which they believe were not properly accounted for in the USDSS model. One witness said producer prices in Colorado currently exceed those of the FMMO's base zone, however, if the USDSS model average were adopted, it would result in producer blend prices lower than prices announced at the base zone, causing significant financial harm to Colorado dairy farmers.

Arizona

A United Dairymen of Arizona (UDA) witness representing NMPF testified in support of Proposal 19. UDA is a dairy farmer-owned cooperative association, with 36 cooperative members and a manufacturing plant located in Arizona. The witness cited many factors, such as weather, climate, transportation, fuel, and increased costs of producing Grade A milk as challenges for Arizona dairy farmers. The witness stressed the costs of maintaining Grade A status in the state exceeded \$2.35 per cwt. According to the UDA witness, the proposed Arizona Class I differentials: generally follow the USDSS model, with deviations made to reflect local market conditions; maintain current price relationships between handlers within Arizona and the surrounding states; and establish a smooth differential transition from surrounding areas.

The witness noted UDA operates a plant in Tempe, Arizona, that serves as a balancing plant for the market. The witness said the cost of operating the plant does increase in the summer months as less milk volume is run through the plant when milk supplies are lower.

California

A CDI witness testified on the process for determining the proposed California differentials. The witness said the goal

of the California differentials was to recognize regional cost drivers and local market conditions unique to servicing California urban areas, and to maintain price relationships with surrounding states. In the witness' opinion, the USDSS model did not account for the impact on producer prices, which could alter pool stability and incentives to supply the Class I market, and region-specific cost drivers such as geography or traffic. Those considerations form the basis for the deviations from the USDSS model output NMPF proposed.

The CDI witness provided an overview of the similarities between the California Central Valley and Upper Midwest milksheds to justify the position that the lowest differential in both regions should remain similar. For that reason, said the witness, NMPF proposes a minimum differential zone of \$2.50 in California, which is similar to the lowest Upper Midwest FMMO differential zone of \$2.55. The witness also discussed dwindling milk supplies, increased population, pervasive traffic congestion, and the closure of manufacturing plants in southern California as reasons for making off-model adjustments. The witness described changes made in three California regions (Central Valley, Bay Area, and Southern California) to provide incentives for dairy farmers to serve the Class I market in urban areas.

A DFA witness also testified on the proposed Class I differentials for California and northern Nevada. The witness advocated the maintenance of competitive equity between Class I and manufacturing plants in northern Nevada and California counties. The witness was of the opinion the USDSS model fell short in adequately capturing the cost of producing milk in California. The witness said the current \$0.10 difference in zones is not sufficient as it does not reflect the actual movements of milk or unique California State regulations, taxes, geography, and high milk production costs. The witness stated the current differentials do not cover the hauling costs in a state with high gas prices, heavy traffic, and road weight limits. The witness supported testimony from the CDI witness justifying the proposed California differentials. The DFA witness also expressed northern Nevada counties have a historic competitive relationship with northern California, which should be preserved. The witness noted that Proposal 19 recognizes this dynamic by proposing a \$2.90 differential for the region.

Pacific Northwest

A witness representing Northwest Dairy Association (NDA) testified on behalf of NMPF regarding the proposed differentials in the Pacific Northwest region, which includes the States of Washington, Oregon, Idaho and Montana. NDA is a dairy farmer-owned cooperative that markets the milk of approximately 295 dairy farmers in Washington, Oregon, Idaho, and Montana, and conducts all processing and marketing operations through the wholly owned subsidiary Darigold. The witness described regional competitiveness at the farm level, ensuring incentives to supply Class I markets, and geographic and population-influenced cost factors were the primary reasons the proposed differentials deviate from the USDSS model's averages. The witness was of the opinion proposed differentials in the Pacific Northwest FMMO urban areas should mirror those of the Central FMMO, as the urban areas of the two regions operate similarly. To ensure competitive equity and the balancing needs of distinct areas within the region, the witness said Proposal 19 recommended fewer pricing zones than produced by the USDSS model.

The NDA witness also described market changes similar to those of other witnesses: declining milk production, increased population, longer haul distances, and increased transportation costs. The witness estimated NDA transportation costs for servicing Pacific Northwest Class I plants has increased \$1.10 per cwt in the last 15 years.

Regarding the unregulated areas of the northwest, the witness used King County, Washington, as the base at \$3.00 per cwt, and kept the zones the same as they currently exist. In counties with little to no milk production, the differential was reduced to as low as \$2.20 in Idaho. For areas with higher milk production, the differentials were proposed at \$2.55, reflecting the same level of differentials in South Dakota.

In its post-hearing brief, NMPF emphasized adoption of Proposal 19 was necessary to ensure Class I differentials would be more reflective of the current costs of supplying the Class I market. NMPF maintained that the proposal would result in Class I differentials below actual costs, keeping with the FMMO principle of minimum pricing. NMPF reiterated testimony given at the hearing regarding the continued relevancy of the costs associated with the base differential and stressed that costs have increased since it was first adopted in 2000. NMPF reviewed its own testimony at the

hearing on what it believed were the appropriate regional considerations used to propose deviations from the USDSS model results. According to NMPF, adoption of Proposal 19 would only raise the regulated cost of Class I milk under FMMOs by slightly less than 8 percent.

NMPF reiterated the importance of Class I prices remaining the highest priced class to ensure producers move surplus milk to deficit regions to meet Class I demand. Without such pricing hierarchy, NMPF stated, milk in the higher-valued use class would not be pooled and it would result in non-uniform prices to producers.

A witness representing the AFBF testified in support of Proposal 19. The witness concurred with NMPF testimony on the increased costs of servicing the market since the differentials were adopted in 2000. In offering support for the differential adjustments, the witness said the purpose of the USDSS model was to mimic an ideal market solution, so it would be expected that actual market costs are higher. The witness mentioned that given the seasonality of milk demand, it could be considered more appropriate to start with the USDSS model's October 2021 results, rather than the average of May and October. In its post-hearing brief, the AFBF stressed that regulated Class I differentials provide for long-term stability; something that cannot be assured if a larger portion of milk prices is negotiated through over-order premiums.

A witness representing IDFA testified in opposition to Proposal 19. The witness was of the opinion NMPF did not use a consistent methodology when determining differential level adjustments from the USDSS model results. Additionally, stressed the witness, some of the factors NMPF considered were not relevant and/or were unevenly applied (dairy farm production costs, private business relationships, blend price impacts, and regional dairy farm competitiveness), or were already factored into the USDSS model (transportation costs and maintaining handler equity). The witness was of the opinion that if milk suppliers and cooperatives experienced transportation costs higher than those provided for in the differentials, the additional cost reimbursement should be negotiated through over-order premiums with milk buyers. The witness also took issue with what they deemed an undefined base differential, proposed at \$1.60 in some areas and \$2.20 in other areas, because they

opined, there was no cost justification for the difference.

The IDFA witness argued the purpose of Class I differentials is to bring forth an adequate supply of milk for fluid use. According to the witness, with an FMMO Class I utilization of 27 percent, the current milk supply is more than adequate to serve Class I needs and there is no justification for increasing Class I differentials. The IDFA witness cited a recent retail milk demand study that found milk demand is elastic and, thus, the quantity demanded is sensitive to price changes. The witness argued any increase in price would not only hurt Class I sales, but also increase government purchase costs for milk used in nutrition and feeding programs. The witness stressed retail fluid milk sales are declining and USDA should not hasten the decline by increasing Class I prices. The witness also added that eliminating or reducing the depooling of milk should not be a consideration when evaluating Class I differential levels. The witness said depooling is a necessary tool for manufacturing handlers when the Class III or Class IV price exceeds the blend price. They estimated that in some FMMO areas the Class I differential would have to increase to \$41.32 per cwt in order to disincentivize depooling.

The IDFA witness was of the opinion that if USDA recommends differential increases, they should not be increased in the three southeastern FMMOs as those provisions already require fluid milk handlers to pay transportation credits and distributing plant delivery credit assessments to encourage producers to service Class I demand in those deficit markets. The witness estimated those assessments already account for approximately 42 to 46 percent of the differential increases contained in Proposal 19.

The IDFA witness also argued the \$0.40 portion of the base differential attributed to maintaining Grade A status is no longer relevant given over 99 percent of all milk currently produced is Grade A. Consequently, said the witness, there is no longer a need to incentivize farms to become Grade A in order to service the Class I market and the base differential should be lowered to \$1.20 per cwt.

Two witnesses representing IDFA, Saputo and Plains Dairy, testified in opposition to Proposal 19 and offered support for the arguments put forth by the IDFA witness. The Saputo witness said increasing fluid milk prices may reduce the retail price spread between fluid milk and plant-based products, further depress fluid milk sales, and

ultimately force fluid plants to switch from HTST to ESL processing. The witness speculated a further decline in HTST facilities will force cultured products to be made elsewhere and increase costs to consumers. In regard to obtaining milk supplies, the witness said Saputo pays over-order premiums when necessary. The witness also opposed any increases in minimum regulated prices on the grounds that nonuniform increases would put some of its plants at a cost disadvantage. The Plains Dairy witness stated the increase from the model average results would impact consumer prices by \$0.07 per gallon. Plains Dairy is a fluid milk processing facility in Texas.

A witness representing MIG also testified in opposition to Proposal 19 for many of the same reasons articulated by the IDFA witness. The MIG witness said NMPF failed to cost-justify any elements of the base differential, either at the \$1.60 or \$2.20 level, to support why it should be maintained. In echoing IDFA's arguments, the MIG witness also objected to NMPF's use of the USDSS model's averages as a starting point. As the FMMO system provides for minimum prices, the witness was of the opinion any evaluation of differential changes should start with the USDSS model's May results, which represent the flush season for milk production. The witness said Proposal 19's problems are compounded because NMPF failed to use a consistent set of principles to justify its deviations from the USDSS model results. In addition, many of the factors used to justify deviations, the witness said, were already factors considered by the model and, thus, are being double counted.

The MIG witness characterized the NMPF deviations as substantial and presented a series of maps to visualize the magnitude of the disparate changes. The witness also pointed to areas where price changes are more dramatic between neighboring counties and suggested such price disparities could create incentives for disorderly marketing. The witness deemed the Proposal 19 differentials to be significantly different from current differentials and argued the increases were proposed despite a lack of evidence from NMPF that there is a shortage of milk available to meet Class I demand. Class I differentials should reflect the minimum cost of supplying Class I milk, stressed the witness. If there are additional transportation costs not provided for under the current differential, as alleged by NMPF, the witness testified, those would be reflected in negotiated over-order premiums in the market. Instead, many

areas of the country have no over-order premiums, which the MIG witness interpreted as an indication that FMMO prices are not minimums, but price enhancing. Similar to the IDFA witness, the MIG witness was of the opinion no changes should be made to the differentials in the three southeastern FMMOs until the full impact of the recent amendments to the transportation credits and establishment of the distributing plant delivery credits are known.

Three witnesses representing Organic Valley testified in opposition to Proposal 19. Organic Valley consists of 1,600 farmer-owners who produce certified organic milk, three dairy manufacturing facilities which make Class III and IV products and a network of co-packers to process and distribute Class I products. The witnesses opposed the NMPF proposed differentials as they would increase Organic Valley's obligation to FMMO marketwide pools.

The Organic Valley witnesses described the differences between the organic and conventional milk markets (both at the producer and processor levels). They were of the opinion Proposal 19 failed to account for these differences and would result in inefficient milk movements if adopted. The witnesses countered arguments that the conventional market balances the organic market, claiming only around 2 percent of organic milk finds its way into conventional products.

A witness from Aurora testified in opposition to Proposal 19. Aurora is a vertically integrated organic milk supplier with four organic dairy farms located in Colorado and Texas. The witness was of the opinion no justification exists to increase Class I differentials as the areas surrounding the Aurora plants have adequate organic milk supplies, something that was not accounted for in the USDSS model. The witness described the organic milk market and argued its structural differences from the conventional milk market make any change to the Class I differentials as applied to organic milk unwarranted. Similar arguments were made by a MIG witness on behalf of Danone and Crystal Creamery.

A witness for Maple Hill Creamery (Maple Hill) testified in opposition to Proposal 19. Maple Hill purchases grass-fed organic milk for processing and national distribution but does not own a fluid milk plant. The witness opposed the proposed Class I differentials and estimated their Class I marketwide pool obligation could increase up to 80 percent as a result. The witness made arguments similar to other organic processors and concluded that

increasing Class I differentials would result in a choice between paying a lower organic fixed price to its dairy farm suppliers and jeopardizing supply or raising retail prices and jeopardizing sales.

A witness representing Shamrock, a member of MIG, testified in opposition to Proposal 19. The witness said adoption of Proposal 19 would increase their raw milk costs anywhere from 29 to 62 percent. The witness testified Shamrock pays over-order premiums which they believed cover any additional costs associated with servicing their plants in excess of the Class I differential value. The witness noted an inconsistency in NMPF methodology, as the differential for their Virginia plant is proposed at the USDSS model average, while the differential at their Arizona plant is \$0.65 greater than the average.

A witness for AE, a MIG member, also testified in opposition to Proposal 19. The witness was of the opinion NMPF had not provided justification for the Class I differential increases. They specifically objected to the Class I differential changes that would, in the witness' opinion, give its nearest competitor a \$0.15 greater advantage than currently exists.

A MIG member witness for HP Hood testified in opposition to Proposal 19. HP Hood also operates four standalone Class II plants in the northeast. Similar to the AE witness, the HP Hood witness testified the proposed Class I differentials would create competitive disadvantages for their plants in relation to nearby cooperative owned plants. The witness criticized what they believed was the lack of uniformity used by NMPF in developing differentials that deviated from USDSS model results. The witness said there were ample milk supplies to meet Class I needs and any increase in the Class I price would only serve to decrease fluid milk sales.

A witness from Turner Dairy, a MIG member, testified in opposition of Proposal 19. The witness objected to the continued relevance of the three base differential components. The witness said Turner Dairy had not had difficulty finding adequate milk supplies through its independent dairy farm supply. The witness said any Class I differential increases would be paid into the FMMO marketwide pool, not to its direct suppliers. The witness said this would make it harder to compete for dairy farm suppliers, particularly with competitors in the unregulated area to their east. Similar to other witnesses, the Turner Dairy witness detailed how the proposed Class I differentials created

competitive disadvantages for their plants relative to nearby cooperative plants and would decrease fluid milk consumption.

A MIG witness testifying on behalf of fairlife opposed Proposal 19. The witness argued that if more money is needed to attract fluid milk supplies, it should be negotiated in the marketplace, not mandated in FMMO pricing provisions. The witness said fairlife regularly pays over-order premiums for even day receiving, transportation costs, and quality attributes. In the witness' opinion, there were ample fluid milk supplies and any increase in differential would only serve to create market winners and losers.

A witness from Shehadey, testified in opposition to Proposal 19. Shehadey operates four manufacturing plants in California, Nevada, and Oregon, producing Class I and Class II products. The witness argued the Class I differentials proposed for their plant locations should not be increased as the local milk supply was adequate to meet their fluid needs. The witness took particular objection with the disproportionate increase by the Fresno, California, plant in relation to their competitors located farther from the state's primary milk supply in the Central Valley. The witness added that their Oregon plant has a more distant milk supply relative to their other plants, and over-order premiums are used to compensate dairy farmers for the additional costs of servicing the plant.

A witness representing United Dairy, Inc. (United) testified in opposition to Proposal 19. United is a fluid milk processor operating three plants in West Virginia, Ohio, and Pennsylvania, which are primarily supplied by independent dairy farms. The witness testified their plants received adequate milk supplies and pay over-order premiums when needed to ensure their milk needs are met. The witness opined the market should depend on over-order premiums, not unduly high regulated prices, to direct milk where needed. Similar to other witnesses, the United witness argued FMMO prices should not be increased because it would negatively impact Class I sales. The witness objected to the uneven application of differential increases, highlighting the differential increases for the United plants are higher than every other plant in the region, even when United has had no milk supply shortages. A West Virginia independent dairy farm supplier of United also testified in opposition to Proposal 19. The witness expressed concern the proposed differential increases would ultimately

lead to the closure of the independent fluid milk processors in the State, leaving local dairy farmers with few, if any, local market outlets, and would widen the nutritional gap that already exists in the Appalachian area as higher prices would reduce fluid milk consumption.

A witness representing Lamers testified in opposition to Proposal 19. The witness said increasing Class I differentials would not benefit consumers or processors as higher prices would lead to a decline in fluid milk consumption and the closure of more fluid milk plants. The witness was of the opinion that limiting or disallowing the depooling of manufacturing milk would be a more beneficial change for all dairy stakeholders. A post-hearing brief filed by Lamers contended the hearing record contained no evidence of Class I demand not being fulfilled, thus, any increase in Class I prices was not justified. The brief argued that if additional transportation costs of moving milk to Class I plants exist, they should be negotiated through over-order premiums.

A series of academic researchers testified regarding milk price elasticity. One researcher testified on behalf of NMPF regarding the potential impact to fluid milk demand as a result of regulated price changes. The witness referred to this as price elasticity, which estimates the percentage change in demand (quantity) due to a 1 percent change in price. The witness said any price elasticity less than the absolute value of 1 is considered price inelastic—a 1 percent change in price would result in less than a 1 percent change in demand—implying increased revenue due to the price change would more than offset the decreased revenue from fewer sales.

The NMPF witness reviewed 38 empirical studies, conducted between 1964 and 2022, measuring milk price elasticity at the retail level. The witness found the study average elasticity of 0.35 percent, and a median of 0.2 percent, concluding milk demand is inelastic. The witness said consumers remain price insensitive because milk continues to be considered a staple food. To illustrate its price inelasticity, the witness elaborated the real price of milk relative to all goods and services has declined 7 percent since 2013, during which time milk demand has decreased 18.3 percent. If milk was elastic, said the witness, a decline in price should have resulted in an increase in demand. The witness reviewed other factors which they believed were driving decreased milk

consumption, including increased competition in the beverage market from new products and alternative beverages, an increase in the amount of food consumed away from home, and the lower proportion of young kids in the population.

The NMPF witness evaluated the average increase in differentials contained in Proposal 19, \$1.49 or an 8.6 percent Class I price increase, to estimate the impact on demand. Assuming a 55 percent retail price transmission rate (1 percent change in the Class I price would cause a 0.55 percent change in the retail price), the witness estimated Proposal 19 would lead to a 1.6 percent decrease in demand. The witness concluded the decrease in demand would be lower than the increase in Class I revenue, resulting in a net increase of dairy farmer revenue.

Another researcher testified on behalf of IDFA. The witness presented the results of a study evaluating the impact milk price changes have on the consumption of milk (in five disaggregated varieties) and various alternatives, including soft drinks, bottled, water, juices, and for the first time considered plant-based alternatives. The witness utilized weekly scanner data from 2017 through August 2023 to evaluate three distinct time periods (pre-COVID, COVID and post-COVID). The witness estimated the data represented approximately 84 percent of the milk volume sold at retail outlets, or 64 percent of overall milk volume. The witness attributed the remaining 36 percent to milk sales through untracked retail, foodservice, schools, and shrinkage. The witness noted it is likely the elasticity for the unaccounted milk volume was highly inelastic.

The IDFA witness said the study found the own-price elasticities for traditional white, flavored, and lactose-free milk to be elastic, and when all five categories of milk were combined, it had an elasticity of -1.26 in the post-COVID time period. Utilizing some of the NMPF researcher's assumptions (8.6 percent increase in Class I prices and a retail price transmission rate of .55 percent), the witness estimated adoption of Proposal 19 would result in an overall 5.98 percent decrease in fluid milk sales and a 2.1 percent increase in gross dairy farmer revenue. The witness concluded this study revealed retail fluid milk sales are more sensitive to price changes than previously thought. The witness also noted other demand studies that utilize AMS estimated fluid milk sales, not weekly scanner data, do not reflect the current retail marketplace

because they incorporate highly inelastic sales to schools, colleges and universities, long-term care and senior living facilities, hospitals, and correctional institutions.

A third academic researcher, also testifying on behalf of IDFA, provided results of a study evaluating the market effects of Proposal 19. Looking at milk production, fluid milk consumption, and producer price statistics since 2000, the witness concluded there are sufficient milk supplies nationally to meet Class I demands. The witness was also of the opinion sufficient milk supplies, at reasonable prices, exist for the high Class I utilization FMMOs (the Appalachian, Southeast, and Florida), because retail prices in the three markets were below those of a 30-city average retail milk price when compared to other regions of the country. The witness commented that elasticity studies not accounting for non-dairy alternatives were not representative of the current retail market. The witness reviewed recent fluid demand studies and concluded adoption of Proposal 19 would increase fluid milk prices, decrease consumption, and result in more milk use in manufactured products.

A post-hearing brief submitted on behalf of Select supported increasing Class I differentials, but not to the levels contained in Proposal 19. Select contended deviations from the USDSS model results made by NMPF may be appropriate but disagreed with the type and extent of those included in Proposal 19. Select took exception to the proposed adjustments in the mideast and southwest regions where they have member farms. Select noted reasons for making deviations were not applied uniformly, especially in areas that have similar supply and demand environments. Select stated increased transportation costs and shifts in milk production and processing locations justify increasing Class I differentials and offered support for using the average of the May and October 2021 USDSS results, with minor adjustments and smoothing of the surface as appropriate.

A post-hearing brief submitted on behalf of MIG opposed adoption of Proposal 19, arguing hearing evidence supported lowering, not raising, Class I differentials. MIG cites the abundance of milk available to serve the Class I market and FMMO adjustments to shipping percentages as evidence to deny Proposal 19. MIG reiterated its objection to the methodology used and deviations made by NMPF in developing the proposed differentials. The brief contended raising Class I

differentials would be disorderly because it would lower Class I demand and aggravate challenges already faced by fluid milk processors. MIG also noted Class I differential changes should not be considered until the impact of recent changes to transportation cost-related provisions in the Appalachian, Florida, and Southeast FMMOs were known.

A post-hearing brief submitted on behalf of IDFA opposed Proposal 19 on the grounds its adoption would cause market disorder by raising fluid milk prices, decreasing fluid milk consumption, harm consumers, and divert milk into manufacturing uses. IDFA reiterated hearing testimony in its brief regarding the price elasticity of fluid milk and concluded adopting Proposal 19 would reduce fluid milk consumption by 5.98 percent, resulting in over 2.2 billion pounds of milk being diverted to manufacturing uses.

Similarly, IDFA objected to NMPF's methodology in determining the differential levels offered in Proposal 19. IDFA objected to NMPF's use of dairy farm production costs to justify increases to the Class I differentials and referenced existing milk production as more than adequate to meet fluid milk demand. IDFA maintained Class I differentials should instead be lowered by \$0.40 per cwt because the Grade A maintenance cost consideration is obsolete and inaccurate.

A MIG witness testified in support of Proposal 20, seeking to reduce the base differential to \$0.00. The witness' testimony centered around the continued relevance of the cost components currently provided for in the base differential: Grade A maintenance, balancing, and Class I incentive costs. The witness was of the opinion the base differential results in market enhancing prices that induce overproduction and reduce fluid milk consumption. The witness said that since almost all U.S. produced milk meets Grade A standards, it is no longer necessary to provide compensation through Class I differentials for those costs as they are not unique to producers supplying the Class I market. They argued these costs are already provided for in market-clearing Class III and IV prices where most of the U.S. milk supply is utilized.

The MIG witness said the balancing cost factor is no longer justified as fluid milk processors have either invested in infrastructure to balance their own milk supply or pay over-order premiums to their suppliers for balancing services. The witness was of the opinion incorporating balancing costs within the Class I price results in processors paying for balancing services they do not

receive or paying twice for such services—once through the Class I price and again in an over-order premium. Lastly, the MIG witness argued the \$0.60 Class I incentive cost factor was no longer necessary to attract adequate supplies of fluid milk given the low, and continually declining Class I utilization.

Witnesses from MIG member companies testified in support of Proposal 20. MIG's members echoed the previous MIG testimony challenging the relevance of the base differential cost factors in the current market environment. In particular, the MIG witnesses argued that through plant investments, particularly ESL processing or additional milk silos, combined with over-order premiums paid to their milk suppliers, they were directly paying for their individual milk balancing needs. The witnesses all opined that through the base differential they were being double charged for such services. All MIG members testified that if additional monies are needed for balancing services or to obtain adequate milk supplies, it is more appropriate for those costs to be negotiated in the marketplace and paid directly to their milk suppliers, rather than as part of a regulated minimum price shared with all pooled producers.

Another MIG witness testified regarding the relevancy of the base differential in the current marketplace. The witness was of the opinion the base differential should be reduced to \$0.00, and if cost recovery is needed by producers, it can be negotiated with milk buyers. The witness utilized the USDSS model to compare the value of Class I and Class III milk at the county level. The witness presented the results and explained in some parts of the country, where Class III milk is more valuable, it would take additional incentives to service a Class I plant rather than remain at the higher valued manufacturing plant. In other areas of the country, namely the southeast, northeast, and California, the value of Class I is higher, representing the cost to balance the region's Class I demand. The witness said the national average value of the differences was negative \$0.38, indicating nationally, it is more valuable for milk to service Class III plants. The witness drew the conclusion this analysis supports the argument for lowering the base differential to \$0.00 and allowing fluid plants to negotiate and pay premiums directly to their milk suppliers.

A post-hearing brief submitted on behalf of MIG reiterated its witnesses' testimony that the base differential is no longer economically justified. MIG

argued the current oversupply of Class I milk is caused, in part, from high FMMO blend prices. According to MIG, adoption of Proposal 20 would correct this disorder by allowing a greater proportion of fluid milk costs to be negotiated and paid directly to suppliers. The brief reviewed MIG witness testimony on the relevancy of the costs associated with the base differential and the steps taken by its fluid milk processor members to balance and obtain a milk supply.

A Lone Star witness, appearing on behalf of NMPF, testified in opposition to Proposal 20. The witness argued a base differential of \$0.00 would result in the elimination of any Class I differential for large portions of the U.S., amounting to approximately \$650 million annually, with no guarantee the money could be recovered through over-order premiums. Additionally, said the witness, the lower differentials would lead to disorderly marketing conditions through increased occurrences of negative PPDs, higher volumes of depooled milk, and reduced or eliminated incentives to supply the Class I market. The witness stressed that costs to maintain Grade A status and balance the market's milk supply are real and significant. The witness said adoption of Proposal 20 would be akin to adopting individual handler pools in much of the country, an idea which they said has been found to cause disorderly marketing conditions.

The NMPF witness maintained that milk has an inelastic demand, so any reduction in Class I prices will not have a significant impact on Class I sales. The witness also said that despite opposition testimony regarding the perils of setting regulated prices too high, there are also negative consequences for setting the regulated price too low. In the witness's opinion, dairy farmers face a market power imbalance when negotiating prices above FMMO minimums, reiterating previous testimony on the difficulty cooperatives faced when negotiating and maintaining over-order premiums.

The NMPF witness concluded by emphasizing the objective of the FMMO system is to set prices to ensure a sufficient quantity of milk for fluid use. The witness stressed providing for prices that reflect the current costs of supplying the market as demonstrated through NMPF testimony should be a priority of this proceeding.

In their post-hearing brief, NMPF argued Proposal 20 incorrectly assumes the cost of servicing Class I demand has not increased and reiterated witness testimony on the continued relevancy and need for the base differential. NMPF

stressed that costs recognized in the base differential continued to be incurred by dairy farmers in servicing the Class I market and took exception with the position such costs could be adequately recovered through over-order premiums. NMPF maintained Class I demand is inelastic and reiterated the need for Class I prices to continue to be the highest priced class in order to ensure an adequate supply.

The AFBF witness also expressed opposition to Proposal 20. The witness testified the cost factors provided for in the base differential are still relevant and in fact higher than when the differential was adopted. The witness suggested the Department consider raising the base differential and provided current cost estimates for each of the three factors, which resulted in a base differential increase of approximately \$0.60 per cwt. The witness stressed the importance of the base differential in contributing to the proper alignment of classified prices which they considered a critical element of orderly marketing. The AFBF's post-hearing brief reiterated its witnesses' hearing testimony and concluded adoption of Proposal 20 would lead to disorderly marketing conditions.

A post-hearing brief filed by Lamers offered support for Proposal 20. Lamers stated its adoption would better reflect the real value of milk and all four classes would have a closer price relationship. Lamers asserted high Class I differentials were no longer needed to supply the fluid market given that 98 percent of milk produced is Grade A. A post-hearing brief submitted by New Dairy also offered support for Proposal 20.

Select's post-hearing brief expressed opposition to Proposal 20 and asserted a base differential of \$1.60 should be maintained. Select opined the cost of maintaining Grade A status still exists and has increased, as have the costs associated with balancing and competing for a milk supply.

A post-hearing brief submitted by Edge, while not offering support or opposition to Proposals 19 or 20, did contend Class I milk prices should not be raised beyond necessary levels and not be raised merely to offset the negative producer impact of increasing make allowances.

The AFBF witness also testified in support of Proposal 21, seeking to increase the Class II differential from \$0.70 to \$1.56 per cwt. The witness explained the proposed differential reflects updated drying costs based on the current NFDM make allowance. The witness did not believe the proposed

increase would lead to the substitution of Class IV powders in lieu of Class II fresh milk. The witness estimated that adoption of Proposal 21 would increase annual FMMO marketwide pool values by \$122 million and reduce the likelihood of negative PPDs and depooling. These views were reiterated in AFBF's post-hearing brief.

Several witnesses representing MIG including Turner Dairy; HP Hood; AE; Shamrock; CROPP; Aurora; Shehadey; Crystal Creamery; and fairlife testified in opposition to Proposal 21. The MIG witnesses indicated adoption of Proposal 21 would result in Class II standalone plants choosing not to participate in the FMMO system, putting fully regulated Class I plants with Class II production at a competitive disadvantage. This sentiment was emphasized by witnesses from Turner Dairy and Shehadey, whose fully regulated Class I plants also produced notable volumes of Class II products. The witness from Crystal Creamery provided an analysis of CME NFDM and Class II nonfat solids prices, projecting an increase of 20 to 50 percent in the use of Class IV nonfat solids if Proposal 21 was adopted. Lastly, a witness from fairlife predicted adoption of Proposal 21 would cause some manufacturers to reformulate products in order to avoid paying the higher Class II price.

In its post-hearing brief, MIG reiterated hearing testimony and added that cream, a Class II product, must be made with fluid milk in accordance with the standards of identity established by the U.S. Food and Drug Administration. As such, according to MIG, a pooled Class II manufacturer of cream could not reformulate and, further, would experience an estimated 3.5 percent increase in its FMMO marketwide pool obligations.

Several witnesses representing IDFA, including Saputo, Galloway, and Lakeview Farms, also testified in opposition to Proposal 21. The witness for Saputo indicated the demand for Class II skim solids is likely to decrease if Proposal 21 is adopted, as alternative milk solids would have a greater substitution value. Further, according to the witness, costs to consumers for cream would likely increase.

The witness for Galloway testified that adoption of Proposal 21 would not increase blend prices or limit depooling and negative PPDs, as alleged, because Class II manufacturers would instead utilize more Class IV powder ingredients in lieu of fresh milk. In the witness' opinion, increasing the Class II differential would only serve to promote disorderly marketing through the

displacement of the local milk supply and permanent investment in equipment to enable the use of Class IV ingredients. The witness said once a manufacturer makes the costly capital investment decision, they do not switch back to use fresh milk in the future. The witness estimated adoption of Proposal 21 would result in a \$99.4 million loss to producers through the use of lower valued Class IV ingredients. A witness from Lakeview Farms supported the statements of other witnesses, emphasizing the likely increase in costs to the customer. This witness added that innovation of more oil-based formulations to offset the price volatility of dairy fat would lead to a disruption in the dairy supply chain.

In its post-hearing brief, IDFA reiterated testimony from the hearing which stressed that there is already an adequate supply of milk for Class I and Class II needs and opined the current Class II price formula is working well as is. As such, according to IDFA, there is no evidence that suggests a need to increase the Class II differential. IDFA argued further that farmers are likely to receive lower net prices as a result of Proposal 21 due to the anticipated substitution of lower cost Class IV NFDM for Class II nonfat solids. Lastly, IDFA focused on the likely disproportionate impact of Proposal 21 on Class I handlers that also manufacture Class II products. Without the ability to depool, these handlers could not take advantage of lower NFDM prices, IDFA wrote.

An MMPA witness appearing on behalf of NMPF also testified in opposition to Proposal 21. The witness' testimony mirrored other witnesses cautioning that adoption could cause substitution with Class IV powder ingredients. The witness said not only does the Class II and Class IV price difference need to be considered, but so does the significantly lower transportation cost of powder versus fresh milk. Under the current Class II differential, Class II milk already has an incentive not to be pooled, said the witness. Increasing the differential would only heighten the incentive and create competitive disadvantages for Class I plants making Class II products, while simultaneously lowering marketwide pool values. In its post-hearing brief, NMPF added that adoption of Proposal 21 may incentivize the practice of substituting less expensive milk powder for fresh milk to make Class II products. NMPF also elaborated on its members' concerns regarding the likely increase in depooling of Class II milk if Proposal 21 was adopted.

USDA received post-hearing briefs related to Proposal 21 from three additional stakeholders: New Dairy, Select, and Lamers. New Dairy expressed its opposition to the AFBF's Proposal 21, emphasizing that the current milk supply is sufficient, and it shared the concerns of other hearing participants regarding the potential competitive disadvantages for Class I handlers manufacturing Class II products. Select explained that the AFBF's proposal deviates from the rationale and methodology USDA utilized to establish the Class II differential during Order Reform and, thus, according to Select, Proposal 21 likely overstates an appropriate Class II differential. Further, Select was of the opinion increasing the Class II differential would discourage the use of fresh milk and cream in lieu of Class IV ingredients. Lastly, Lamers expressed its concern that the adoption of Proposal 21 would lead to disorderly marketing and stated no evidence was presented to suggest a need to increase the Class II differential.

Discussion and Findings

An FMMO (or "order") is a regulation issued by the Secretary of Agriculture (Secretary) that places certain requirements on the handling of milk in a defined geographic marketing area. FMMOs are authorized by the AMAA. The declared policy of the AMAA is to ". . . establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce . . ." 7 U.S.C. 602(1). As specified by the AMAA, the principal means of meeting the objectives of the FMMO program are through classified milk pricing and the marketwide pooling of returns. This rulemaking concerns and is limited to classified milk pricing.

FMMOs announce prices each month for milk received by plants during that month, according to its use classification. Since 2000, the FMMO program has used product price formulas that rely on the wholesale price of bulk products to determine the minimum classified prices handlers pay for raw milk in the four classes of utilization. Class III and Class IV prices are announced on or before the 5th day of the following month to which they apply. The Class III and Class IV price formulas form the base, also known as the mover, from which Class I and Class II prices are determined.

The Class I price is announced in advance of the applicable month. It is determined by adding the Class I differential assigned to the plant's location, plus the average of advanced

Class III and Class IV prices (computed by using the most recent two weeks' DPMRP data released on or before the 23rd of the preceding month), plus \$0.74. The Class II skim milk price, announced at the same time as the Class I price, is determined by adding \$0.70 per cwt to the advanced Class IV skim milk price. Thus, the advanced prices pertaining to milk marketed in a particular month use the same formulae as the calculation of Class III and IV prices for milk marketed in that same month, but the specific data are from different time periods. The Class II butterfat price is announced at the end of the month, at the same time as the Class III and Class IV prices, by adding \$0.007 per pound to the Class IV butterfat price.

Component prices are based on prices for the selected bulk products collected through the AMS-administered DPMRP, which collects weekly wholesale prices for four manufactured dairy products in various bulk package sizes (cheese, butter, NFDM, and dry whey powder). Weekly average prices for cheddar cheese (the weighted average of block and barrel prices), butter, NFDM, and dry whey are reported in the NDPSR.¹ Butterfat prices for milk used in products in each of the four classes is determined through surveyed butter prices. Protein and other solids prices for milk used in Class III products are derived from surveyed cheese and dry whey prices, respectively. The nonfat solids price for milk used in Class II and Class IV products is calculated from surveyed NFDM product prices.

The butterfat, protein, other solids, and nonfat solids prices are derived through the weighted average monthly NDPSR survey prices of each corresponding commodity, minus a manufacturing (make) allowance, multiplied by a yield factor. The make allowance factor represents the fixed and variable processing costs manufacturers incur in making raw milk into one pound of product. The yield factor represents the approximate quantity of product that can be made from a cwt of milk received at the plant, assuming a certain component composition of the milk and the final products. Among other factors used to determine yield, the milk received at a plant is adjusted to reflect farm-to-plant shrinkage compared to farm weights. This relates to the basic question of how

much milk is required to make a pound of product.

This product pricing system was implemented as a part of Order Reform on January 1, 2000. 64 FR 70868 (Dec. 17, 1999). While individual pieces of the price formulas have been updated occasionally since that time, this proceeding is the first time since their adoption that the Department is considering a comprehensive update to all four classified price formulas. 68 FR 7063 (Feb. 12, 2003); 71 FR 78333 (Dec. 29, 2006); 78 FR 24334 (Apr. 25, 2013).

The objective of this proceeding is to evaluate whether market or other economic conditions have changed and if the price formulas need to be updated to reflect current conditions, including economic and technological factors related to processing, transportation, and other relevant market functions or services. Twenty-one proposals, divided into five main topic areas, were considered: milk composition factors—two proposals; surveyed commodity products—four proposals; Class III and Class IV formula factors—six proposals; base Class I skim milk price (often referred to as the "higher of")—six proposals; and Class I and Class II differentials—three proposals.

The record supports the findings that some price formula factors should be amended to reflect current market conditions that were evidenced in this proceeding. The proposed changes, which are discussed in detail below, include:

1. *Milk Composition Factors*: Update the factors to 3.3 percent true protein, 6.0 percent other solids, and 9.3 percent nonfat solids.

2. *Surveyed Commodity Products*: Remove 500-pound barrel cheddar cheese prices from the DPMRP survey and rely solely on the 40-pound block cheddar cheese price to determine the monthly average cheese price used in the formulas.

3. *Class III and Class IV Formula Factors*:

a. Update the manufacturing allowances as follows:

- i. Cheese: \$0.2519;
- ii. Butter: \$0.2272;
- iii. NFDM: \$0.2393; and
- iv. Dry Whey: \$0.2668.

b. Update the butterfat recovery factor to 91 percent.

4. *Base Class I Skim Milk Price*: updating the formula as follows:

a. Class I milk used in ESL products: The average of the advanced Class III and Class IV skim milk prices, plus a rolling monthly adjuster. The rolling monthly adjuster would be equal to the average of the difference between the

¹ Official Notice is taken of the Notice of Equivalent Price Series: 77 FR 22282 (April 18, 2012). The National Dairy Product Sales Report was deemed as equivalent to the price series previously released by the National Agricultural Statistics Service.

higher-of and the average-of, for 24 months, with a 12-month lag.

b. Milk used in all other Class I products: the higher-of the advanced Class III or Class IV skim milk prices for the month.

5. *Class I and Class II differentials:* Update the Class I differentials to generally reflect the United States Dairy Sector Simulator May results contained in evidence.

Milk Composition Factors

Milk composition factors contained in the product price formulas represent assumed component levels of skim milk on a cwt basis. These factors were adopted on January 1, 2000. Currently, the formulas assume 3.1 pounds of true protein, 5.9 pounds of other solids, and 9 pounds of nonfat solids in 100 pounds of skim milk.

The level of assumed components in milk ultimately impacts minimum regulated prices paid by handlers, although the impact varies since there are variations in how components are used to value milk between FMMOs. All handlers regulated by the Arizona, Southeast, Florida, and Appalachian FMMOs pay for milk used in all four classes on a volume (cwt) basis, regardless of the components contained in the skim milk they receive (referred to as skim/fat pricing). Simply put, handlers pay for the pounds of skim and pounds of butterfat in milk they purchase from dairy farmers, where the butterfat payment is calculated according to actual pounds of butterfat received but the skim milk is specified at a standardized composition. In the remaining seven FMMOs, handlers pay for manufacturing milk based on the actual pounds of components in milk they purchase (referred to as multiple component pricing). Milk used in fluid milk products (Class I) is paid on skim/fat basis as described above. Because of these pricing differences, changing the milk component factors primarily impacts Class I minimum prices paid by fluid milk processors in all 11 FMMOs, and to a lesser extent manufacturing handlers purchasing milk for Class II, III, and IV uses on skim/fat FMMOs.

Proponents of changing the milk component factors argue actual average milk component levels in farm milk have increased since January 1, 2000, and milk should be priced to buyers to reflect the value of those components. NMPF proposes (Proposal 1) component levels at observed 2022 levels (3.39 true protein, 6.02 other solids, and 9.41 pounds of nonfat solids). NMPF also proposes an updated methodology whereby components could be updated once every three years, without a

rulemaking proceeding, if the nonfat solids levels in FMMO producer skim milk changed by 0.07 percentage points or more from the level stated in regulation. In its proposal, NAJ seeks an automatic annual update, with no change threshold to be met (Proposal 2).

Both NMPF and NAJ argue that because component levels in producer milk have risen but are still accounted for in the price formulas at 2000 levels, the difference between Class I prices and manufacturing milk prices (Class III and IV) has narrowed. Put another way, milk used in manufacturing in the multiple component FMMOs is paid based on actual component levels, so producers are paid for all component pounds delivered to manufacturing plants (approximately 85 percent of FMMO manufacturing milk is pooled on the 7 multiple component orders). Consequently, payments for milk delivered to manufacturing plants increase as component levels delivered to those plants increase. However, milk delivered to Class I plants is paid on a skim/fat basis whose formulas contain component levels that are fixed and do not change either over time or across producer milk receipts. Thus, as milk component levels have risen, Class I plants have continued to pay for milk based on the static component levels contained in the formulas. Proponents argue the result has been a narrowing between fluid and manufacturing prices, thereby creating marketing challenges, one of which is a preference of suppliers to sell higher component milk to manufacturing handlers. They argue this is especially problematic in the milk deficit skim/fat markets in the southeastern region that must compete with manufacturing milk demands in multiple component orders to procure a supplemental Class I milk supply. Proponents also alleged the narrowing of the difference between Class I and manufacturing milk prices increases the occurrence of price inversions and depooling.

The record of this proceeding reveals FMMO component levels in raw milk have increased since January 1, 2000, most notably since the mid-2010s. National FMMO average component data before 2000 is not part of this hearing record. The Order Reform decision did not address specifically why the current assumptions were adopted, other than stating they were based on prevailing protein tests as reported by AMS/USDA, as correctly cited by NAJ in its brief and public comment. While a preliminary Basic Formula Price report does purport to provide average protein levels, none of the Reform related reports in evidence

in this proceeding provide an adequate level of detail as to what exactly the data used represented. However, given the data in evidence in this rulemaking shows component levels observed in FMMO skim milk in 2000 were 3.1 percent true protein, 5.9 percent other solids, and 9.0 percent nonfat solids, it is reasonable to assume they were set at those levels because at the time they were representative of all pooled milk in the FMMO system. Evidence from this proceeding reveals that from 2000, component levels were relatively flat with only a slight increase through the mid-2010s. Beginning in 2016, observed data shows a marked increase in component levels. The data also clearly shows component levels throughout the country vary by season, with levels lower in the spring and summer, and higher in the fall and winter. Hearing testimony revealed numerous reasons for the recently observed milk component increases, including genomics in dairy cattle selection and breeding, higher cull rates of less productive cattle, and improvements in cattle nutrition and animal husbandry.

Opponents of increasing component levels, primarily fluid milk handlers, argued three general reasons an increase is not justified. First, fluid milk handlers, who would be primarily impacted by these proposals, do not receive producer milk at the proposed component levels. They contend higher component milk is delivered to manufacturing plants, leaving the lower component milk for fluid milk handlers. Second, fluid milk handlers testified they receive no additional market revenue for higher components in milk because their customers purchase on a volume basis (e.g., gallons) not on the skim component levels in their fluid milk products. Therefore, they argued, they could not recover an increased cost for their raw material from a higher finished product price. Third, opponents argued updating component levels also would unduly harm manufacturing handlers in the skim/fat orders who pay for milk based on a skim/fat basis. They argued the proposed component levels are higher than those delivered to plants, both fluid and manufacturing, in the four skim/fat orders. An evaluation of the record evidence for each of these claims follows.

First, regarding the composition of producer milk received by Class I handlers, testimony from fluid milk handlers during the hearing was incomplete and mixed. Some fluid milk handlers would not reveal component levels for the Department to consider, citing confidentiality concerns. Other

fluid handlers offered data that showed a range of average component levels in skim milk received: true protein ranged from 3.09 to 3.63 and other solids ranged from 5.83 to 6.10. Many producers who testified also discussed the rise in their farm component levels because of the decisions and investments made at the farm. While some producers could cite data, for example true protein tests ranged from 3.12 to 3.83, many who could not cite specifics did contend a general increase in their component levels. The testimony supported an increase in skim milk component levels since 2000, but precise increases that apply to all milk or all Class I milk was not presented.

Second, regarding market compensation for higher skim components in finished Class I products, the record clearly shows fluid milk handlers sell fluid milk products based on volume. Proponents of changing the composition levels provided anecdotal evidence, such as marketing claims and product description, to assert that some fluid milk products can garner additional market revenue for higher component levels. However, no data was provided to prove there is a general industry-accepted norm or practice that allows handlers to recover a value for nonfat milk solids in excess of the nutrition label claim.

Finally, concerning the claim that the level of components assigned to skim milk can create disorder in the procurement of milk for manufacturing versus Class I uses, the record contains actual component tests of producer milk in the multiple component pricing orders. However, component data for the four skim/fat orders could only be estimated as producers in those orders are paid based on the volume of skim milk and butterfat produced, not component levels. Record evidence contains USDA estimated data showing component levels in milk have consistently been above the current assumptions in all four skim/fat orders. Estimated protein and other solids levels of skim milk pooled in the three southeastern orders have been above the assumed levels in most months since January 2018, and below the levels contained in Proposal 1 in all months. Estimated protein and other solids levels of skim milk pooled in the Arizona Order have been above the assumed levels in all months since January 2018, and above the levels contained in Proposal 1 some months. Dairy Herd Improvement Association (DHIA) component data was offered at the hearing. This data is from farms who elected to use DHIA services and are

neither a proper statistical sampling of the US nor a census of the US; however, it is a large data set that covers many farms of different sizes and locations. The DHIA data is consistent with estimated data provided by USDA. In the four skim/fat orders, average protein levels from 2020–2022 were above the current formula assumptions but below those contained in Proposal 1.

This decision is considering how the price formulas should be updated to reflect current market conditions. Milk composition levels are one piece of the formulas being addressed. However, as with all the factors adopted at the time of Order Reform and updated through subsequent rulemakings, the question before the Department is what level is representative of current supply and demand conditions, as required by the AMAA. Some parties argued milk composition factors should not be changed because not all milk would meet the levels proposed by NMPF. Price formulas in the FMMO system have never had factors that assumed all milk was identical, just as it has not been assumed that each plant has the same cost of manufacturing or yields. Because FMMOs utilize a national pricing system, price formulas have always relied on benchmarks to set levels representative of market conditions. The nature of any representative number is that some milk will fall above or below the specified level. This was true with the milk composition levels that were adopted in 2000, and similar to other factors used in the formulas such as make allowances, survey commodity prices, and butterfat recovery percentages.

While the record does not contain a comprehensive data set of milk component levels received at all fluid milk plants, it does contain data on milk component levels of all milk pooled on the FMMOs, as well as evidence submitted by some producers on the component levels in their milk, and information from some fluid milk handlers on the component levels they receive. Importantly, fluid plant operators testified the milk components received at their respective plants are higher than currently assumed in the formulas, but less than what was proposed by NMPF and NAJ.

The record clearly supports that producer milk now contains higher levels of skim milk components compared to when the current composition factors were established in 2000. As FMMO provisions should reflect current market conditions to ensure orderly marketing, the question becomes what specific composition standards best reflect the current market

and are consistent with the practice of specifying levels that ensure minimum prices are most consistent with supply and demand conditions. The review of record evidence described earlier reveals many factors should be considered: the component levels of pooled producer milk, the variability in milk components regionally and seasonally, the discrepancy in milk component levels received by fluid milk handlers compared to manufacturing handlers, and the variability of component levels from farm to farm. These factors were not specifically mentioned as being considered in the Order Reform decision when the current levels were set. However, given the evolution of the dairy industry in the past 24 years, milk composition benchmarks are relevant for consideration in this proceeding.

The record indicates milk composition levels should be increased, but the levels in Proposal 1 are not justified. Given the variability and seasonality of component level information contained in the record, this decision continues to find the average component levels in the FMMOs from 2016–2022 to be the most appropriate benchmark to represent producer skim milk components, and result in a valuation of skim milk reflecting current market conditions. Accordingly, this decision continues to recommend the following: 3.3 percent true protein, 6.0 percent other solids, and 9.3 percent nonfat solids.

Estimated data for the three southeastern orders shows component levels exceeding these proposed levels in recent months, thus addressing opponents' claims that manufacturing handlers in the southeastern orders receive lower component milk than other FMMOs.

In its comment on the recommended decision, NMPF suggested the 2018–2022 time period would be more appropriate. However, this decision continues to find the 2016–2022 time period the most appropriate as it maintains a proper balance between sellers' and buyers' concerns expressed in this rulemaking and would provide for more orderly marketing.

In public comments submitted on the recommended decision, IDFA and MIG reiterated previous arguments offered that fluid milk handlers do not receive milk with higher nonfat solids levels and, even if they did, cannot recover a higher value for them in traditional fluid milk products (*e.g.*, gallons and half gallons) which encompass a vast majority of Class I sales. They presented a number of arguments: (1) the Department failed to justify a policy

change as it had previously stated Class I prices should not be priced on components because there is no additional value in Class I products; (2) the Department failed to address why updated milk composition levels support orderly marketing and therefore meet the objective of the AMAA; and (3) the Department ignored fluid milk handler testimony regarding the components levels they receive.

On the other hand, NAJ's public comment argued that by not increasing composition standards to the levels proposed by NMPF and NAJ, the Department is artificially constraining the manufacturing and Class I milk price relationship and failing to address the resulting instances of disorderly price inversions and depooling.

This final decision is not recommending a Class I policy change, as some commenters suggest. This decision continues the Class I pricing policy adopted as part of Order Reform. Prior to Order Reform, FMMO prices were based on prices determined by the competition for Grade B milk supplies updated by a product price formula (referred to as the Basic Formula Price (BFP)). During Order Reform, the Department sought to find a replacement that would: (1) meet the supply and demand criteria set forth in the AMAA; (2) not deviate greatly from the general level of the current BFP; and (3) demonstrate the ability to change in response to changes in supply and demand. 64 FR 16026, 16091 (Apr. 2, 1999).

The BFP, and its predecessor Minnesota-Wisconsin price (M-W price), represented a competitive cost of Grade B milk in the Minnesota and Wisconsin area as it was the value for milk at the farm sold into manufacturing uses in those areas. A butterfat differential, reflecting the value of milkfat, was subtracted to determine the value of milk having no fat—i.e., skim milk. Class I skim prices at the time were determined by adding a location differential to the BFP skim price. As it was a survey of prices paid for raw milk in manufacturing, updated by the value of commodity products, the BFP met the objective of the AMAA to reflect market supply and demand conditions. The BFP had the ability to change in response to changes in milk component levels and their value to the manufacturer. By the same token, changes in a manufacturer's costs of manufacturing or yields could also be demand factors that could move the BFP. A change in the BFP due to any of these underlying factors, including milk composition, could be passed through to

the Class I price which was based off the BFP.

With the adoption of product price formulas to replace the BFP in 2000, Class prices became determined, in part, from the value of commodity dairy products in wholesale markets whose values were translated to an implied value for farm milk used in each Class. The Class I skim price became determined through the higher of the Class III or Class IV skim price. The new pricing system also required a new method for determining these Class III and Class IV skim milk values. Under the new system, a value of skim milk had to be built up from its underlying milk components as there was no farm milk price to start with, only product prices. Hence, specifying underlying composition levels of skim milk based on either a skim solids standard or protein plus other solids standards was necessary. At the time of the transition from BFP to product price formulas, the Class I price reflected the supply and demand conditions for all milk products, as the BFP replacement was designed to not deviate greatly from the BFP price levels at the time of Reform. As highlighted in the decision, "The supply and demand for Grade A milk is not limited to one category of products. The same milk may be used for fluid or soft manufactured products as well as the Class III and Class IV products used to determine the BFP. As a result, the minimum prices established for Class III and Class IV reflect supply and demand for the milk used in all products" (64 FR 16026, 16095).

The record of this current proceeding has highlighted that under the current product price formulas, the standard component assumptions in the Class III and Class IV formulas are not able to automatically adjust to reflect the value of milk used in all products. Data reveals the current formulas reflect the value of very few products in the market as current average FMMO milk composition levels are consistently exceeding the assumed standard levels. Further, as highlighted earlier, fluid milk handlers testified to routinely receiving milk at composition levels greater than the current assumptions. USDA data on MCP orders show market average components consistently above the current standard components since Order Reform, with a noticeable increase in the rate of change since 2016. When combining MCP order data with USDA estimated data for the fat/skim markets, market averages have exceeded the assumed standard component levels since 2021.

Some commenters claimed data entered by fluid milk plants was ignored

and that, instead, USDA relied on less relevant FMMO data. This decision rejects the claim that FMMO data is less relevant to the determination of skim milk composition standards in the formulas than the evidence presented by the plants in question. The current assumptions reflect FMMO data from when the standards were first adopted, and such consideration remains relevant as a change is being considered. As described earlier, the objective of the product price formulas is to represent the value of milk used in all products. Milk composition standards are part of that valuation, and as such, it remains valid to consider FMMO data that reflects the composition of milk used in all products.

As described earlier, aggregated data supplied by MIG through a survey of members of its fluid milk plants regulated by MCP Orders show components levels consistently exceeding current assumed levels but below those proposed by NMPF and NAJ. This information was specifically listed as a factor in determining the proposed skim milk composition levels.

This decision finds updating the skim milk composition standards will provide for more orderly marketing as they will better reflect the supply and demand conditions for milk used in all products, as was one of the stated objectives when the product price formulas were first adopted. As is the nature of fixed factors such as milk composition standards, much like make allowances, are changed through rulemaking. This decision continues to find updating milk composition, as described earlier, will ensure prices paid by handlers and received by producers reflect the supply and demand of milk, a tenet of the AMAA.

NAJ argued the decision ignored testimony presented on the impact of price inversion and depooling and insisted adoption of the proposed levels maintains a narrow spread between Class I and manufacturing prices. Much testimony was given on the impact of price inversions and depooling and attributed at least some cause to inadequate skim milk composition levels. While record evidence demonstrated the occurrence and magnitude of price inversions and depooling, such outcomes are not a reason for changing milk composition levels. This decision finds that milk composition levels should be increased to better reflect current market conditions. While this change may decrease the occurrence and/or magnitude of price inversions and depooling, this was not a determinant in proposing the change as this decision

does not find it an appropriate reason for updating the valuation of skim milk.

A comment filed by Crystal Creamery stated the proposed levels will cause a disproportionate burden for fluid milk handlers in California that must fortify Class I products to meet the State nonfat solids standard. As required by the AMAA, FMMO class prices are applied uniformly across all handlers regulated by a FMMO. Any additional costs a handler might incur due to State requirements are outside the purview of USDA, and outside the scope of this proceeding.

During the hearing and in its post-hearing brief, Edge proposed, in addition to updating skim component levels, that the assumed butterfat level of 3.5 percent should also be updated to facilitate risk management. This idea was not proposed by USDA in the recommended decision.

Edge's public comments on the recommended decision reiterated its request to update the butterfat standard, citing hearing testimony but providing no new arguments. A comment by Sabrosura Foods made the same request. Some commenters indicated not changing the butterfat standard would cause issues related to their risk management positions.

This decision continues to find changing the butterfat standard is not needed to maintain orderly marketing of milk within the FMMO system. Risk management programs, which often utilize FMMO prices, are maintained in the private sector. These programs can adapt as necessary to facilitate the use of updated FMMO price formulas. Additionally, the butterfat standard does not impact FMMO prices paid by handlers, both fluid and manufacturing, because in all orders handlers pay for the actual pounds of butterfat received. Therefore, the request to amend the butterfat standard continues to be denied.

The NMPF and NAI proposals contained alternative updating and implementation schedules for the skim milk composition levels. NMPF proposed the composition levels be updated once every three years, but only if there was a 0.07 percent or greater change in nonfat solids levels, compared to what was in regulation. For example, if Proposal 1 was adopted, milk composition factors could only be updated three years later if the average nonfat solids levels in pooled FMMO milk was 9.48 percent (9.41×1.007). NAI proposed the levels be updated annually, regardless of the magnitude of increase. Both proponents requested a 12-month implementation lag because of the implications such a change could

have on producer risk management positions. Edge proposed a longer implementation lag of 15½ months because of risk management positions tied to the DRP.

The development and use of dairy risk management tools is relatively new, and the Department has never before been asked to delay implementation of FMMO changes in consideration of risk management. However, testimony made clear producers' concern regarding the negative financial impact that could occur if regulatory changes did not account for the growing use of risk management tools.

Producers testified to the use of numerous market-based risk management tools, including the CME futures and options, and the two USDA-Risk Management Agency approved insurance products, DRP and Livestock Gross Margin—Dairy (LGM-Dairy). Use of risk management tools by producers testifying at the hearing varied, with some not using any tools, some only enrolling in the DMC program which does not involve futures prices, and fewer using DRP insurance or the CME hedging tools. The record reflects 32 percent of U.S. milk production was covered in 2022 under DRP, and with a much smaller use of LGM-Dairy.

Producers testifying were particularly concerned with the implementation schedule for the initial change, as risk management positions could be as far out as 18 to 24 months. Evidence shows that from 2018 through 2022, almost all CME contracts, 97.34 percent, expired within 12 months. According to producers, any change to the milk composition level assumptions during the contract period could result in basis risk to producers not covered by the hedge. A CME witness testified they saw a 54 percent drop in contracts with expiration dates over 360 days in 2022 as compared to 2018, which the CME attributed to the industry already anticipating a regulatory change based on the outcome of this hearing.

Record evidence depicted the concern regulatory changes could have on risk management tools, particularly the impact on the usability of these tools during a transition period. However, producer equity requires that risk management usage be considered against the interest of other producers who do not use risk management tools, because it would delay recognition of the higher components in producer milk.

Risk management issues are not an appropriate consideration in whether milk composition standards should be changed or to what level they should be changed. However, this decision finds

the timing of a regulatory change could impact producer hedging decisions made before a regulatory pricing change. This decision continues to find it appropriate to consider an implementation timeframe in an attempt to mitigate potential financial harm to producers who utilize risk management tools.

The recommended decision proposed a 12-month implementation lag, beginning when other changes from this proceeding become effective. The 12-month lag was selected to cover hedge positions for the vast majority of producers utilizing these tools. There was considerable public comment from six dairy farmers, five State Farm Bureaus, and four producer-led organizations opposing the 12-month implementation delay on the proposed skim milk composition levels. The producers and producer organizations requested the standards be implemented immediately so producers would be properly compensated for the components in their milk without delay. Some producers questioned why an implementation delay was proposed for skim milk composition standards but not for other factors such as make allowances that also impact Class III and Class IV prices. As noted in the summary of testimony, proponents of the delay explained they assume additional basis risk if a change in a price formula factor results in a price higher than what was locked in when they placed a hedge. As described in testimony, additional basis risk is not assumed if a price formula change results in a lower price.

Record testimony from the CME, as described earlier in the summary of testimony, indicated a decrease in the number of contracts with expiration dates over 12 months due to the regulatory uncertainty created by the unknown implementation timeline of this rulemaking proceeding. A comment submitted by the CME in response to the recommended decision noted a continuing decline in the volume of contracts over 12 months. This indicates the market is already adjusting to potential FMMO changes.

Accordingly, while this decision continues to find it appropriate to offer an implementation lag for the skim milk composition standards because of the impact to producer hedging positions, the record evidence indicates that shortening the implementation lag to 6 months is appropriate. When combined with the additional rulemaking steps still needed to determine producer approval and issuance of a final rule if approved by producers, this implementation timeframe still offers

adequate notice to the vast majority of producers utilizing risk management tools, while also allowing Class I skim milk prices to more quickly reflect milk supply and demand conditions. The implementation lag would still begin when the other changes from this rulemaking became effective.

Lastly, this decision does not support an automatic update of the milk composition levels, as contained in Proposal 1 or Proposal 2. It is clear from the record that many factors, as described earlier, should be considered when making a change. Those factors can only be considered through the course of a rulemaking. This is the same rationale for changes to make allowances and yield factors, the other two sets of fixed parameters in the pricing formulas, which data shows tend to change over the long term rather than short term (*i.e.*, monthly), but outside of the normal, predictable seasonal swings in milk components. The nature of all of these fixed parameters, including skim milk components, involve complexities that are difficult to anticipate, as discussed throughout this final decision, and therefore demand robust consideration through a rulemaking proceeding.

Surveyed Commodity Products

USDA administers the Dairy Product Mandatory Reporting Program to gather weekly wholesale prices of four manufactured dairy products. Average survey prices are released weekly in the National Dairy Product Sales Report, and monthly average commodity prices are released by AMS on or before the 5th of the following month. The monthly product prices are then used in the FMMO price formulas to determine component values in raw milk. The same four commodities have been surveyed since 2000. The National Agricultural Statistics Service administered the survey from 2000 to 2012; submitting data was voluntary until 2008, and then mandatory and verified from 2008 to 2012. AMS has administered the survey since 2012 with the data being mandatory and audited 73 FR 34175 (June 17, 2008).

This proceeding is considering four proposals that would add or remove a variety of products in the DPMRP survey. Because FMMOs enforce minimum raw milk pricing, the overarching question for the Department in this decision is whether the current surveyed commodities are an appropriate representation of market clearing, wholesale commodity products whose prices provide an accurate reflection of the minimum value of raw milk. DPMRP currently surveys cheddar

cheese, butter, nonfat dry milk, and dry whey. Proposals submitted in this proceeding offer changes to the cheese survey (Proposals 3, 4, and 6) and changes to the butter survey (Proposal 5). No proposals seek changes to the NFDM or dry whey surveys.

Cheese Survey

Currently, FMMOs utilize a weighted average DPMRP survey price of 40-lb cheddar cheese blocks and 500-lb cheddar cheese barrels to determine the protein price used in the Class III price formula. Although both products meet the definition of cheddar cheese, the different package styles reflect that their intended uses are different. Cheddar cheese barrels are intended to be further processed into processed cheeses. Cheddar cheese blocks can also be used for that purpose, but they are produced with the intention of use in a natural cheese with minimal further processing (for example cutting into consumer packages or shredding.) DPMRP weights the cheese price by the volume of surveyed blocks and barrels, which according to record evidence, is typically around 50 percent blocks and 50 percent barrels.

Proposal 3 seeks to drop barrels from the survey and solely rely on a survey of 40-lb blocks. Proponents offered a few reasons for dropping barrels. First, they believe barrels are overrepresented in the survey because the weighting methodology is based on the production percentages included in the survey and not actual production across the entire cheddar cheese market. Proponents believe the percentage of cheddar cheese manufactured and priced off 40-pound block prices is significantly higher than 50 percent of the U.S. natural cheese market. Second, proponents argue that having what amounts to two products in the survey results in an average price that is not representative of either blocks or barrels. They say this has been particularly evident since 2017, when market prices between blocks and barrels began to significantly diverge, both in magnitude and direction, from the historical average difference of \$0.03. Barrel prices were even occasionally higher than blocks (historically, block prices have been higher than barrel prices). Proponents argued that when barrel prices have been well below the assumed \$0.03 difference, the current weighting methodology results in a lower average cheddar price than would have been if the two prices were weighted in accordance with actual, total production of each product. Members of NMPF testified a block-only survey would

contain adequate survey volume to be representative of the cheese market.

Opponents of dropping barrels asserted: (1) it is not appropriate to eliminate approximately half of the current cheese survey volume; (2) barrels are a market-clearing product and should continue to be included in the survey; and (3) blocks and barrels together represent the national cheese market as they are both commodity products with different commercial uses. Opponents also disputed the claim that most cheese is priced off the block market.

During the hearing, Edge offered an alternative that would reweight the survey average price based on the U.S. production volume of blocks and barrels as determined by NASS, instead of volume from respondents to the AMS survey. They opined barrels should not be removed from the survey because in months where the barrel price exceeded blocks, the Class III price would have been lower than it otherwise was, and consequently producer revenue would be less. Instead, Edge argued a better solution to the issue of overweighting barrels was to use a weighting methodology reflective of actual U.S. cheddar cheese production.

Proposal 4, submitted by AFBF, seeks to add 640-lb blocks of cheddar cheese to the survey. This type of cheddar cheese is made using the same process as 40-lb blocks and differs only in the final container for the cheese curd. Both sizes represent an intermediate product requiring further processing before it can be consumed. The proponent's primary justification is the additional survey volume that would be added. The AFBF agreed with NMPF that barrels are overrepresented in the survey, and their proposed solution is to add survey volume through the addition of 640-lb blocks. This argument implicitly assumes the accuracy of milk valuation is improved when a larger volume of cheese is surveyed.

Opponents to adding 640-lb blocks argued: (1) most 640-lb blocks are already priced off 40-lb blocks, so their inclusion would not enhance price discovery; and (2) 640-lb blocks are typically customer-specific which would exclude those blocks from the survey. The opposition is premised on the additional survey volume not adding new price information either because the prices are already reflected in the 40-pound block price, or because the customized products are value-added and should not be included for minimum pricing.

Proposal 6, offered by CDC, seeks to add mozzarella cheese to the survey. Proponents argue mozzarella is the

largest volume of cheese produced in the U.S., and revenue from mozzarella products should be captured in the survey and ultimately reflected in prices paid by Class III handlers. Further, proponents argued a higher Class III price should be reflected in producer prices to offset increasing farm production costs.

Opponents argued there is no one standard of identity for mozzarella cheese, making it difficult to delineate what mozzarella product would have a substantial volume of reportable sales to represent the market value of mozzarella cheese. In addition, opponents stated no manufacturing cost data is available to be evaluated for inclusion in the manufacturing allowance calculation for cheese. Lastly, opponents asserted mozzarella is not a market-clearing product and therefore should not be considered when determining minimum prices.

While there were three proposals offering changes to the cheese survey, two of them lack data and evidence to support adoption. First, the addition of mozzarella is not supported by the record. The record reveals multiple standards for different mozzarella cheese products, but no evidence was presented to show which of those would be appropriate to survey as an improvement in finding a minimum value for milk. Furthermore, no evidence was presented on what would define a commodity mozzarella product, rather than a value-added product, which is a general rule for inclusion in the DPMRP. Proponents offered information on mozzarella in consumer sized packages (e.g. mozzarella sticks), but little to no evidence on what should be considered a commodity mozzarella product. Evidence shows that a majority of what is considered mozzarella production is driven by customer specification and would not meet any of the standards of identities offered, indicating it would be considered a value-added product and excluded from the survey. Lastly, the record indicates mozzarella products are already typically priced based on the 40-pound cheddar cheese block price. Therefore, adoption of Proposal 6 would only result in significant costs associated with determining a commodity mozzarella product to be surveyed and the ongoing cost of surveying said product, without adding measurable new price information to the DPMRP cheese survey.

Most public comments submitted regarding changes to the surveyed commodity products supported the continued exclusion of mozzarella cheese. A public comment submitted by

Leprino stated that continued exclusion of mozzarella cheese from the Class III price formula would limit complexity and more accurately reflect a standard market price. Two individual dairy farmers also submitted comments in support of excluding mozzarella cheese.

In its comments, CDC requested reevaluation of the decision, reiterating arguments expressed at the hearing that more products should be included in the DPMRP survey and inclusion of mozzarella would raise producer revenue. Similar comments were also submitted by the National Family Farm Coalition.

Ten dairy farmers from California and Wisconsin submitted public comments supporting the inclusion of mozzarella cheese. The farmers generally expressed that mozzarella should be included because it is a key milk price indicator, and its higher value should be reflected in their milk check. A Wisconsin dairy farmer was of the opinion the cheese value should not be determined from only one type of cheese.

This decision continues to find exclusion of mozzarella cheese appropriate. Hearing testimony and public comments made in support of including mozzarella primarily centered around generating additional revenue for producers as mozzarella garners a higher price in the market. FMMO prices represent minimum prices paid by handlers for milk used in market-clearing commodity products. The DPMRP survey specifically excludes value added products, and the record contains no evidence that mozzarella is considered a market-clearing commodity product. Consequently, Proposal 6 continues to be denied.

The record lacks evidence to support adoption of Proposal 4, adding 640-lb blocks. The record reflects widespread industry consensus that 640-lb blocks are typically priced off 40-lb blocks. Because of this price relationship, numerous industry witnesses testified that no new price information would be captured by including 640-lb blocks. In addition, several witnesses testified 640-lb blocks are largely made-to-order on long-term price contracts which would exclude the sales from the survey because of these marketing characteristics. No data was presented to evaluate whether any additional price information gained through inclusion of 640-lb blocks would offset the burden (lack of efficiency) to both the industry and USDA for their inclusion.

One individual dairy farmer and the AFBF submitted comments on the recommended decision taking exception with the continued exclusion of 640-lb blocks. The AFBF reiterated its

testimony that inclusion of 640-lb blocks would add volume to the survey to ensure more accurate and representative pricing. Similar comments were submitted by the New York, Michigan, Wisconsin, Minnesota, and Arizona Farm Bureaus. AFBF further claimed that without inclusion of 640-lb blocks, manufacturers switch between 40-lb and 640-lb block production to avoid reporting prices to the DPMRP survey. There is no evidence on the record to support that such price manipulation would or does happen given that 640-lb blocks are currently not reported. This decision continues to exclude 640-lb blocks as the record does not demonstrate price discovery is aided by its inclusion. In addition, this decision continues to find it appropriate that more orderly marketing conditions are best maintained through price discovery of a single commodity product, as further discussed below. Accordingly, Proposal 4 continues to be denied.

The Department considered the idea presented by Edge to reweight blocks and barrels in the survey to reflect total U.S. cheddar cheese production volumes by packaging type, instead of survey volumes. However, the record lacks evidence regarding the market dynamics of barrel production to analyze how this idea would be implemented, or the impact it may have on prices, to evaluate whether it would result in a more appropriate cheese price. In addition, as is made clear below, this final decision continues to find that surveying two cheese products is no longer an appropriate method for providing orderly marketing in today's marketplace, rendering further discussion of a more proper weighting methodology unnecessary.

A comment submitted by Edge in response to the recommended decision maintained reweighting blocks and barrels was a more appropriate alternative to removing 500-lb barrels from the survey. However, the comment did not address a methodology to determine how such a proposal would be implemented. This decision maintains that surveying two cheese products, regardless of how they were weighted in the survey, results in a cheese price that does not represent a single product.

What is left to consider is whether 500-lb barrels should remain in the survey. When determining which products are appropriate to be included in surveys, the Order Reform Final Decision is instructive. As described in the decision, "The importance of using minimum prices that are market-clearing for milk used to make cheese

and butter/nonfat dry milk cannot be overstated. The prices for milk used in these products must reflect supply and demand and must not exceed a level that would require handlers to pay more for milk than needed to clear the market and make a profit.” 64 FR 16026, 16094 (Apr. 2, 1999). To effectuate that objective, FMMOs use survey prices of market-clearing commodity products.

In the Order Reform decision, both block and barrel cheese were included in the survey to increase the sample size and give a better representation of the cheese market. Since Order Reform was implemented, an evaluation of which products should be included in the cheese survey has occurred twice. In 2000, shortly after implementation of Order Reform, the Department considered both the addition and subtraction of cheese products into the survey, which at that time was administered by the NASS. 65 FR 20094 (April 14, 2000). In 2007, the Department again considered changing the products in the cheese survey, including the removal of 500-lb cheddar cheese barrels. 72 FR 6179 (Feb. 9, 2007). In both proceedings, the Department maintained that inclusion of both 40-lb blocks and 500-lb barrels was representative of the cheese market at the time.

While not contained in the hearing notice of the 2000 proceeding, there was testimony at the hearing for incorporation of other cheeses in addition to cheddar. The idea was denied because “If the survey included other descriptions of cheddar and other types of cheese, such as mozzarella, it would not be possible to consider the reported price as representative of the value of any particular product.” 67 FR 67906, 67926 (Nov. 7, 2002). This reasoning illustrates an important consideration of which products should be contained in the survey; products whose resulting prices are representative of a distinct product.

For all other product pricing formulas (butter, nonfat dry milk, and dry whey), DPMRP only surveys one product. The butter survey collects prices of 80 percent salted Grade AA butter, the NFDM survey collects prices of USDA Extra Grade NFDM, and the dry whey survey collects prices for USDA Extra Grade dry whey. While all three of these products can be in varying bulk packaging sizes as specified in regulation, the product itself is essentially the same. 7 CFR 1170.8 Consequently, the resulting survey prices represent single, distinct products.

The same cannot be said of the two cheddar cheese products surveyed.

Forty-pound block cheddar cheese is typically colored, and primarily sent for further processing into consumer type packages such as “cut and wrap” and shredded products. Barrel cheese, on the other hand, is typically white (uncolored) and used primarily for processed cheese and cheese-flavored products. The hearing record demonstrates the two products are not interchangeable but rather are produced for two distinctly different uses which have their own supply and demand factors. These fundamental qualities have not significantly changed since Order Reform. At the time of Order Reform, and during the subsequent two rulemakings considering changes to the cheese survey, the prices of blocks and barrels were relatively close, and it was determined the additional volume added with the inclusion of barrels was a benefit to orderly marketing as it ensured a robust survey sample.

Testimony and evidence presented showed the historical price alignment of the two products, estimated at \$0.03 per pound, until 2017. Proponents argued the market changed significantly in 2017 when there was a dramatic increase in price volatility both within each product and in the relationship between the two products. To determine statistical validity of that claim, the differences in the monthly average block and barrel prices from 2001–2023 were analyzed to identify breaks in the structure of the block-barrel spread. The analysis found December 2016 to be a statistically significant month, indicating the period between 2001 to 2016 and 2017 to 2023 were statistically different in terms of the block-barrel spread volatility. Historically, prices for blocks and barrels were similarly priced. From 2001–2016, the block-barrel spread averaged \$0.01 per pound, while from 2017–2023 the spread significantly increased to \$0.115 per pound.

When surveying prices of two products that recently are so divergent, the resulting average cheese price does not represent either of the products surveyed. For example, in October 2020, cheddar block prices averaged \$2.5692 per pound and cheddar barrel prices averaged \$0.6052 per pound lower at \$1.9640 per pound. The weighted average cheese price for October used to compute FMMO component prices was \$2.2921, a price reflecting neither of the two survey products. Accordingly, after careful analysis of the record, this final decision continues to find the DPMRP cheese survey should only include 40-lb cheddar cheese blocks. Evidence reveals a clear and statistically significant shift in the cheddar markets

occurred in 2017, which witness testimony attributed to a number of market factors including plant investments and increased production of white whey. As a result, inclusion of both blocks and barrels in the cheese survey has resulted in average cheese prices used in FMMO formulas that are not representative of any one cheese product. Therefore, this decision continues to recommend adoption of Proposal 3.

Comments submitted by NMPF, Select, and DFA in response to the recommended decision supported the exclusion of 500-lb barrels to provide for an appropriate market clearing cheese price representative of a single product. Comments submitted by two individual dairy farmers and state Farm Bureaus from Arizona, Wisconsin, Minnesota, Michigan, and New York expressed concern that the exclusion of 500-lb barrels could affect market transparency and price accuracy. Prices used in the FMMO system are collected through the DPMRP, which has a robust reporting and auditing component to ensure reporting handlers are complying with program regulations and reporting all qualifiable products. In addition, Annual Validation surveys are conducted with all current and potentially qualifying plants (any entity marketing and selling one million pounds or more of product) to verify current reporters know and understand all reporting requirements and if potentially qualifying plants are still exempt from reporting. Consequently, given the safeguards described, this decision does not find price accuracy and market transparency will be negatively impacted by the exclusion of 500-lb barrels.

There was significant testimony regarding how cheddar barrel makers would be impacted if 500-lb barrels were no longer surveyed. It was clear there was no industry consensus, not even between barrel makers, on the impact. What is paramount to any rulemaking is to ensure FMMO provisions provide for orderly marketing conditions, as required by the AMAA. The ultimate consideration is which set of bulk, market-clearing, commodity type dairy products provide the most accurate and efficient means of determining the minimum value of milk components. One facet of this is to ensure prices used in the formula best represent the fundamental products selected for their purpose. As described above, that goal is not being met by using both blocks and barrels in the survey.

One concern expressed by some barrel cheese manufacturers is that the Class

III price resulting from a block-only calculation would often be too high to ensure a profitable return to barrel cheese makers. Multiple considerations are worth noting. One, there are numerous styles of cheese represented in Class III. Manufacturers of each have no guarantees on their net returns, and, hence, manage their business by taking minimum pricing into account. To that end, there are many steps remaining in this rulemaking process, including publication of a final decision, producer referendum, and if passed, an implementation period. These steps should allow barrel manufacturers ample time to determine if changes are needed in their business practices to adjust to the prices that would result from this recommended price survey. As FMMOs only enforce minimum regulated prices on pooled milk, it should not be overlooked that barrel manufacturers choose whether to pool milk subject to minimum prices.

Since this decision proposes to remove 500-lb barrels from the DPMRP survey, this decision also proposes a conforming change to the cheese pricing reporting specifications in the Dairy Product Mandatory Reporting Program regulations (7 CFR 1170.8).

Butter Survey

Currently, FMMOs utilize the monthly average DPMRP survey price of 80 percent salted Grade AA butter in 25-kilogram and 68-pound boxes to determine the butterfat price used in all 4 classified pricing formulas. Proposal 5 seeks to add unsalted butter to the survey. Proponents argue the volume of U.S. butter production captured by the survey has been decreasing, and adding unsalted butter would increase the sample size and yield more robust survey results.

Testimony in opposition to Proposal 5 asserted the production of unsalted butter is mostly manufactured to a particular customer order. Because the lack of salt results in a shorter shelf life, unsalted butter is generally not manufactured unless its sale is imminent. On the other hand, because salted butter can be stored, when milk needs to clear the market and butter manufacturers lack a buyer, they will make salted butter to store and sell later. Opponents also noted unsalted butter is typically exported, often facilitated through premium-assisted sales, rendering those sales unreportable.

The record lacks evidence to support adoption of Proposal 5. Although data was entered showing the amount of unsalted butter graded by the USDA Dairy Grading Program tripled between 2005 and 2022, the USDA butter grading

program is voluntary; hence, the data does not give a complete picture of the U.S. butter market. Furthermore, there was no indication regarding what percentage of the graded butter volume would be reportable given testimony noting the structure of the unsalted butter market would likely make a large share of it nonreportable. No data was presented to evaluate whether any additional price information gained through inclusion of unsalted butter would outweigh the burden to both the industry and USDA for its inclusion. In fact, the record demonstrates that unsalted butter is not a market clearing product given its shorter shelf-life and on-demand production.

The record evidence supports salted butter as the market clearing butter product and continuation as the only butter product in the survey. In addition, as discussed in evaluating the cheese survey, having two commodity products surveyed (such as blocks and barrels) can have the unintended consequence of resulting in a component price that does not represent either product produced. As no price information was entered into evidence to evaluate how salted and unsalted butter prices compare, the Department could not determine if a similar situation might occur by adding unsalted butter to the survey.

A comment submitted by CDC in response to the recommended decision advocated for increasing the number of products surveyed, including unsalted butter, but provided no additional arguments for why unsalted butter should be considered a market clearing product. Accordingly, Proposal 5 continues to be denied.

Class III and Class IV Formula Factors

The Class III and IV formula factors include four distinct elements—manufacturing (make) allowance, butterfat recovery, farm-to-plant shrinkage, and nonfat solids yield.

a. Make Allowances

Make allowances represent the costs of converting raw milk into the four manufactured dairy products surveyed by USDA. The current make allowance levels were determined through a 2007 rulemaking that became effective October 1, 2008, and are as follows (\$/per pound): cheese—0.2003; butter—0.1715; NFDM—0.1678; and dry whey—0.1991. The 2007 rulemaking used an average of two surveys: a voluntary, unaudited 2006 nationwide cost survey conducted by the Cornell Program on Dairy Markets and Policy (CPDMP), and a mandatory, audited 2006 cost survey of plants located in California

conducted by the CDFA. This proceeding must determine whether manufacturing costs have increased such that a change from the current levels is warranted, and if so, what are appropriate levels.

Four manufacturing cost data sets were entered into the record for consideration in this proceeding. The first was conducted by the University of Wisconsin, on behalf of USDA, and was a voluntary survey of manufacturing plants throughout the U.S. (2021 survey). This survey was similar to the 2006 CPDMP survey used to determine current make allowances, as the primary researcher authored both. The 2021 survey collected cost information provided from manufacturing plants of cheese (10 plants), butter (12 plants), NFDM (27 plants) and dry whey (8 plants). Annual data submitted by plants primarily represented calendar year 2019, and included labor, utilities, non-labor processing, packaging, general and administrative, and return on investment cost categories. The 2021 survey results were presented as total averages, and high and low-cost plant averages.

The 2021 survey methodology was similar to the 2006 study, except for the allocation of non-allocated costs. Some fixed or overhead costs could not be allocated directly. Some costs were inherently direct costs but were not collected in a manner that allowed them to be assigned to a particular processing activity or product. When that occurred in previous studies, unallocated costs were allocated on a solids basis, which testimony revealed to be a common practice, according to some manufacturers. In some facilities making multiple products, such as butter and powder plants, not all plant operators had the infrastructure to allocate costs to the different products. A common example was plant utilities wherein the plant only had a single electric meter. If an operator utilized 70 percent of the solids received at the plant in butter, then 70 percent of the unallocated costs (e.g. electricity) were allocated to butter production, and the remaining 30 percent were allocated to NFDM production. This allocation method was referred to by the study author as the “non-transformation” method.

In the 2021 survey, the author used what they believed to be a better method for addressing costs the manufacturer could not directly allocate. Unallocated costs were allocated based on an estimation of the degree of processing transformation the raw milk underwent to transform into a manufactured product. On a scale from 1 to 10, products with minimum processing

(liquid whey) were assigned a 1, while products with a high degree of transformation (whey protein concentrate) were assigned a 10. The survey author argued this somewhat subjective and ordinal measure of costs could provide a more logical allocation of certain costs that were inarguably not properly attributed through the non-transformation cost allocation method. The most obvious example was the highly energy consuming process of drying for NFDM powders. For example, operating a milk dryer requires significant energy, resulting in an assumption that it was more appropriate for a higher percentage of the plant's energy costs to be attributed to its powder production.

A second data set was a survey conducted by the same author, administered on behalf of IDFA, seeking to capture more current costs and increase the number of respondents. This survey, referred to as the 2023 survey, was similar to the 2021 survey, except for two elements. First, the plants that voluntarily submitted data were different in number and type: 18 cheese, 13 butter, 15 NFDM, and 9 dry whey plants participated. The survey author explained that while the number of participating plants were similar for butter and whey across both surveys, the structure of the plants was noticeably different. Consequently, most of the variability in average costs between the 2021 and 2023 surveys is

attributed to the plant sample, rather than actual cost increases over time. For example, the 2021 butter plants surveyed tended to be larger than the 2023 butter plants surveyed, accounting for a significant portion of the cost difference between the two surveys. Some witnesses at hearing also noted the 2023 survey captured 2022 costs, a time of historically high inflation which has since moderated.

The second notable difference was the 2023 survey used the non-transformation methodology of allocating unallocated costs on a solids basis. The survey author indicated mixed industry feedback on the transformation allocation methodology used in the 2021 survey, as many participants stated allocating costs on a solids basis is standard practice. To facilitate comparison of the two surveys the author also presented updated 2021 survey results using the non-transformation allocation methodology.

In support of a separate data set, mandatory and audited 2004–2016 California manufacturing cost survey results, conducted by the CDFA, were entered. These surveys formed the historical data used to forecast current costs in the CA Forecast described below. The 2006 CDFA study was used by USDA when determining the current FMMO make allowances.

The fourth data set, entered on behalf of IDFA, was a result of a statistical model that used data from the 2004–

2016 California manufacturing cost surveys and other known input prices and productivity data (for example, the producer price index) to project future California manufacturing costs, referred to hereinafter as the CA Forecast. The study author testified the model predictions were a better estimate of costs than a simple trend analysis since they accounted for the impacts of other factors, such as accelerating inflation, that are known to describe changes in manufacturing costs in California. Unlike the 2021 and 2023 surveys which evaluated six cost categories (processing labor, utilities, packaging, non-labor or utilities processing, general and administrative, and return on investment), the CA Forecast only estimated three cost categories (labor, utility, and other). Other costs were defined as the remaining costs after labor and utility costs were deducted. Inasmuch as the CDFA results were used by USDA when previously amending make allowances, proponents argued this statistical estimation of what CA manufacturing costs might have been for 2022 would be a helpful indicator to validate other manufacturing cost data entered into the record.

These data sets were the basis of the manufacturing allowance levels proposed by stakeholders at the hearing. Two sets of make allowance levels were offered (\$/pound):

Product	Proposal 7	Proposals 8 and 9			
	NMPF	IDFA/WCMA year 1	IDFA/WCMA year 2	IDFA/WCMA year 3	IDFA/WCMA year 4
Cheese	0.2400	0.2422	0.2561	0.2701	0.2840
Dry Whey	0.2300	0.2582	0.2778	0.2976	0.3172
NFDM	0.2100	0.2198	0.2370	0.2544	0.2716
Butter	0.2100	0.2251	0.2428	0.2607	0.2785

NMPF asserted that their proposed levels take a balanced approach between recognizing increased manufacturing costs and the impact to producers if there is a significant increase from current levels. They testified that while they evaluated the 2021 survey when developing their proposal, the levels they ultimately proposed were a consensus judgment of all NMPF members. By their own description, the proposal is not intended to reflect the entirety of current manufacturing costs. NMPF witnesses argued that their proposal would update make allowances to be a closer reflection of manufacturing costs, but further increases could not be justified because of the potential impact to producers.

They argued at the hearing, as well as in their public comments in response to the recommended decision, that until a mandatory cost survey can be conducted to provide assurances of accuracy in manufacturing cost calculations, any increases larger than they proposed would reduce producer revenue, lower already slim (if any) margins, and negatively impact the availability of adequate supplies of milk for fluid use. They considered such consequences disorderly.

NMPF stressed current make allowances are too low and have resulted in cooperative rebalancing as a method of sharing losses among cooperative members who own manufacturing plants. NMPF witnesses

also testified to receiving reduced premiums from manufacturing plant customers as they attempt to recoup costs not covered by the current make allowance levels. Reduced and/or deferred plant investment caused by inadequate make allowances was also a theme discussed by many witnesses. Cooperative witnesses spoke of the disproportionate burden on cooperatives with balancing plants, which inherently have higher manufacturing costs as they do not operate continuously at full capacity because of the market-wide balancing role they necessarily assume.

NMPF cooperative witnesses and dairy farmer members presented evidence on increasing farm production

costs and slim farm margins. They opined at the hearing, as well as in their public comments to the recommended decision, that the impact to producers' profitability should be considered when determining appropriate make allowance levels.

WCMA and IDFA offered separate, but identical, proposals. Their proposed make allowance levels were derived from the average of the 2023 study and the CA Forecast, plus a \$0.0015 marketing cost factor. The proposals contained a 4-year implementation schedule with 50 percent of the increase implemented in year 1 and the remaining 50 percent implemented evenly across the next 3 years. Proponents offered a phased implementation schedule in recognition of the impact that sudden, large increases in make allowances would have on producer revenue.

WCMA and IDFA witnesses asserted there are limits to a manufacturing handler's ability to lower costs through efficiencies. As make allowances have not been increased in over 15 years, the witnesses stated plants have reached the limit on capturing cost efficiencies, and inadequate make allowances are now impacting innovation and capital investments. Manufacturing handlers testified their costs of manufacturing have increased and are in line with the 2021 and 2023 survey results. As a consequence of inadequate make allowances, the witnesses said classified prices are overvaluing raw milk. To substantiate the claim, witnesses compared producer mailbox prices with FMMO blend prices. In regions where mailbox prices (which contain premiums and deductions reflecting reblending) are below blend prices, the witnesses asserted regulated prices are too high, as manufacturers have lowered market premiums to make up for high manufacturing costs.

The record clearly demonstrates that current make allowance levels are not reflective of the costs manufacturers incur in processing raw milk into the finished bulk products of cheese, butter, NFDM, and dry whey. This was one of the only facts to which all participating parties agreed and offered evidence in support, as discussed above. However, there were divergent views on what should constitute adequate make allowance values going forward.

Since 2000, when product pricing was adopted, FMMO decisions have consistently relied on surveys of observed manufacturing costs to determine proper make allowance levels. Previous make allowances have been derived in whole, or in combination with, surveys conducted

by CPDMP, CDFA, and the USDA Rural Business Cooperative Service. The importance of relying on actual, observed costs cannot be overstated. FMMO price formulas determine the classified prices handlers pay to dairy farmers. It is important that all variables reflect actual market conditions.

While the use of modeling is helpful for policy analysis, the evidentiary record of this proceeding contains adequate observed market data to determine make allowance levels without the need to rely on model assumptions. Modeling involves a host of assumptions made by the modeler, as was described by the CA Forecast author, which result in estimates with a wide confidence interval. In other words, cost estimates could have a wide range of possible values consistent with the model. The confidence interval for the cost estimates widens when some indexes used to forecast are not specific to dairy manufacturing. Economic modeling was considered and rejected during Order Reform as a replacement for the Basic Formula Price. This decision affirms the Department's long-held position that this type of modeling, requiring extensive assumptions, is not an appropriate methodology for determining make allowances when superior information is available. As it is common for participants to not reveal confidential information such as manufacturing costs, the cost surveys contained in evidence provide the best available information on observed costs for this proceeding. Accordingly, this decision does not find justification for using the CA Forecast in determining appropriate make allowances levels.

In opposition to Proposals 8 and 9, cooperatives and dairy farmer members offered substantial testimony regarding the potential impact to dairy farmers should make allowances be significantly increased. Accordingly, they recommend adoption of the NMPF proposal as it attempts to temper the impact to producers.

FMMOs are designed to provide for orderly marketing through classified prices paid by handlers and marketwide pooling to determine average minimum blend prices paid to producers. As FMMO formulas are market-oriented, the product prices that drive classified prices are chosen to reflect current supply and demand conditions. This was last reiterated by the Department in 2013, writing "when the supply of milk is insufficient to meet the demand for Class III and Class IV products, the prices for these products increase as do regulated minimum milk prices paid to dairy farmers; because the milk is more valuable, and the greater value is

captured in the pricing formulas." 78 FR 9248 (Feb. 7, 2013). Further, the Secretary is expressly authorized in the AMAA to set prices to reflect ". . . the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products. . . ." 7 U.S.C. 608c(18). This concept was discussed and validated by a federal court and is relevant to this proceeding. *Bridgewater Dairy, LLC et al. v. USDA*, No. 3:07-cv-104, 2007 WL 634059 (N.D. Ohio, 2007). Therefore, the potential impact to producers remains an inappropriate factor in determining make allowance levels. While many stakeholders look to the FMMO program to provide stability, it is not within FMMO authority to support dairy farmer income.

Accordingly, record evidence does not support adoption of Proposal 7, whose make allowances levels are not reflective of observed costs provided in evidence and is designed to dampen the impact to producers.

A vast majority of hearing participants supported a USDA-administered, mandatory, and audited survey as the most appropriate method for obtaining observed cost data to determine make allowance levels. Some witnesses asserted at the hearing, as well as in public comments to the recommended decision, that make allowances should not be changed until such a survey is administered and results published. Conducting such a survey is not currently authorized by law. The lack of a mandatory survey has not been reason to delay two previous updates to make allowance levels, and its continued lack of existence now is not a reason for delaying such an update in this proceeding. As discussed, the record of this proceeding clearly demonstrates manufacturing costs have increased since make allowance levels were last changed. Given the body of evidence, this final decision continues to find it appropriate to increase make allowances to ensure the price formulas better reflect manufacturing costs and provide for more orderly marketing conditions.

The record reveals the voluntary, unaudited nature of the 2021 and 2023 surveys are not considered an accurate representation of costs by some stakeholders, particularly the producer community. Forty dairy farmers located throughout the U.S. and 10 dairy farmer organizations who submitted comments to the recommended decision opposed the make allowances levels contained in the hearing notice and proposed by USDA due to the unaudited and voluntary nature of the surveys on which they were based; further, DFA and NMPF mentioned that the surveys

and hearing record do not include cost data from several large manufacturers, potentially leading to an upward bias in the make allowances contained in the recommended decision. The AFBF; the Arizona, Florida, New York, Michigan, and Tennessee Farm Bureaus; and some dairy farmers argued in their comments that make allowances should not be changed without a mandatory audited survey, reiterating testimony on the weaknesses of the 2021 and 2023 surveys. In their joint comment, the Wisconsin and Minnesota Farm Bureaus rejected raising make allowances, as the survey data is unaudited and voluntary. Raising make allowances, they commented, will be detrimental to dairy farmers in the Upper Midwest and other regions with high Class III and IV utilization, speeding up dairy farm consolidation and bankruptcies. NMPF and DFA comments expressed support of an increase in make allowance levels at this time but maintained the NMPF-proposed make allowances in Proposal 7 are best supported by the record until a mandatory survey can be conducted.

Questions regarding plant sampling, cost allocation methodology, and capturing a high-cost time period expressed in testimony and public comments are legitimate considerations. Issues with the results of voluntary, unaudited surveys are not new to the process of determining make allowances. Similar situations occurred in both the 2006 and 2007 rulemakings. In both instances, make allowances were determined by using parts of different survey results. The record of this proceeding continues to support the use of unaudited, voluntary surveys for determining make allowances, as has been done in the past.

What remains for the Department to consider is determining representative make allowance levels given the evidentiary survey data: the 2021 survey, the 2023 survey, and the 2016 CA survey. The record does not support consideration of the 2021 survey results that relied on the transformation cost allocation method for allocating unallocated costs. Hearing participants expressed skepticism of this method as it is standard industry practice to allocate costs on a solids basis. Although the study author explained how the transformation numbers were assigned to products, the record does not contain sufficient evidence to validate the new methodology. Whether or not the transformation methodology is theoretically more accurate is not relevant. What is germane is that manufacturers allocate costs, manage their plants, and make marketing and pricing decisions in accordance with the

traditional method of allocating fixed and unallocated costs on a pro-rata basis of milk solids in the final products. Accordingly, the 2021 survey results utilizing this methodology were not considered when determining the proposed levels in this decision. Select's alternative methodology presented in its post-hearing brief, which relied on the transformed 2021 survey numbers, was not considered further.

The recommended decision found usage of the revised non-transformed 2021 and 2023 surveys and the 2016 CA survey appropriate to determine the proposed make allowances. The decision found that relying on a combination of these survey results provided a consensus set of data to determine appropriate make allowance levels and was superior to relying only on one survey.

The Department received 75 comments regarding amendments to make allowances, submitted by dairy farmers (mostly small), cooperatives, processors, trade associations, and advocacy groups from 23 different states.

Dairy farmers and organizations representing dairy farmers, including the AFBF; state Farm Bureaus representing Florida, Michigan, Minnesota, New York, Tennessee, and Wisconsin; Farm Women United; the National Family Farm Coalition; and the Ohio Farmers Union opposed the make allowance levels in the recommended decision. The comments said increasing make allowances would reduce farm income, particularly for small and medium-sized farms, potentially leading to more closures and accelerating industry consolidation.

In their comments, NMPF and DFA also opposed the make allowance levels specified in the recommended decision and continued to advocate for the NMPF-proposed levels in Proposal 7. They reiterated hearing testimony that dairy farmer cost of production should be considered when determining make allowances to ensure orderly marketing conditions. In its comment, NMPF cited a 2008 amendment to the AMAA stipulating the price for feed and fuel should be considered when determining whether to adjust make allowances. (7 U.S.C. 608c(17)(G)). The provision cited by NMPF applies to hearings commencing prior to September 20, 2012, and the provision was not extended in the 2012 Farm Bill. The Department continues to find it to be inappropriate to consider producer income as a factor in determining make allowance levels.

In its comment to the recommended decision, Edge reiterated arguments

from its post-hearing brief that make allowances should be based on plants at the technological frontier, rather than inefficient plants they claim were represented in the voluntary surveys whose results are part of this hearing record. Since Edge offered no details in their comment on how this methodology would be implemented given this proceeding's evidence, no further consideration was given.

Also opposing the make allowances contained in the recommended decision, IDFA and WCMA advocated in their comments for use of the 2023 survey data only. IDFA and WCMA argued that after eliminating the 2022 CA Forecast from consideration, the only reasonable data remaining is the 2023 survey results. They both objected to the use of the 2021 survey to moderate the influence of prices during an inflationary period. According to IDFA and WCMA, unless price deflation occurred, which they argued did not, there is no reason for adopting anything other than the 2023 survey results for all four commodities.

Inflation describes a general price level increase across the whole economy, whereas deflation describes a general price level decrease. Price decreases can occur in an inflationary environment just as price increases can occur in a deflationary one, and producer price indexes (PPIs) are one way to evaluate such price movements. A series of Federal Reserve Bank of St. Louis input indexes and U.S. Energy Information Administration price data relevant to dairy commodity manufacturing, from June 2022 (marking the end of most pandemic-related programs) to June 2024 (the last full month before the recommended decision was issued) was evaluated to analyze IDFA and WCMA comments. While this decision does not find it appropriate to rely on indexing or forecasting to determine make allowances levels, the consideration of indexes can serve as a check that the proposed levels are reasonable and reflect current costs given the totality of evidence in this rulemaking.

As stated in the recommended decision, there have been price decreases in sectors relevant to the manufacturing process that indicate manufacturing costs were high in 2022 and thus are not reflective of current costs. The PPIs from June 2022 to June 2024 for Corrugated Materials, which declined approximately 14 percent, and Lumber, which declined more than 21 percent, as well as the Henry Hub (U.S. Energy Information Administration) average spot price for natural gas, which declined more than 67 percent, serve as

examples of prices that declined during an inflationary period. The PPI for All Commodities, which decreased nearly 9 percent from June 2022 to 2024, is another more general indicator that input prices for commodities were particularly high in 2022 compared to 2024. Other examples of elevated input prices highlighted in the IDFA and WCMA public comments include labor, legal, insurance, and administrative costs. The presence of cost categories that have not declined do not preclude objective declines in other categories. The record indicates that even after accounting for wage increases of nearly 9 percent, according to the Employment Cost Index from the U.S. Bureau of Labor Statistics, declines in other areas outweigh increased labor costs, leading to an overall decrease in manufacturing costs. These overall input price decreases are relevant to all surveyed products; thus, the Department continues to find sole reliance on the 2023 survey is inappropriate in determining make allowances that reflect current costs.

IDFA and Leprino commented the Department should continue to incorporate a \$0.0015 marketing

allowance in all make allowances, based on the necessary costs to get commodity products to market, historical precedent, and lack of supporting data to merit its removal. IDFA stated the \$0.0015 marketing allowance was first adopted as part of Order Reform to cover the cost of moving commodity products to market, which include maintaining and staffing warehouses, supporting a marketing and sales staff, and transporting product to market. Leprino commented that the marketing allowance is necessary to reflect commodity costs at the same stage in the value chain as commodity prices in the NDPSR. In its comment, Leprino pointed to the make allowance levels since Order Reform as examples of the rationale in maintaining the \$0.0015 marketing allowance without new data to merit its removal. IDFA commented that, while no specific data was offered to estimate the current marketing allowance cost level, a review of the record reveals no evidence to support its removal.

The Department reevaluated the record for testimony related to the marketing allowance. The 2021 and 2023 cost surveys included costs

through product packaging. Post-packaging costs such as warehousing and marketing were specifically excluded. Testimony from a cheese manufacturer estimated the \$0.0015 marketing allowance covers post-packaging costs unaccounted for in the 2021 and 2023 cost surveys. Further, the DPMRP requires manufacturers to report prices that incorporate all costs associated with the product before it is shipped to market. It is important that prices reported to DPMRP and released through the NDPSR relate to the costs accounted for in the make allowance. Since marketing costs are included in prices reported through DPMRP, it is appropriate for such costs to also be accounted for in the make allowance. Therefore, this decision finds it appropriate for make allowances to include a \$0.0015 marketing allowance.

Additional public comments were submitted which pertained to specific make allowance levels proposed in the recommended decision. Those comments are addressed in the respective sections below.

Cheese

	2021	2023	2016			
	Non-transformed	Non-transformed	CA survey	Current	USDA proposed (recommended decision)	USDA proposed (final decision-inc. marketing allowance)
Low Cost .....	.....	\$0.2201	.....	.....	.....	.....
High Cost .....	.....	\$0.3181	.....	.....	.....	.....
Average	\$0.2365	\$0.2643	\$0.2454	\$0.2003	\$0.2504	\$0.2519
# Plants	10	18	4	.....	.....	.....

The recommended decision proposed a \$0.2504 per pound cheese make allowance, derived from the average of the 2021 and 2023 non-transformed survey results. The 2023 survey incorporates a representative sample size, accounting for 55.6 percent of NASS cheddar cheese production. The record indicates the 2023 survey, which collected cost data primarily from 2022, covered a period of relatively high inflation and rising input costs. An example is packaging costs, including lumber and corrugated materials, which testimony indicates and the input index analysis described earlier confirms, have receded since peaking in 2022. Absent any other data on the record, this final decision continues to find it appropriate to utilize an average of the 2023 and 2021 non-transformed survey results to ensure the proposed cheese make allowance is not

disproportionately affected by higher 2022 costs that have since moderated. The decision continues to find use of the 2021 and 2023 surveys provides a manufacturing allowance reflective of the national cheddar cheese market. In 2022, California cheddar cheese production represented approximately 6.9 percent of reported NASS cheddar cheese production. As incorporation of the 2016 CA survey would result in an over representation of California cheese manufacturing costs, this decision does not support its consideration.

In its public comment, AFBF wrote the current cheese make allowance is clearly adequate as there has been considerable investment in cheese plants; thus, the recommended cheese make allowance is too high. While anecdotal testimony on investments in cheese plants was presented at the hearing, data on the record clearly

indicates costs of processing commodity cheese have increased since make allowances were last updated.

The AFBF, as well as dairy farmers from Iowa and Pennsylvania, commented in opposition of all make allowance increases, but specific to cheese they argued that only about half the number of DPMRP reporting manufacturing plants are represented in the data. The Department continues to find it appropriate to use the 2021 and 2023 survey results, as the two samples together provide a reasonable representation of cheddar cheese processing.

This final decision therefore recommends a \$0.2519 per pound cheese make allowance, derived from the average of the 2021 and 2023 non-transformed survey results plus the \$0.0015 marketing allowance.

Butter

	2021	2023	2016	Current	USDA proposed (recommended decision)	USDA proposed (final decision-inc. marketing allowance)
	Non-transformed	Non-transformed	CA survey			
Low Cost .....	.....	\$0.2616	\$0.1838	.....	.....	.....
High Cost .....	.....	\$0.4210	\$0.2149	.....	.....	.....
Average	\$0.1338	\$0.3176	\$0.1938	\$0.1715	\$0.2257	\$0.2272
# Plants	12	13	7	.....	.....	.....

The recommended decision proposed a \$0.2257 per pound butter make allowance, derived from the average of the 2021 and 2023 non-transformed survey results. While the 2021 and 2023 surveys had roughly the same number of reporting plants and represented roughly the same volume of NASS U.S. butter production (approximately 80–82 percent), the plant samples differed significantly. The study author claimed sampling was the main driver for the notably different survey results. The 2023 survey captured data from both smaller and larger plants while the 2021 survey consisted of a more homogenous sample of larger and more efficient plants. The record indicates the 2023 survey, which collected cost data primarily from 2022, covered a period of

relatively high inflation and rising input costs. According to the Producer Price Index for All Commodities (PPI), published by the Bureau of Labor Statistics, prices have moderated since their June 2022 peak. Thus, this final decision continues to find it appropriate to average the 2023 and 2021 non-transformed surveys to account for the differences in plant sampling, and to ensure the proposed butter make allowance is not disproportionately affected by higher 2022 input costs that have since moderated. The decision continues to find use of the 2021 and 2023 surveys provides a manufacturing allowance reflective of the national butter market, as both surveys represent over 80 percent of 2022 NASS butter production volumes. This decision does

not support incorporating the 2016 CA survey in the calculation as it would overrepresent California butter manufacturing costs.

The Department received no public comments in response to the recommended decision specifically addressing the butter make allowance. However, since this decision finds it appropriate to continue to incorporate a marketing allowance into all make allowances, the final decision recommends a \$0.2272 per pound butter make allowance, derived from the average of the 2021 and 2023 non-transformed survey results plus a \$0.0015 marketing allowance.

NFDM

	2021	2023	2016	Current	USDA proposed (recommended decision)	USDA proposed (final decision-inc. marketing allowance)
	Non-transformed	Non-transformed	CA survey			
Low Cost .....	.....	\$0.2302	\$0.1854	.....	.....	.....
High Cost .....	.....	\$0.3247	\$0.2786	.....	.....	.....
Average	\$0.2454	\$0.2750	\$0.2082	\$0.1678	\$0.2268	\$0.2393
# Plants	27	15	8	.....	.....	.....

The recommended decision proposed a \$0.2268 per pound NFDM make allowance, derived from the average of the 2021 non-transformed survey and 2016 CDFA cost of processing survey results. In 2022, California represented 43.7 percent of U.S. NFDM production. This supported hearing testimony describing the importance of California manufacturing facilities in the total U.S. production of NFDM powder. Therefore, the recommended decision found it appropriate to place more emphasis on California NFDM plant costs considering the dominant share of NFDM production by California plants. As stated previously, given all the cost surveys contained in the evidentiary record had shortcomings, the recommended decision found it appropriate to use an average of two surveys when recommending make allowances. The recommended decision concluded that it was best to combine

the 2021 survey and the 2016 CDFA cost of processing survey to determine the NFDM make allowance. The 2021 survey was selected over 2023 due to a better plant sample and because the 2023 survey represented costs during a period of high inflation, in particular for energy-intensive (natural gas) dried products like NFDM.

Comments from IDFA, CDI, and Agri-Mark specifically opposed the NFDM make allowance contained in the recommended decision, advocating for different methodologies to be applied. IDFA argued the NFDM make allowance should at least be based on a weighting of the 2021 non-transformed cost of production survey and the 2023 non-transformed cost of production survey for all plants, or at most an adjustment to the 2023 survey to address higher energy costs in 2022 could be made. Agri-Mark and CDI argued that data sources for the NFDM make allowance

should be reconsidered, questioning whether use of 2016 data was too old and not reflective of current costs, especially given its 50 percent weighting in the computation. While the 2023 survey was not used due to higher-than-normal natural gas prices that have since moderated, Agrimark argued in their comment, other cost categories have not similarly moderated. CDI commented that the NFDM make allowance should be determined using a similar methodology to dry whey, taking the simple average of the non-transformed 2021 survey and the 2023 low-cost survey, which would equal \$0.2378.

This decision continues to find it appropriate, given the shortcomings of the cost surveys in the record, to use an average of two surveys to determine appropriate make allowance levels. However, after a review of public comments and a reevaluation of record

evidence, this final decision finds it appropriate to apply a consistent methodology for NFDM and dry whey, as described in CDI's comment.

The 2023 survey represents the most recent cost data but significantly fewer participating plants than the 2021 survey. Additionally, as NFDM production is heavily reliant on natural gas, the 2023 survey captured the historically high energy costs, particularly natural gas. Natural gas prices increased substantially between 2019 and 2022. The Henry Hub Natural Gas Spot Price increased 153 percent between 2019 and 2022. However, prices declined from June 2022 to June 2024, with the spot price falling over 67 percent. Natural gas prices in 2024 were comparable to prices in 2019, with the

June 2024 spot price only 5 percent higher than in 2019. This data suggests current natural gas prices are similar to price levels observed during the 2021 survey. Cost breakdown of the 2023 survey show that utilities (energy) costs constituted 15 percent of the total manufacturing costs of dry whey. This is in contrast to utilities representing 7 percent of total costs for butter and 6 percent for cheese. As the record reveals the major component of this difference in utilities costs share is from drying the product, this cost category is sensitive to movements in natural gas prices.

The record reveals the 2021 survey represents more NFDM plants than the 2023 survey (27 vs. 15), while the 2023 survey represents a larger volume of NFDM production than the 2021 survey

(91.2 percent vs. 64.8 percent). Utilizing a simple average of the 2021 and the low-cost 2023 surveys results in a better representation of NFDM production across the universe of plants making the product, while moderating the influence of the high inflationary period in 2022 as described earlier in the PPI analysis, with particular consideration of declining utilities costs described above. Therefore, in the final decision, the Department recommends a \$0.2393 per pound NFDM make allowance, derived from the average of the 2021 non-transformed survey and the 2023 non-transformed low-cost survey result, plus a \$0.0015 marketing allowance.

Dry Whey

	2021	2023	2016			
	Non-transformed	Non-transformed	CA survey	Current	USDA proposed (recommended decision)	USDA proposed (final decision-inc. marketing allowance)
Low Cost .....	.....	\$0.2848	.....	.....	.....	.....
High Cost .....	.....	\$0.3952	.....	.....	.....	.....
Average	\$0.2457	\$0.3361	.....	\$0.1991	\$0.2653	\$0.2668
# Plants	8	9	.....	.....	.....	.....

The recommended decision proposed a \$0.2653 per pound dry whey make allowance, derived from the 2021 non-transformed survey and 2023 non-transformed low-cost survey result. Similar to NFDM, dry whey production is heavily energy (natural gas) dependent, and the same concerns regarding the 2023 survey results exist for dry whey, as discussed above. Absent any other data on the record, the recommended decision found it suitable to utilize the 2023 non-transformed low-cost average (\$0.2848) with the 2021 non-transformed survey to ensure the proposed dry whey make allowance is not disproportionately affected by higher 2022 natural gas and utilities costs that have since moderated.

Several comments were received specifically on the dry whey make allowance contained in the recommended decision. IDFA and WCMA opposed the methodology used and opined the dry whey make allowance should be based solely on the 2023 non-transformed cost of production survey for dry whey plants. Due to 2022 being a period of particularly high prices, this decision continues to maintain their proposed methodology is not appropriate. Earlier analysis of relevant price indices contained in the record support this conclusion.

In its public comment, the AFBF wrote that the current dry whey make allowance is clearly sufficient, as there has been considerable investment in dry whey plants; thus, the amended dry whey make allowance contained in the recommended decision is too high. While anecdotal testimony on investments in dry whey plants was presented at the hearing, data on the record clearly indicates costs of processing commodity dry whey have increased since make allowances were last updated.

The AFBF, as well as dairy farmers from Iowa and Pennsylvania, commented in opposition of all make allowances, but especially dry whey, as only about half the number of DPMRP reporting plants provided cost data. This decision continues to find it appropriate to use two surveys in the make allowance calculation, as together they provide sufficient representation of dry whey production.

A public comment filed by the American Dairy Coalition (ADC) opposed all make allowances in the recommended decision and advocated for reevaluation of all proposed changes. ADC specifically addressed the proposed increase in the dry whey make allowance relative to its small market price and advocated implementing a snubber to prevent negative producer values for other solids. Per ADC's

suggestion, if the market price for dry whey is less than the make allowance in a given month, the other solids price would be zero rather than a resulting negative value. For historical context, the Class III price formula briefly contained a similar snubber from Order Reform implementation (January 2000) to October 2001, but it was removed as it was found to mute market signals and arbitrarily adjust prices. There is insufficient evidence on the hearing record of this proceeding to support ADC's comment suggesting a change to the other solids snubber. Similar to NFDM, utilities represent a larger share of manufacturing costs for dry whey at 10 percent of total cost, rather than the 7 percent and 6 percent for butter and cheese, respectively, which are not dried during the manufacturing process. Accordingly, the same consideration of declining utility costs evaluated in the NFDM section apply to dry whey. Utilizing a simple average of the 2021 and low-cost 2023 surveys results in a better representation of dry whey production across the universe of plants making the product, while moderating the influence of the high inflationary period in 2022 as described earlier in the PPI analysis, with particular consideration of declining utilities cost since 2022. Therefore, this decision recommends a \$0.2668 per pound dry whey make allowance, based on the

average of the 2021 non-transformed survey and 2023 low-cost dry whey surveys, plus a \$0.0015 marketing allowance.

The Department finds the proposed make allowances in this final decision are more representative of manufacturing costs than current make allowances, which were last changed in 2008. Record evidence clearly supports updates. However, as previously mentioned, each of the observed costs surveys have weaknesses. The proposed make allowance levels are the best representation of manufacturing costs, given publicly available data and evidence contained in this proceeding's record.

b. Butterfat Recovery

Currently, the Class III formula contains a 90-percent butterfat recovery assumption. This represents the percentage of butterfat in raw milk that can be recovered during the cheesemaking process, recognizing that for both theoretical and practical reasons, 100% of utilization of butterfat (or any other raw milk component) in the production of a dairy product is impossible. Proposal 10 seeks to increase the butterfat recovery assumption to 93 percent. Proponents claimed modern cheesemaking equipment and better cheese handling techniques make a higher butterfat recovery not only attainable, but common in practice.

Opponents mainly consisted of manufacturers asserting that while some cheese plants attain butterfat recovery percentages in excess of 90 percent, yield assumptions that increase producer revenue, such as butterfat recovery, should not be amended outside a comprehensive review of all assumptions that determine yield factors. Multiple opponents mentioned the overvaluation of whey cream as an example of a potential issue.

This rulemaking proceeding sought to consider changes to the FMMO pricing formulas. Industry participants were invited to submit proposals concerning the current pricing provisions of the FMMOs. Those opposing changes to the butterfat recovery percentage had an opportunity to submit proposals on any of the yield factors, as they fall within the provisions of the pricing formulas. None, other than those submitted by Select, were received. This decision does not find it appropriate to deny consideration of any yield related proposal presented in this proceeding on the basis of a potential future evaluation of all yield factors.

The record contains testimony from several expert witnesses explaining the

cheesemaking process and use of more modern cheese equipment and technology, including improvements in coagulants and curd handling, allowing handlers the ability to capture a larger percentage of butterfat in cheese. Testimony also described how cheese fines, or small particles of cheese left in whey during the cheesemaking process, represent a significant source of fat loss to a cheese manufacturer, and are not returned to the finished cheese product due to concerns of bacterial contamination. As butterfat recovery numbers are considered confidential information, the record does not contain a well-developed picture of recovery levels currently attained in U.S. cheese plants. The record indicates the age of equipment and technology used in cheese plants varies widely. While evidence was submitted describing high butterfat retention rates that are achievable using new equipment, it does not demonstrate those rates are reflective of the general industry conditions. Other than a few new, very modern plants, the record does not support a 93 percent butterfat recovery factor as attainable by most cheese plants.

The record contains considerable testimony estimating current butterfat recovery rates in the universe of cheese plants with varying ages of equipment and technology. Expert witnesses estimated butterfat recovery in cheddar plants ranged from 88 to 93 percent, attributing much of the difference to cheddar vat equipment. It is important that the product price formulas reflect current, not theoretical, conditions for the general population of plants. Experts generally offered that most commodity cheddar cheese plants can obtain greater than 90 percent recovery, but few obtain 93 percent, with a 91 percent butterfat recovery rate considered the industry average. Accordingly, this decision recommends a 91 percent butterfat recovery rate. Such an increase necessitates a change to the butterfat yield factor in cheese from 1.572 to 1.589.

The Department received comments in support of the amended butterfat recovery factor contained in the recommended decision, including from several state Farm Bureaus (Arizona, Florida, Michigan, Minnesota, New York, Tennessee, and Wisconsin) and five California dairy farmers. These commenters support increasing the butterfat recovery factor from 90 to 91 percent, as it more accurately reflects modern cheesemaking technology and plant efficiencies.

Several comments were also submitted in opposition of the proposed

butterfat recovery factor. Commenting in opposition, Select continued to contend that the factor should be updated to 93 percent. Select pointed to testimony from its expert witness claiming that 93 percent butterfat recovery is attainable by most plants. Even with older cheese making equipment, Select reiterated 93 percent butterfat recovery can be achieved. This decision maintains that the butterfat recovery percentage should represent what is currently attained by the universe of U.S. cheese manufacturing plants, not what can theoretically be attained or may be attained in modern plants. Therefore, this decision maintains a proposed 91 percent butterfat recovery factor.

In its comment, Crystal Creamery argued that cheese moisture levels and other factors in the cheese making process should also be considered in the amended butterfat recovery factor and requested conforming changes to the butterfat-to-protein ratio, from 1.17 to 1.16. Sufficient testimony and evidence was not provided on the record to justify a change to the butterfat-to-protein ratio, therefore, the proposed conforming change is denied.

c. Farm-to-Plant Shrinkage

Currently, the FMMO formulas assume a farm-to-plant shrinkage factor of 0.25 percent and 0.015 pounds per cwt of additional butterfat loss. This represents normal milk losses that occur when milk is delivered from the farm to a plant. Under the FMMO system, most handlers purchase milk from producers based on farm weights and tests. The farm-to-plant shrinkage factor recognizes that when milk is pumped from a farm bulk tank to a milk tanker, and then from milk tanker to the plant silo, milk, and to a greater degree butterfat, sticks to the sides of the pipes and tanks. Milk and butterfat can also be lost in the milk hauling process when milk haulers must make multiple farm stops to fill a load. As a result, plants often physically receive less milk and butterfat than was measured at the farm. The record reflects that as the nature of milk and butterfat has not changed, it still sticks to equipment. In recognition of this reality, the yields are slightly reduced to reflect the amount of milk and butterfat actually available to make a product, as compared to the amount of milk picked up on farms.

The proponents asserted that producers shipping full tanker loads is common in the Southwest where they operate. They testified to and provided cooperative data regarding the steps they have taken to reduce shrinkage. Proponents said increased average farm size results in fewer stops by the milk

hauler to fill up a load, thus lowering overall shrinkage. They opined shrinkage should no longer be a reality for farms as losses can be managed on any size farm through adoption of farm scales, flow measurements, and other technologies to improve accuracy.

Opponents argued only a small percentage of dairy farms are able to produce enough milk to fill an entire tanker load. While the number of large farms has grown, opponents testified removing the shrinkage factor could further incentivize manufacturers to prefer large over small farms. Consequently, they opined the farm-to-plant shrinkage factor should remain.

Record evidence reveals most dairy farms are unable to fill a tanker load per day. According to the NASS, daily milk production per cow averaged 66.5 pounds in 2022. Assuming an average tanker load of milk is approximately 48,000 pounds, it would require a milking herd of 722 cows to fill a tanker. In 2022, of the 24,470 U.S. dairy farms with milk sales, only 3,451 farms (approximately 14 percent) had 500 or more milk cows, and 2,013 (approximately 8 percent) had 1,000 or more milk cows.

For the approximately 90 percent of farms that are not able to ship full tanker loads of milk, the record indicates farm-to-plant losses remain a reality for most producers and cooperatives operating within the FMMO system. As most handlers pay producers based on farm weights and tests, it remains appropriate to provide recognition in the formulas for milk solids paid for but not physically received at the handler's facility.

Leprino submitted a public comment in support of maintaining the farm-to-plant shrinkage. In contrast, Select commented in opposition of the amended shrinkage in the recommended decision, reiterating arguments in the hearing that it should be eliminated. According to Select, the recommended decision underestimates the number of farms capable of shipping a full tanker. Select contends that more than 75 percent of milk is produced on farms shipping full tanker loads and asserts the recommended decision did not address unsupported additional butterfat shrink.

While the recommended decision inadvertently failed to mention the 0.015 pounds per cwt of additional butterfat loss, the entirety of the farm-to-plant shrinkage within the formulas and the evidentiary record was evaluated. The record contains evidence that additional butterfat losses occur as butterfat naturally clings to equipment. While Select offered evidence its

cooperative has developed operating practices that have greatly reduced observed shrinkage, no other data was offered to validate that it is being attained by other industry stakeholders. Thus, this decision continues to find it appropriate to include the 0.25 percent shrinkage factor and the 0.015 pounds of additional butterfat loss in the formulas as these factors should be based on what is attained, on average, rather than only attainable by some. Accordingly, this decision continues to reject Proposal 11.

d. Nonfat Solids Yield

Currently, the FMMO Class IV price formula contains a NFDM yield factor of 0.99, representing the pounds of NFDM that can be made from one pound of nonfat solids of raw milk delivered from the farm. This factor is less than 1.0, as it recognizes both farm-to-plant shrinkage and the portion of nonfat solids utilized in NFDM.

Select offered Proposal 12 to adjust the NFDM yield factor to account for both the NFDM and buttermilk powder that can be manufactured from the same pound of nonfat solids, and proposed an NFDM yield factor of 1.03. Proponents claim producers are not compensated for nonfat solids that end up in buttermilk powder since such production is not accounted for in the yield factor.

A review of previous rulemakings reveals numerous changes to the NFDM yield factor both during and since Order Reform. The Order Reform recommended decision contained a nonfat solids yield factor of 0.96 as a divisor (equivalent to a 1.04 multiplier) in the nonfat solids price equation. It represented the percent of nonfat solids in a pound of NFDM. In other words, if a NFDM plant had 1 pound of nonfat solids, it could make 1.04 pounds of NFDM due to the moisture content in the final product. The factor was changed in the Order Reform final decision to a 1.02 divisor (equivalent to a 0.98 multiplier) as stakeholders commented it should represent both the NFDM and buttermilk powder that could be produced from one pound of nonfat solids. In other words, the yield factor, when converted to a multiplier, was less than one to reflect that only a portion of the nonfat solids that arrive at a plant are utilized in NFDM.

The nonfat solids yield factor was again considered in a 2000 rulemaking. Initially, the factor was amended to 1.00. 65 FR 82832 (Dec. 28, 2000). During that proceeding, stakeholders argued the yield factor should reflect that more than one pound of NFDM can be manufactured from one pound of

nonfat solids, resulting in a divisor less than one, or a multiplier greater than one. Evidence from that proceeding was used to demonstrate a calculation using only the NFDM price, NFDM make allowance, and a multiplier of 1.00 would be equivalent to a more complex formula attempting to combine the NFDM and buttermilk net prices using corresponding yield factors.

The final decision in the 2000 rulemaking changed all yield factors, including the nonfat solids yield, from divisors to multipliers. 67 FR 67906 (Nov. 7, 2002). Keeping in line with only reflecting the nonfat solids used in NFDM, the nonfat solids yield multiplier changed from 1.0 to 0.99, with the incorporation of a farm-to-plant shrinkage factor of 0.25 percent. As calculated, for 1 pound of nonfat solids leaving the farm, 0.9975 pounds entered the plant ($1.00 - 0.0025 = 0.9975$). Subtracting an estimated 0.0479 pounds of nonfat solids ending up in buttermilk powder left 0.9496 pounds of nonfat solids in NFDM ($0.9975 - 0.0479 = 0.9496$). It was assumed NFDM is 96.2 percent nonfat solids, resulting in a NFDM yield factor calculation of $0.9496/0.962 = 0.9871$, which was rounded to 0.99. The final decision made clear the 0.99 should be considered a NFDM yield factor, no longer a nonfat solids yield factor as was the case when Order Reform was implemented.

Proposal 12 requests buttermilk powder again be incorporated into the NFDM yield. Proponents testified that without accounting for buttermilk powder, producers are not compensated for all the nonfat solids they sell to a Class IV manufacturer. Record evidence does not support such a claim. Class IV manufacturers are required to pay the nonfat solids price for pooled milk purchased, regardless of whether those nonfat solids end up in NFDM, butter, buttermilk powder, or any other Class IV product. The same can be said for other classified products whose component prices are computed similarly, even if there are numerous products in the category. For example, the other solids price is determined through a survey of dry whey prices and a dry whey make allowance. Manufacturers pay the other solids price even if they are making other products in the category, such as whey protein concentrate or whey protein isolate.

Additionally, while the rulemaking history of the NFDM and nonfat solids yield factors is complex, the record evidence in this proceeding does not support reflecting two products (buttermilk powder and NFDM) in the NFDM yield would provide for more

orderly marketing conditions. As such, the recommended decision maintained the current NFDM yield factor to only reflect one product and did not propose the adoption of Proposal 12.

Leprino, as well as the Arizona Farm Bureau, offered comments on the recommended decision in favor of maintaining the 0.99 nonfat solids yield, as they said it properly reflects a widely attainable NFDM yield. In its comment, Select objected to the continuation of the 0.99 NFDM yield, and reiterated arguments presented at the hearing that the value of buttermilk powder should be included.

This decision maintains that yield factors are not intended to represent the value of milk components utilized in various products, but rather the quantity of a specific product that can be manufactured from a given quantity of milk components. As stated in the recommended decision, the NFDM yield factor represents the quantity of NFDM that can be produced from one pound of nonfat solids in producer milk. This decision continues to find the current NFDM yield factor, and the nonfat solids price formula, appropriately represent the value of NFDM to the nonfat solids utilized in manufacturing NFDM. This decision finds no basis to support the claim that powder manufacturers are not paying for solids in the buttermilk powder they produce. To the contrary, all nonfat solids entering a plant are accounted and paid for at the appropriate use classification. Thus, nonfat solids ending up in buttermilk powder are paid for at the nonfat solids price. This is similar to other products such as whey protein concentrate (WPC), whose other solids are priced at the FMMO other solids price which is based on dry whey yields and prices and does not specifically account for WPC yields and prices.

This decision continues to find it appropriate for component price formulas to utilize a single product price and an associated make allowance and yield factor to determine the value of milk components, which can then be used to value the components utilized in all products under a given class. Accordingly, this decision continues to find it appropriate to maintain the NFDM yield factor of 0.99.

Base Class I Skim Milk Price

Currently, the base Class I skim milk price, also referred to as the "Class I mover" or "mover," is the simple average of the monthly advanced Class III and Class IV skim milk pricing factors, plus an adjuster of \$0.74 per cwt. This formula was implemented under the 2018 Farm Bill, which

amended the AMAA to revise the provisions related to determining the monthly Class I skim milk price. Public Law 115–334, 132 Stat. 4490 § 1403. Congress exempted this amendment from the formal rulemaking process, and USDA implemented the change through a final rule. The formula has been in effect for milk marketed on and after May 1, 2019. 84 FR 8590 (March 11, 2019). Prior to the change, the base Class I skim milk price was the higher of the advanced Class III or Class IV skim milk prices (the "higher-of"), announced on or before the 23rd of the prior month. The higher-of formula had been in effect since January 1, 2000.

Industry stakeholders offered six proposals to amend the Class I mover. Proposal 13 would return to the previous higher-of Class I mover. NMPF explained the change to the average-of was supported at the time by both NMPF and IDFA, as it was intended to be revenue neutral for producers and provide Class I processors the ability to utilize hedging for risk management.

IDFA and MIG proposed maintaining the average-of mover but argued for different adjuster calculations. Proposal 14, offered by IDFA, incorporates an adjuster that resets every January and would be the higher of either: (1) \$0.74; or (2) the 24-month average difference between the higher-of and the average-of the advanced Class III and Class IV skim milk pricing factors. The 24-month calculation would run from August of three years prior to July of the previous year. For example: the 2024 adjuster would have been calculated by subtracting the average of the advanced Class III and IV skim pricing factors from the higher of the advanced Class III or Class IV skim pricing factor for each month of August 2021 through July 2023, then averaging the differences of the 24 months. The result for the August 2021 to July 2023 time period is \$0.95, which is higher than \$0.74, and thus would have been the adjuster effective January 1, 2024, for the calendar year. For the month of January 2024, the advanced Class III and IV skim pricing factors were \$5.74 per cwt and \$9.25 per cwt, respectively, averaging to \$7.50 per cwt. With the addition of the adjuster, the January 2024 base Class I skim milk price would have been \$8.45 per cwt (\$7.50 + \$0.95) under Proposal 14.

Proposal 15, offered by MIG, incorporates a monthly rolling average adjuster calculated as the difference between the higher-of and the average-of, for 24 months, with a 12-month lag. For example, the adjuster for January 2024 would have been \$1.01 per cwt, calculated from the 24-month average difference of the higher of the advanced

Class III or Class IV skim pricing factor less the average of the advanced Class III and IV skim pricing factors from January 2021 to December 2022. The January 2024 advanced Class III skim pricing factor was \$5.74 per cwt and advanced Class IV skim pricing factor was \$9.25 per cwt, resulting in an average of \$7.50 per cwt. The average-of, with the addition of the adjuster, would result in a January 2024 base Class I skim milk price of \$8.51 per cwt (\$7.50 + \$1.01) under Proposal 15.

Edge offered Proposals 16 and 17. The Class I mover in Proposal 16 would be the announced Class III skim milk price, plus an adjuster reflecting the 36-month average of the difference between the higher-of the advanced² Class III or Class IV skim milk prices and the announced³ Class III skim milk price from August of four years prior to July of the previous year. The adjuster would be calculated annually and be effective January of each year. For example: The adjuster for 2024 would be \$1.64 per cwt, calculated from the 36-month average difference of the higher of the advanced Class III or Class IV skim pricing factor and the announced Class III skim milk price from August 2020 to July 2023. The announced Class III skim milk price for January 2024 was \$4.92 per cwt, and with the addition of the adjuster would result in a January 2024 base Class I skim milk price of \$6.56 per cwt under Proposal 16. Proposal 17 would return to the previous higher-of calculation. Both Proposals 16 and 17 would eliminate advanced pricing for Class I and Class II milk. Edge preferred Proposal 16, stating it would facilitate Class I hedging.

The AFBF offered Proposal 18, which is nearly identical to Proposal 17. Both Edge and the AFBF stressed the importance of eliminating advanced pricing as a means for limiting price inversions that result in significant volumes of milk not pooled.

NMPF presented testimony describing how the 2019 mover change was not revenue neutral, which is why they seek a return to the higher-of. NMPF and dairy farmers described volatile markets in response to the COVID–19 pandemic. Even as the COVID–19 pandemic has ended, prices have remained volatile, and stakeholders opined they expect volatility to continue. NMPF witnesses asserted that because of the current formula and volatile markets, there is no way for the impact to dairy farmers to be revenue neutral in the long term.

² Advanced refers to prices announced on or before the 23rd of the prior month.

³ Announced refers to prices announced on or before the 5th of the following month.

According to NMPF, an unanticipated consequence of the average-of mover is the asymmetric risk borne by dairy farmers. NMPF explained the static nature of the \$0.74 adjuster means that dairy farmers only benefit from the average-of when the difference between the advanced Class III and Class IV skim milk prices is less than \$1.48. When the difference is greater, producers are paid less, sometimes significantly less, than they would have been under the higher-of mover. During the 50-month period from May 2019–June 2023, the average-of mover was lower than the higher-of in 27 months. NMPF asserted when the average-of exceeded the higher-of, it did so by no more than \$0.74, regardless of the magnitude of the difference between Class III and Class IV skim milk prices. However, when the average-of was lower than the higher-of, the reduction could be significantly more than \$0.74. NMPF cited October 2022 as an example. At that time, the average-of was lower than the higher-of by \$2.08. According to NMPF, from May 2019 to August 2023, producers were paid \$998.3 million less than they would have if the higher-of mover had been in place.

Both IDFA and MIG asserted their adjusters would result in revenue neutrality to producers over time because of regular updates to better reflect current market conditions, whereas the current static \$0.74 adjuster reflects market conditions from 2000–2018. IDFA further claimed the \$0.74 floor contained in Proposal 14 ensures producers would receive Class I skim milk prices at least equating to what they receive under the current formula. MIG opined a rolling average adjuster would provide better dynamic market signals while also stabilizing prices through more gradual monthly changes.

In justifying these methods to continue an average-of mover, IDFA and MIG witnesses stressed the importance of maintaining the ability for Class I processors to hedge their future prices. The use of an average-of mover would allow them to continue to spread risk by taking equal positions in the Class III and Class IV futures and options markets. IDFA and MIG maintained hedging is a critical tool for certain processors, particularly ESL, to remain competitive with alternative beverages, such as bottled water, juice, and milk alternatives that do not face the same regulatory pricing framework as fluid milk. The ability to lock in a future price makes their cost known and allows a longer price horizon. They further asserted promoting and growing the sale of milk is a goal of the AMAA, which can be achieved using hedging.

Both proponents explained a processor's ability to hedge is not negatively impacted by the adjuster calculation (whether monthly or annually), so long as it is announced well in advance. IDFA was amenable to either adjuster calculation, so long as the average-of mover is maintained.

Proponents of maintaining an average-of mover argued Congress amended the AMAA to facilitate risk management for Class I, and as it directed the Department to adopt the average-of mover, the Department must now continue that policy and refrain from taking action that would inhibit risk management. However, in the 2018 Farm Bill, Congress stipulated the average-of mover must be maintained for a period of not less than two years, at which time the formula could be modified through the standard FMMO amendment process. Congress did not direct that risk management consideration must be maintained beyond the two years following implementation of the 2018 Farm Bill.

To evaluate the NMPF claim regarding asymmetric risk, AMS analyzed May 2019–December 2023 prices (56 months). The analysis found the current average-of mover to be greater than the higher-of mover in 23 months, resulting in \$334 million in additional revenue paid to producers in those months. The two movers were equal in 2 months, and in the remaining 31 months, the average-of mover was less than the higher-of mover, resulting in \$1.4 billion less in revenue paid to producers in those months than would have been without the mover change. The net result to dairy farmers during those 56 months was negative \$1.066 billion. Further, in months when the average-of was more than the higher-of mover, the difference was never greater than \$0.74 and, mathematically, could never be greater than that amount under the current average-of system. However, in months when the average-of was less than the higher-of mover, the difference was as great as \$5.19. This analysis supports NMPF's assertion of the asymmetric risk borne by producers under the current mover calculation.

The record reveals the \$0.74 static adjuster was adopted because, at the time, it represented the additional value paid to producers through the higher-of versus what would have been the average-of mover from 2000–2017. Evidence shows \$0.74 is no longer representative of the additional higher-of value to producers as Class III and IV prices have become significantly more divergent in recent years. A comparison of advanced Class III skim and Class IV skim milk prices from January 2000–

April 2019 and from May 2019–December 2023 illustrates the increased volatility. From January 2000–April 2019, when the Class I skim milk price was determined by the higher-of mover, the monthly difference in advanced prices ranged from \$0 to \$6.77. From May 2019 through December 2023, the range was \$0 to \$11.86, equating to an increase of slightly more than 75 percent.

Testimony described rapidly changing Class III and IV prices resulting not only in months when the Class I mover was significantly lower than it would have been under the higher-of formula, but times when the Class I price (announced before the month) was less than the Class III and/or Class IV price (announced after the month). As handlers have the option to pool Class III and Class IV milk, this price inversion led to many months when the higher-valued manufacturing milk was not pooled. Testimony on the record described several consequences: (1) manufacturing handlers opted out of pool participation, keeping the higher market revenue instead of sharing it with all pooled producers; (2) instances when a manufacturing handler opted out of pool participation, and the historically high market revenue was not shared with their own producer suppliers; and (3) significant disparity in payments to pooled and nonpooled producers in some months.

Testimony detailed the conditions in 2020 when the demand for cheese relative to butter rapidly widened the spread between Class III and Class IV Prices. For example, the base Class I skim milk price for June 2020 (announced May 20, 2020) was \$7.08 (based on an \$6.68 advanced Class III skim milk price and an \$5.99 advanced Class IV skim milk price). Cheese prices rose rapidly during the month, resulting in a \$15.06 Class III skim milk price and \$6.62 Class IV skim milk price. According to record evidence, high volumes of Class III milk were not pooled in order to avoid paying the higher valued Class III price into the marketwide pool.

Record data reveals a significant increase in the estimated volume of milk not pooled in 2020 and 2021, which NMPF attributed to price volatility. Data shows milk volumes not pooled in 2020 and 2021 were approximately 60 percent greater than in 2019. Testimony and evidence pointed to pronounced price volatility being considered the norm, not the exception, going forward.

Record evidence also shows how the lower average-of mover value resulted in muted blend prices in some regions

of the county, making it difficult to attract milk supplies for fluid use. This was particularly a concern in the southeastern FMMOs which experienced a disproportionate reduction in blend prices relative to other FMMOs because of their high Class I utilization. Testimony described how blend prices between the Southeast FMMO and nearby orders narrowed, making it difficult to attract supplemental milk to meet the fluid demand in the milk deficit region.

During Order Reform, the Department considered numerous options for determining Class I prices as it evaluated an appropriate Class I pricing system. In the Order Reform recommended decision, several variations of an average mover were considered, including a moving average and a declining average weighted most heavily by the current month's price, along with a higher-of option based on the second preceding month's prices. When considering its recommendation, the Department evaluated each option's ability to improve price stability while maintaining appropriate producer price signals to ensure an adequate supply of milk for fluid use.

The Department initially recommended a 6-month declining average of the higher-of the Class III and Class IV skim milk prices. The goal was to "decrease monthly Class I price volatility while minimally affecting the long-run price." 63 FR 4802, 4886 (Jan. 30, 1998). Analysis of that option compared to the higher-of option showed only a two-cent difference based on data from 1992–1997, thus supporting the notion an average-of price would not impact prices in the long run. Public comments in response to the recommended decision cautioned the Class I price should be closely and directly linked to manufacturing prices. Commenters opposed a six-month declining average because it would delay the linkage with the Class I price, resulting in counter-cyclical pricing—something noted in the final decision, which stated that, for example, if Class I prices are undervalued, "it reduces producers' pay prices at a time when the producers should be receiving a positive price signal." 64 FR 16026, 16102 (Apr. 2, 1999). Analysis conducted for the Order Reform final decision evaluated prices post-1998 and found using a 6-month average mover during times of increased price volatility would have led to price inversions. The decision explained how price inversions could lead to depooling under which disorderly marketing conditions may arise. As a result, the final decision also articulated, on the same page as the

most recently noted quotation, "because handlers compete for the same milk for different uses, Class I prices should exceed Class III and Class IV prices to assure an adequate supply of milk for fluid use." Accordingly, the final decision recommended the higher-of mover which remained in place until May 2019.

Record evidence clearly shows that the price inversions and depooling predicted in the Order Reform final decision occurred after the average-of mover was implemented in 2019. The principle of maintaining a proper link between Class I and manufacturing prices to avoid price inversions and depooling remains an important consideration in evaluating change to the Class I mover in this rulemaking.

Proponents offering modifications to the average-of mover acknowledge price inversions and depooling have occurred with greater frequency and duration. However, they maintain hedging is a critical risk management tool that should be preserved and cannot be achieved using the higher-of mover. Record evidence highlights that although both HTST and ESL are fluid milk products, there are notable differences between HTST and ESL processing and sales. ESL products require unique processing techniques and packaging that significantly increase product shelf-life. The record indicates ESL products have a shelf-life of at least 65 days; some ESL processors stated their products have a shelf-life of 120 days or more.

ESL processors described marketing differences between the two types of products. ESL products: (1) have a longer shelf-life which facilitates a wider distribution; (2) are typically shipped to centralized retail warehouses (distribution centers) and from there are distributed to individual stores by the store owners; and (3) are sold to retail customers who prefer long-term contracts and a long lead time for any price changes, often 60–90 days or more. This is significantly different than HTST products that: (1) have a significantly shorter self-life (common range is 14–21 days) necessitating more local distribution; (2) are typically distributed through direct-store-delivery (DSD); and (3) whose retail customers are accepting of FMMO Class I prices that vary monthly.

ESL processors explained the average-of mover has enabled them to meet customer demand for long-term price-fixed contracts by using the futures and options market to hedge the risk associated with changes in monthly FMMO Class I prices. They credit the ability to manage risk as a factor in the

growth of ESL products. Before adoption of the average-of mover, processors of ESL products took on a significant amount of price risk to meet the long-term, fixed price contracts required by customers because they had no way of knowing when they negotiated contracts whether the advanced Class III or Class IV price would become the base Class I skim milk price. The record contains no similar evidence that HTST processors face the same constraints. In fact, record evidence shows advanced Class I pricing with monthly sales negotiations was, and remains, standard practice for these products.

Given all the record evidence, this decision must determine the best method for determining Class I skim milk prices that ensure adequate fluid milk supplies and orderly marketing conditions. The earlier discussion of record evidence clearly highlights the disorderly marketing conditions that occurred as a result of the average-of mover. However, when considering how to provide for more orderly marketing conditions, this decision cannot ignore how the Class I market has evolved since 2000.

Prior to FMMO Reform, fluid milk products were almost exclusively HTST, which have a shorter shelf-life and move from farm to retail in a relatively short time. Advanced pricing ensures equity among fluid milk handlers, allowing them to know their regulated minimum raw milk cost at the time they negotiate prices with their buyers and ensure equal raw milk cost between similarly situated handlers.

The record reflects significant development and growth of ESL products since Order Reform. The record also highlights marketing ESL products is significantly different than HTST products. Evidence shows the different distribution pattern (warehouse v. DSD) and longer shelf-life (65–120 days) facilitates wider geographic, rather than local, marketing and distribution. In addition, it is common for competing ESL products being sold in the same month to have been processed during a range of previous months. As a result, processors of ESL products do not necessarily have the same regulated minimum raw milk prices for products sold during the same month. This undermines handler equity between processors of ESL products as they do not have equal raw milk costs for products competing for sales in the same month. This decision supports a hybrid solution that will ensure adequate supplies of milk for fluid use, while also accounting for the inequities between processors of ESL products.

FMMOs are tasked with ensuring minimum prices reflect supply and demand conditions, which is accomplished, in part, through weekly surveys of wholesale bulk commodity products. Weekly survey prices provide signals to market participants on the changing value relationships between dairy product markets. FMMOs do not control those market-based relationships. As monthly average prices are determinants of Class III and IV prices, it is expected there will be periods when Class III values will be higher, and other times when Class IV values will be higher. Under a monthly pricing system that allows for voluntary pooling of manufactured milk and advanced Class I pricing, there will be occasions when these value differences are large enough to have price inversions and/or incentivize handlers to not pool milk during a particular month. The record clearly shows such situations occurred prior to May 2019. However, record data highlights the shift in duration and magnitude of these occurrences since the average-of mover was adopted. The record reveals large and prolonged value differences can cause significant differences in pay prices between producers and reduced willingness to supply the Class I market. The record of this proceeding supports returning to the higher-of Class I mover for HTST products. The higher-of would provide a better link between Class I and manufacturing prices and better ensure Class I prices remain the highest to bring forth an adequate supply of fluid milk. Therefore, this decision continues to recommend adoption of Proposal 13 for HTST fluid milk products.

AMS received 29 comments that specifically supported a return to the higher-of mover. Comments in support of the higher-of mover were submitted by: NMPF; Select; AFBF; ADC; the state Farm Bureaus of Arizona, Michigan, New York, Michigan, Wisconsin, Minnesota, and Tennessee; Georgia Milk Producers, Inc.; Northeast Dairy Producers Association (NDPA); National Family Farm Coalition; Farm Women United; and 15 individual dairy farmers. Seven commenters, including NMPF, ADC, NDPA, and four individual dairy farmers, expressed the higher-of keeps dairy markets more orderly. NDPA noted the return to the higher-of would have an immediate positive impact on farmers. The Wisconsin and Minnesota Farm Bureaus commented the higher-of often provided better financial returns to farmers in the past. One dairy farmer praised a return to the higher-of, arguing its removal in 2019 decreased revenue.

In its comment, AFBF reiterated arguments that the return to the higher-of is critical for ensuring dairy farmers receive fair and adequate compensation for their milk, especially in the face of volatile market conditions. AFBF continued to argue that most fluid milk processors have not increased or even begun the use of hedging, which was the intent of adoption of the average-of mover. The Michigan Farm Bureau commented that a return to the higher-of would better reflect current market conditions and improve overall pricing for farmers. Georgia Milk Producers, Inc., stated the return to the higher-of is critical to the success of its producers, who were disproportionately impacted by the change to the average-of mover. A dairy farmer commenter advocated for a simple and stable price program that uses the higher-of.

CDC and two dairy farmers specifically requested the higher-of mover alone, without the proposed ESL adjustment, apply to all Class I milk. AFBF; the state Farm Bureaus of Arizona, Florida, New York, and Tennessee; and the two dairy farmers requested a return to the higher-of on an expedited basis.

In their comments on the recommended decision, MIG and Crystal Creamery opposed a return to a higher-of Class I mover. MIG reiterated its hearing testimony that the return to the higher-of on HTST milk prohibits effective hedging.

This decision continues to find that returning to the higher-of mover for ESL products would deepen the pricing inequity that naturally exists for those products, as described earlier. For example, under the higher-of mover, a handler processing and selling an ESL product in January 2023 would have faced a base Class I skim milk price of \$11.62 per cwt. However, handlers who processed ESL products two or four months before, which are also being sold in January 2023, would have faced a base Class I skim milk price of \$12.61 and \$13.82 per cwt, respectively. This results in a difference of base raw milk costs of up to \$2.20 per cwt for ESL products competing for sales during January 2023.

Given the marketing characteristics of ESL products, short of providing for fixed minimum prices, price differences between these competing products will always exist. However, this decision strives to recognize the evolution of the ESL market since Order Reform with a pricing structure for ESL products that would narrow differences, make them more predictable, and provide for more orderly marketing conditions.

This decision continues to find pricing differences would be reduced through adoption of a Class I ESL adjustment that would equate to a Class I price for all ESL products equal to the average-of mover contained in Proposal 15. The recommended Class I ESL adjustment would provide more long-run pricing equity for ESL product by better ensuring handlers whose ESL products compete for sales during the same month, but whose raw milk may have been purchased and processed during different time periods, have more similar costs.

This decision continues to find adoption of the higher-of mover and Class I ESL adjustment appropriate to provide for more orderly marketing and better ensure price equity for handlers of similar Class I products. As set forth in the recommended decision, the higher-of Class I mover would be announced on or before the 23rd of the prior month. A Class I ESL adjustment would be announced at the same time and equal the difference between the higher-of mover and the average-of the advanced Class III and Class IV skim pricing factors plus a rolling monthly adjuster. The rolling monthly adjuster would be calculated as the average of the differences between the higher-of and the average-of calculations for the prior 13 to 36 months and could be positive or negative.

The recommended decision described milk subject to the ESL adjustment as all milk used in ESL products with a shelf-life no less than 60 days, regardless of the type of Class I plant in which they are made.⁴ This decision continues to propose an ESL adjustment that would be added to or subtracted from the handler's pool obligation applicable to the amount of milk used in ESL products. The rolling adjuster would be computed in advance and announced on or before the 23rd of the month 12 months in advance of its application (*i.e.*, January 2023 rolling adjuster would have been announced on or before December 23, 2021).

For example, the advanced Class III and IV skim pricing factors for January 2023 were \$9.54 per cwt and \$11.62 per cwt, respectively.

- The average-of the two factors (applicable to ESL milk) would have been \$10.58 plus the rolling adjuster reflecting the average of the differences between the higher-of and the average-of from January 2020 to December 2021 (\$1.58 per cwt), for a total of \$12.16 per cwt.

⁴ 1xxx.7(a) or 1xxx.7(b).

- The higher-of mover (applicable to HTST milk) would have been \$11.62 per cwt.

- The January 2023 Class I ESL adjustment would have been \$0.54 (\$12.16 – \$11.62), calculated by subtracting the higher-of announced price from the average plus rolling average calculation.

The effect of the adjustment would be a base Class I skim price for HTST milk of \$11.62, and an effective base Class I skim milk price for ESL milk of \$12.16. While this example computes a positive adjustment resulting in a higher effective price for ESL milk, it is to be expected in some months the adjustment will be negative, resulting in a lower effective price. The objective of the ESL adjustment is not to create a higher or lower effective Class I price, but rather to reduce the range of base Class I skim prices paid for milk used in ESL products being sold during a month. Evidence on the record indicates the Class I ESL adjustment would tend to moderate the price highs and lows, thus providing improved price equity between handlers of ESL products. The record indicates ESL products represent approximately 8 to 10 percent of the Class I market and would be subject to the Class I ESL adjustment.

Comments to the recommended decision submitted by Select, Edge, Nestle, IDFA, and MIG supported the inclusion of the ESL adjustment as part of the Class I mover. MIG and IDFA further advocated for implementation of a base Class I skim milk price that supports risk management for all Class I milk products, not only ESL products. Both groups expressed that all Class I processors should benefit from the new formula, which they maintained is revenue-neutral with the higher-of formula over time.

In its comment, MIG stated the ESL adjustment would allow processors of ultra-pasteurized or aseptically processed and packaged fluid milk to continue to hedge price risk. MIG credited use of an average-of formula with allowing ESL processors to offer stable pricing, which in turn allows ESL products to more effectively compete with non-dairy alternatives including plant-based beverages.

Select stated the ESL adjustment would accommodate the expressed desire of handlers of ESL products to hedge their raw milk costs while providing dairy farmers the necessary stability of an overall higher-of Class I mover. Nestle opined the average-of formula utilized in the ESL adjuster provides holistic solutions for the industry and provides dairy farmers with assurances on the sale of their

product before the milk is produced. These factors, Nestle wrote, create pricing stability for both retailers and end consumers.

Many comments submitted expressed support for a return to the higher-of mover, but either opposed inclusion of the Class I ESL adjustment or expressed concern the provision could be abused. NMPF, AFBF, Michigan Farm Bureau, ADC, and seven individual dairy farmers stated the milk to which the ESL adjustment would apply was not well defined in the recommended decision, or that ESL itself was not clearly defined. Three commenters noted that the parameters of an ESL product are vague, including the recommended use of shelf-life to define qualifying products. NMPF, AFBF, Michigan Farm Bureau, Upstate Niagara, and an individual dairy farmer expressed concern that handlers could potentially abuse or manipulate the system, for example, by labeling a product with a shelf life of 59 days to benefit from a lower mover price when it is advantageous to do so. Such scenarios, AFBF noted, create a risk of inconsistent application and the potential for market distortions.

AFBF, Michigan Farm Bureau, Upstate Niagara, and five individual dairy farmers expressed concern that the inclusion of the ESL adjustment creates a potential for handlers to take advantage of the ESL adjustment by opting in or out of an adjustment on a monthly basis when favorable. Some commenters expressed concern over handlers attempting to qualify milk for the more favorable mover in a month in order to reduce payments to producers, likening it to depooling. AFBF and other commenters noted the possible range of a 95-cent reduction to a \$1.18 increase per cwt difference in base Class I price creates an incentive for handlers to take advantage of the system.

Several commenters, including NMPF, requested a clear definition of ESL products based on processing characteristics, not product or marketing characteristics such as shelf life. While the recommended decision highlighted the marketing characteristics of ESL, including the significantly longer shelf-life, the record reflects it is the processing technique that enables ESL products to have these marketing characteristics which facilitate wider distribution, shipping to centralized retail warehouses before distribution to individual stores, and most often, long-term sales contracts. In recognition of the possibility the ESL adjustment may be abused by adjusting the shelf life of a product as highlighted in the comments received, this decision finds

it appropriate to rely solely on the definition of the processing technique to define milk eligible to receive the ESL adjustment. While it is an industry term to refer to ESL products, the method of achieving ESL is accomplished through specific temperature and time thresholds which are contained in the ultra-pasteurized definition. As described in the Pasteurized Milk Ordinance, the process of ultra-pasteurization involves heating milk “at or above 138 °C (280 °F) for at least 2 seconds . . . so as to produce a milk or milk product, which has an extended shelf-life under refrigerated conditions.” This process of obtaining ESL products is to what witnesses testified. Accordingly, this decision finds it appropriate that ultra-pasteurized milk as defined in 21 CFR 131.3(c) would receive the ESL adjustment. The regulatory definition also encompasses aseptically packaged milk products, as the process of aseptic packaging requires milk to first be ultra pasteurized. As a provision defining a shelf-life threshold was not part of the original proposed order language, no changes to the proposed order language are necessary.

AFBF, Michigan Farm Bureau, and Upstate Niagara expressed concern about the potential for the ESL adjustment to set precedent for other types of adjustments for marketing claims for various production practices at the farm level. The proposed ESL adjustment would apply to a specific processing technique at the plant which the record demonstrates results in market characteristics that differentiate ESL products from HTST products.

NMPF requested clear guidance on how handlers report and account for Class I milk to ensure handlers cannot take advantage of the ESL adjustment by only applying it when advantageous. In its comment, ADC requested qualifying Class I fluid products remain with the ESL designation to avoid opportunistic use of the ESL adjustment that could reduce pool payment obligations. Several other commenters requested a review process be incorporated into the ESL adjustment provisions. Upstate Niagara commented many plants have the capacity to process both HTST and ESL products and expressed concern whether the Department would be able to prevent plants switching the type of processing for a pricing advantage.

This decision clarifies that the ESL adjustment would apply to all ESL milk meeting the ultra-pasteurized definition. Current handler reporting provisions in the regulations require handlers that process skim milk classified under 7 CFR 1000.44, both ultra-pasteurized and

HTST, to report monthly utilization for Class I utilization as defined in § 1xxx.30(a). Handlers report the type of product, how much product is sold or distributed within, and outside, the marketing area, as well as any other information pertaining to milk receipts and utilization the Market Administrator requires. If the ESL adjustment is adopted, handlers would report HTST and ESL products separately, ensuring accurate handler utilization is accounted for.

The FMMO program has a robust component that audits all handler reports filed with the Market Administrator. As part of an ESL handler's audit plan, FMMO auditors would review and verify handler records currently maintained under 7 CFR 1000.27(a) to ensure the raw milk was processed using ultra-pasteurized equipment, in accordance with the reported utilization. FMMO auditors would use documents such as pasteurization reports and State health department inspection records identifying equipment used for processing as verification.

Handlers producing ESL products would not determine when the Class I ESL adjustment would apply. The Class I ESL adjustment would apply automatically to milk used in ESL products. Handlers found misreporting ESL milk would be subject to an audit adjustment to the FMMO Producer Settlement Fund, as well as any other remedies authorized by current regulations.

Upstate Niagara; AFBF; the state Farm Bureaus of Arizona, Georgia, and Michigan; the Kentucky Dairy Development Council; Pennsylvania Association of Milk Dealers (PAMD); CDC; and 10 individual dairy farmers claimed the recommended ESL adjustment was not discussed or evaluated at the hearing, and no justification was presented. The Michigan Farm Bureau commented no testimony specifically supporting this type of adjustment was offered during the hearing process, making it difficult to recognize the necessity of its inclusion.

The commenters expressed concern that the impact of the package of proposed changes to the Class I mover provisions was not fully analyzed. Several expressed concern the proposed adjustment could have unintended consequences similar to those resulting from the Congressionally mandated change to the average-of mover in 2019. Upstate Niagara commented that as the percentage of ESL products in the market grows, the ESL adjustment would apply to an increasing volume of

milk. As a result, Upstate Niagara claimed, while the adjuster could mute price volatility over the long term for processors, it could also impact FMMO pools and producer pay in real-time.

Two commenters, PAMD and Upstate Niagara, claimed that because the combination of higher-of and ESL adjuster proposal was not specifically discussed at the hearing, the outcome was not properly noticed. The PAMD, a group representing fluid milk processors that own 14 processing plants located in and around Pennsylvania, opposed the return to the higher-of mover with the ESL adjustment. PAMD stated had the idea been noticed, it would have presented opposing evidence at the hearing. Additionally, PAMD argued the same advantages of less volatility and the opportunity to engage in risk management should apply to HTST processors as well as ESL processors in order to avoid competitive issues that would occur.

As set forth in the hearing notice, the base Class I skim milk price was open for testimony and evidence to be offered on the record for amendments. All FMMO regulated handlers received notice that changes to how milk in Class I products was priced were being considered. The recommended Class I mover is a combination of two proposals noticed and examined through testimony at the hearing. While the mechanics of adding an ESL adjustment to a higher-of mover are slightly different than proposals presented, the record contains extensive testimony and evidence on the processing and marketing of HTST and ESL products. Based on this evidence, this decision continues to find the recommended mover best promotes orderly marketing.

AFBF, Michigan Farm Bureau, ADC, and seven individual dairy farmers claimed the recommendation of a higher-of mover in combination with an ESL adjustment creates a "fifth" or "new" class of milk. Upstate Niagara, AFBF, the state Farm Bureaus of Arizona and Michigan, ADC, and four individual dairy farmers stated that the addition of an ESL adjustment introduces significant complications to an already complex Class I pricing system. AFBF and Michigan Farm Bureau commented the ESL adjuster creates a dual pricing system and adds an additional layer of complexity to an already intricate system. Some commenters asserted the proposed Class I mover provisions would likely create disparities between processors operating at the same location and undermine the FMMO principle of uniform prices.

Edge maintained the adjustment does not create a new classification of milk

but is an innovative approach to allow ESL handlers the ability to continue to use risk management in a changing industry.

Fluid milk products are defined in the current regulations as ". . . any milk products in fluid or frozen form that are intended to be used as beverages containing less than 9 percent butterfat and 6.5 percent or more nonfat solids or 2.25 percent or more true milk protein . . ." 7 CFR 1000.15(a). Milk used in both HTST and ESL products meets this definition of a fluid milk product and, therefore, a new or separate class of milk is not being proposed. Inclusion of the ESL adjustment to the Class I mover reflects the substantial record evidence demonstrating the unique ultra-pasteurization milk product characteristics warranting recognition in the pricing provisions. The ESL adjustment to a handler's pool obligation meets current needs of the industry seeking to update the price formula provisions to reflect current market conditions. While the adjustment adds a new component to the Class I mover, the Department calculates the Class I base price and an ESL handler's adjustment. Handlers already report to the Department the types of products they distribute and would not incur any new reporting as a result of the ESL adjustment.

In its comment, NMPF noted that until 36 months after implementation, some or all of the look-back calculation for the ESL adjuster would be based on the announced Class III and Class IV skim milk pricing factors prior to the regulatory changes stemming from this proceeding. NMPF requested in its comment the prices used to compute the rolling adjuster prior to the implementation of the Final Rule be recalculated based on the regulatory changes proposed in this rulemaking. The record does not contain evidence explaining why historical prices should be recalculated. Therefore, this decision does not find it is appropriate to recalculate the look-back portion of the ESL adjuster with updates for other amendments to the FMMOs.

In its comment opposing a return to the higher-of, Crystal Creamery maintained the higher-of mover would provide no financial value to mandatorily pooled handlers and would not incentivize service to the Class I market. Further, Crystal Creamery argued, the higher-of would distort market signals and cause greater imbalances in manufacturing markets, leading to disorderly marketing and increased prices to consumers. Crystal Creamery reiterated a return to the higher-of would incentivize the lower-

value manufacturing class milk to remain pooled because of the payment it receives from the producer settlement fund as a result of marketwide pooling.

Marketwide pooling is a cornerstone of the FMMO program. As the record reveals, dairy farmers sell milk to a wide variety of handlers whose products have distinctly different supply, demand, and market conditions. Marketwide pooling provides for more orderly marketing by ensuring a minimum uniform price is paid to producers whose milk is used in distinctively different products, thus preventing destructive competition among producers. While some commenters allege the higher-of will cause disorderly marketing, the evidentiary record shows the adoption of the higher-of would result in greater value differences between Class I and manufacturing prices for shorter time periods, leading to fewer and smaller price inversions, less depooling, and more orderly marketing conditions.

An individual dairy farmer commented the ESL adjustment would incentivize a large spread between Class III and Class IV in the short term, resulting in increased price volatility between ESL and HTST milk, against the intended purpose of FMMOs. The farmer claimed pricing Class I milk using two formulas could result in periods where the price for one product is increasing month-to-month while the other is decreasing, depending on the direction the adjuster moved.

This decision does not find use of an ESL adjustment would incentivize large Class III and Class IV price spreads. The record of this proceeding reveals that farm milk used to produce products in each of the four classifications have distinct supply and demand conditions. The record does not contain evidence to support the implication that manufacturers of dairy products, the majority of which do not manufacture ESL products, would make business decisions to gain an advantage in the fluid market where they do compete.

In its comment, MIG requested two changes to the proposed order language. MIG first requested a reference be added to the proposed Class I ESL adjustment in section 1000.50(r) to refer to section 1000.43(e) General classification rules, in order to link the pricing provision and eligible Class I milk. This decision does not find this change necessary because section 1000.43(e) is referenced in the section 10xx.60(i) Handler's value of milk. The reference in section 10xx.60(i) provides the requested link between the eligible Class I milk and the pricing provision.

MIG also requested clarifying language be added to section 1xxx.60(i)

that the ESL adjustment may be a positive or negative value. This decision finds such technical change warranted but finds the clarifying clause more appropriate in section 1000.50(r). The language is contained in the proposed regulations below.

This decision also continues to propose maintaining advanced Class I pricing. Proponents of Proposals 16, 17, and 18 argued advanced pricing should be eliminated to prevent short term inversions between the monthly Class I price and Class III and/or IV prices, and subsequent incentives for depooling. In their comments, AFBF, and the state Farm Bureaus of Arizona, Michigan, and New York expressed disappointment this decision did not eliminate advanced pricing. Commenters reiterated arguments in testimony that advanced pricing has contributed to discrepancies in milk prices, has increased price volatility, and has caused price inversions and depooling, resulting in lower payments to pooled producers. Eliminating advanced pricing would mitigate these issues, commenters argued, by improving class alignment.

Opponents, both independent and cooperative Class I processors along with a majority of producers, supported the continued use of advanced pricing. As discussed previously, advanced Class I pricing provides equity to regulated Class I processors by informing them of their regulated minimum raw milk cost in advance of the sale of their product. This ensures all dairy processors have an opportunity to align their raw milk costs with the sale prices of their products, which are generally negotiated before the start of the month. In the case of Class I products and the nonfat solids portion of Class II products, this alignment is facilitated by advanced pricing. Accordingly, Proposals 16, 17, and 18 are denied.

Class I and Class II Differentials

a. Class I Differentials

The current Class I price structure was developed during the Order Reform process when Congress directed the Department to review the Class I price structure as part of larger FMMO consolidation efforts. Federal Agriculture Improvement and Reform Act of 1996, Public Law 104–127, 110 Stat. 888. As stated in the recommended decision, the Department considered several objectives when determining an appropriate Class I price surface, including: being national in scope, while also accounting for local and regional conditions; recognizing the

location value of milk; recognizing all uses of milk; and meeting AMAA requirements. The Department met AMAA requirements governing classified pricing by ensuring the price surface would “reflect enough of the milk value to maintain sufficient revenue for producers to maintain an adequate supply of milk and provide equity to handlers with regards to raw product costs.” 64 FR 16026, 16109 (Apr. 2, 1999).⁵ The Class I price surface adopted on January 1, 2000, met those objectives.

Class I milk pricing consists of two pieces: the base Class I mover applied uniformly to all Class I milk (as discussed previously) and a location specific differential which represents the value of milk at a specific plant location. The differentials provide producers a financial incentive to supply the Class I market, which tends to be closer to the population centers, rather than delivering milk to a manufacturing plant typically closer to the farm. The location specific differential consists of two parts: a base value (also referred to as the “base differential”) applied uniformly to all Class I milk, and a location value.

The base differential is currently \$1.60 per cwt, representing three costs whose values were determined to reflect market conditions during the late 1990s. First, the cost of maintaining Grade A farm status (\$0.40) which includes costs associated with the labor, resources and utility expenses for maintaining required equipment and facilities, and adherence to certain management practices. Second, marketing costs (also referred to as balancing costs) (\$0.60) which include, among other things, the costs associated with seasonal and daily reserve balancing of milk supplies and transportation to more distant processing plants. Lastly, a competitive factor (\$0.60) is included to represent a portion of the competitive costs incurred by fluid plants to compete with manufacturing plants for a milk supply.

The location values were developed during the Order Reform process through an analysis conducted with the USDSS model, maintained at the time by Cornell University. The USDSS model was used to evaluate the geographic or “spatial” value of milk and milk components across the U.S. under the assumption of efficient markets. The model used 240 supply locations, 334 consumption locations, 622 dairy processing plant locations, 5 product groups, 2 milk components, and transportation and distribution costs among all locations to determine

⁵ Order Reform Final Decision.

mathematically consistent location values for milk and components. Model results provided county-specific information regarding the relationship of prices between geographic locations based on May and October 1995 data.

Since adoption on January 1, 2000, only differentials in the Appalachian, Florida, and Southeast FMMOs have been amended. The amendments, effective May 1, 2008, were the result of a region-specific rulemaking evaluating transportation costs in servicing those milk deficit orders 73 FR 14153 (Mar. 17, 2008).

The record reflects consensus among hearing participants that the dairy marketplace has evolved significantly over the past 25 years. However, there remains strong disagreement on how the market changes should be interpreted and recognized in the Class I differentials. The producer community argued Class I differentials no longer reflect the cost of servicing fluid milk demand and should be updated to reflect the current structure and significantly higher transportation costs through adoption of Proposal 19. The processing and manufacturing community argued certain cost factors contained in the differentials are no longer relevant and should be eliminated through adoption of Proposal 20. They stressed that if the costs of servicing the Class I market exceed those of the proposed reduced Class I differential values, they can be negotiated between buyers and sellers through over-order premiums.

Proposal 19 would increase the Class I differentials based in part on updated USDSS model results reflecting the current dairy market structure and transportation costs. NMPF witnesses explained model result averages were the foundation of their deliberations, and deviations were made to account for a variety of factors they believed were not accounted for, including producer price impacts, competitive relationships, blend price alignment, private supply arrangements, and unique local market conditions such as traffic or geography. Although NMPF began with results from a mathematical model, the process thereafter was primarily subjective. They started by selecting a series of cities, which they called "anchor cities," to represent areas which bordered multiple FMMO regions. Then, regional committees adjusted model-derived location values to better align location values and reflect local marketing and transportation conditions within their region, respecting the anchor cities as starting points. NMPF combined the independently derived regional results

and made further refinements to ensure smooth pricing transitions between the regions. Ultimately, NMPF proposed the lowest differential increase from \$1.60 per cwt to \$2.20 per cwt. NMPF maintained the cost factors provided for in the base differential value remain relevant and presented testimony from member cooperatives that such costs have increased.

Opposition to Proposal 19 centered on several areas. First, opponents argued there is more than an adequate supply of milk nationally to meet Class I needs, therefore, adoption of Proposal 19, or any increase to Class I differentials, is not warranted. Second, opponents contended raising Class I prices would be disorderly because it would further decrease already declining Class I consumption and, they argued, the FMMO objective of ensuring adequate milk supplies implies FMMOs should adopt provisions that encourage Class I consumption. One such opponent presented an econometric study which found fluid milk demand is elastic, concluding that increasing Class I prices would decrease consumption and violate FMMO objectives. Third, opponents took exception to NMPF's proposal development process and what they considered a lack of unifying principles used to adjust the USDSS model results, believing NMPF had failed to provide cost justification for maintaining a base differential. Independent fluid milk processors further argued the entire development process led to results with a favorable bias towards NMPF member-owned plants. Lastly, organic milk processors and some organic cooperatives argued organic milk should not be treated similarly to conventional milk in the FMMO program because it has different and unrelated market structures. In its post-hearing brief, MIG reiterated its position on organic milk and further argued that because NMPF did not demonstrate that current Class I differentials create disorderly marketing conditions the evidentiary threshold for increasing differentials had not been met.

MIG offered Proposal 20, which would lower the base differential value to \$0.00, contending FMMO Class I prices are too high and have resulted in an oversupply of milk that they believe is disorderly. According to MIG, there is more than an adequate supply of milk to meet fluid demand. Given 99 percent of U.S. milk production meets Grade A standards, MIG argued compensation for Grade A maintenance is already provided for in manufacturing milk prices and, therefore, the \$0.40 Grade A factor is no longer justified.

Additionally, MIG member testimonies detailed efforts they have adopted to balance their own milk supply, including infrastructure investments, creating more uniform receiving and processing schedules, and paying over-order premiums. Organic and ESL MIG members testified their fluid milk products function as wholly distinct markets with their own balancing and supply challenges. Therefore, MIG concluded the balancing cost and Class I competitive factors should no longer be recognized in the Class I price. Lastly, MIG and its members, and Lamers Dairy, argued that if additional money is needed to compensate dairy farmers and cooperatives for balancing costs or to incentivize milk to serve Class I plants, those costs should be negotiated between the buyer and seller and paid through over-order premiums, not as part of the regulated price.

A vast majority of producers and their cooperatives opposed Proposal 20. They maintained, both in witness testimony and post-hearing briefs, there is relevancy of costs associated with the base differential. NMPF stressed the costs, while difficult to precisely quantify, are still relevant and have increased since adopted in 2000. NMPF described the disorder that would arise if the base differential was reduced to \$0.00 and a greater portion of market-wide cost reimbursement was forced to be negotiated in the market. While some NMPF members testified to receiving over-order premiums, they stressed establishing and maintaining premiums is difficult because there remains a market imbalance of power between milk sellers and buyers.

Opponents of any change to Class I prices, either through a change to Class I differentials or other FMMO amendments, raised several overarching objections. First, they alleged disorderly marketing must first be proven to justify any changes to FMMO provisions. They cited a lack of instances of fluid demand not being met as an indication disorder is not present in the fluid milk market.

The declared policy of the AMAA is to ". . . establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce . . ." FMMOs accomplish this mandate through the classified pricing of milk products and marketwide pooling of those classified use values. Through these mechanisms, orderly marketing conditions are provided so handlers are assured of uniform minimum raw milk costs and producers receive minimum uniform payments for their raw milk, regardless of its use. While previous FMMO

amendatory proceedings may have found market disorder to warrant changes to provisions, the AMAA does not contain an express or implied declaration that a finding of disorderly marketing conditions is required before an order can be amended.

Second, opponents argued Class I prices cannot be amended until the FMMO system is modified to recognize the organic milk sector. However, potential amendments that would adopt disparate treatment of organic milk were not within the scope of this proceeding, as defined in the hearing notice.

Finally, opponents testified that milk is typically more valuable when used in Class III products, rather than Class I, and therefore the record lacks justification to increase Class I differentials. Testimony was given comparing USDSS model results (utilizing 2016 data) showing, outside of the southeastern region, higher marginal location values for milk used at Class III manufacturing locations than for milk used in Class I processing in the same locations. No evidence was presented as to how the Class III location values could or should be implemented to achieve the purposes of the AMAA. Unlike estimated Class I location values which have been historically relied upon to determine Class I differentials, this was the first time the USDSS model results were utilized to calculate location values for Class III milk, and the first time testimony was offered to suggest how the correlation between Class III and Class I location values should impact pricing decisions. The record lacks evidence to validate the interpretation of Class III location values, as further indicated by the differing views of the study authors as to whether this would be an appropriate interpretation of the various sets of USDSS model results.

The Department received 33 comments from stakeholders concerning amendments to the Class I differentials in the recommended decision. This included general comments as well as specific requests to reevaluate the proposed Class I differentials in certain counties, as discussed in greater detail by region below. In sum, the Department received 20 comments in support of and 13 comments in opposition to the Class I differentials as proposed in the recommended decision.

Seven individual dairy farmers; AFBF; NMPF; Georgia Milk Producers, Inc.; Maine Dairy Industry Association (MDIA); the Arizona, Michigan, Tennessee, Wisconsin, and Minnesota State Farm Bureau Federations; Upstate Niagara; Select; and Plains Dairy commented in support of the

recommended decision with some location-specific changes requested. These groups largely expressed support for the decision's use of the USDSS model's May results as the baseline for Class I differential changes, as well as the decision to maintain the current base differential of \$1.60. They also pointed to record evidence from producer organizations supporting the need to update the Class I differentials from the levels set nearly 25 years ago. Supporters stated that the increases in the proposed differentials accurately reflect current costs and would ensure an adequate supply of fluid milk nationwide and orderly marketing conditions.

Crystal Creamery; United Dairy; Nestle USA; New Dairy; Lamers Dairy; IDFA; MIG; Pennsylvania Association of Milk Dealers (PAMD); West Virginia Department of Agriculture; and Family Farm Defenders submitted comments objecting to the proposed amendments to the location-specific Class I differentials in the recommended decision and some specifically objected to the continuation of the \$1.60 base differential. DFA, the DFA Mountain Area Council (separately), and an individual DFA producer submitted comments specifically objecting to the Department's reliance on the USDSS model's May results as the basis for determining Class I differentials. They argued the USDSS model does not take into account the unique relationships between dairy farmers and Class I manufacturers in Colorado and the proposed Class I differential levels in Colorado should be raised.

MIG made numerous assertions regarding what it believed were arbitrary and capricious changes proposed in the recommended decision, particularly concerning any deviations from the USDSS model. MIG also continued to express strong opposition to the costs accounted for in the \$1.60 base differential, stating that the record lacks sufficient evidence to continue to account for the Grade A and Class I incentive costs, in particular. IDFA also commented that, in its view, there is no record evidence to support that Class I demand is not met and, thus, the decision to increase Class I differentials to incentivize supply to the Class I market is unsubstantiated.

Comments by Crystal Creamery and Lamers Dairy also expressed additional concerns with the proposed Class I differentials. Crystal Creamery reiterated its support for MIG's proposal to eliminate the base differential, which they believed would allow over-order premiums to incentivize supply to fluid plants. However, Crystal Creamery

stated that if the Department continued to propose Class I differential increases, it believed the use of the USDSS model results, with no additional adjustments, was the best tool available for determining location differentials. Lamers Dairy expressed its continued opposition to any increase in the Class I differentials and criticized the Department's determination not to account for over-order premiums in its recommended decision because they are, in its view, the real incentive to supplying fluid milk plants.

Considering comments received on the recommended decision and all record evidence, this decision continues to find that the cost of servicing the Class I market is no longer sufficiently reflected by existing Class I differentials. This was evident in the USDSS model results and validated through firsthand testimony of cooperative milk suppliers who described increased servicing costs. Current Class I differentials were established based on 1995 data. In the nearly thirty years since, the record reflects the market has substantially changed in size and structure. While milk production by volume has increased approximately 45 percent from 1995 until 2022, during the same time period the number of dairy farms has decreased by approximately 74 percent, and the average herd size has increased from 68 to 261 cows.

Consolidation has also occurred on the processing and manufacturing side. The record describes plant closures, particularly on the fluid processing side, and plant investment, especially in large manufacturing plants. Considerable testimony and evidence were given describing increased distances milk must travel to find a market outlet. Because of the greater distances between supply locations and fluid processing plants, cooperative witnesses testified to increased costs to ensure fluid demand is met. The witnesses also described in detail how the increased costs are disproportionately borne by cooperative members who often see deductions on their milk checks to cover increased organizational and individual transportation costs, which some witnesses attested more than doubled in the past 20 years.

There was little to no rebuttal to the claim the market has consolidated on both the producer and processor side, resulting in increased transportation costs. The USDSS study authors themselves attributed the observed differences in the 2022 results, when compared to the current differentials, to four primary factors: change in milk production locations, change in compositions of dairy product demand,

change in demand locations, and increased transportation costs per mile. What is at issue is the justification for increasing Class I differentials. While only one witness described a situation in which they were unable to procure enough milk to meet the demand of their fluid milk processor, the record is full of testimony on the difficulty cooperatives have faced to ensure fluid milk demand is met. Cooperative witnesses discussed needing to reach out to more distant supply locations to find available milk supplies willing to serve the Class I market instead of remaining at a manufacturing plant, and the inability to recoup a large portion of the additional transportation costs through over-order premiums.

FMMOs were established in the 1930s when the market contained many sellers and few buyers of milk. The highly perishable nature of raw milk resulted in producers engaging in pricing behavior that lowered farm prices as producers undercut one another in order to find a market outlet, a condition generally described as destructive competition. This unavoidable competitive behavior was among the reasons producers petitioned Congress to authorize a marketing order program to provide orderly marketing through known terms of trade and the pooling of market returns, which in turn provided a more equitable balance of power between buyers and sellers.

While the record of this proceeding reveals continued consolidation on both the producer and processing sides of the market, it also contains evidence the fundamental elements that were the genesis of the FMMO program still exist. Raw milk remains a highly perishable product, produced every day, that cannot be stored for any significant length of time and incurs high costs when transported over long distances. No substantive evidence was presented to indicate there is no longer an imbalance of market power between buyers and sellers. Processors spoke of the abundance of milk produced as a reason Class I prices should not be increased. However, that reality also highlights how the dairy marketplace continues to place processors in a price setting role. As a price taker, the record reflects considerable testimony attesting to the difficulty dairy farmers have had and continue to have in obtaining and maintaining over-order premiums at levels sufficient to cover actual and/or opportunity costs.

It is natural for buyers of milk to want to pay less and for sellers of milk to want to be paid more. The role of FMMOs is to determine minimum prices that provide for orderly

marketing conditions that balance these natural competitive desires. The AMAA expressly authorizes nationwide pooling of classified prices as a tool for accomplishing orderly marketing. In determining appropriate classified prices, the Department cannot place an undue reliance on over-order premiums which diminish the role of nationwide revenue pooling and can lead to disorderly marketing conditions. Accordingly, this decision recommends changes to the Class I differentials to better reflect the various aspects of the current marketplace.

The first step in evaluating appropriate Class I differential levels is the base differential. While the USDSS model is appropriate to show the value differences of milk between two fluid plant locations, as will be discussed later, it is not designed to inform the level of the minimum value needed to service Class I plants. Proposal 20 seeks to reduce the base differential to \$0.00 on the premise the costs represented either are no longer relevant (Grade A maintenance) or should be left up to negotiation with the fluid milk processor and their supplier (balancing and Class I incentive cost). This decision continues to find that while the record does not precisely describe how much the cost components of the base differential have increased, it lacks evidence to demonstrate those costs have decreased. In fact, discussion of various costs throughout the proceeding indicates that costs have instead increased. Given the lack of clear record evidence specific to costs accounted for in the base differential, this decision continues to recommend that the \$1.60 per cwt base differential remain.

Despite arguments Grade A maintenance costs should no longer be covered because 99 percent of U.S. milk production is Grade A, this decision continues to find it appropriate to recognize the additional costs for maintaining Grade A status in a regulatory pricing system requiring Grade A standards be met for participation. When the Grade A factor was incorporated into the base differential, it was specifically for Grade A maintenance costs, not costs associated with conversion to Grade A status. Proponents argue that because almost all milk meets Grade A standards, it is no longer necessary to provide a recognition of that cost in the base differential. Whether 99 percent of milk production today is Grade A, or 96 percent as it was at the time of Order Reform, is irrelevant. The record demonstrates dairy producers incur costs to maintain Grade A standards which are a requirement for

participating in the FMMO system. As only Class I milk is required to participate and raw milk used in fluid milk products is required to meet Grade A standards, it is appropriate for the Class I price to continue to recognize those costs.

The record does not demonstrate the remaining two base differential factors, balancing costs and additional monies needed to compete for a milk supply, are no longer relevant. All parties testified to their continued existence. Proposal 20 would require those costs to be negotiated in the market.

Proponents of Proposal 20 argued they have made capital investments to balance their supply and/or pay over-order premiums to their suppliers to meet their milk needs, and/or provide balancing services. While their testimony acknowledges these costs exist, proponents argued the FMMO is making them pay twice for such services—once through the regulated price and again through their negotiated over-order premium. They further argued that if cost reimbursement is needed for such services, they should be able to pay that value to their suppliers directly through over-order premiums, not into the nationwide pool.

Cooperative witnesses testified at length on the costs associated with ensuring daily, weekly, monthly, and seasonal fluctuating needs of the fluid market are met. While their balancing costs were considered confidential information, cooperative witnesses testified to the overall increase in costs associated with providing those services. In particular, cooperative witnesses spoke to the higher costs incurred to operate regional balancing plants. These plants often do not run at full capacity year-round in order to ensure capacity to balance excess supply during flush periods or provide additional milk to fluid processing plants during months of increased demand. The record reflects these marketing costs are incurred for the benefit of balancing the entire market's milk supplies, thus, providing for the orderly marketing of milk for fluid use. It has always been the case that an individual processor may find it necessary and/or advantageous to pay premiums above the minimum value to suit their individual and fluctuating needs. FMMO pricing balances the value needed to be reflected in the minimum regulated prices, without an over-reliance on over-order premiums that can undermine nationwide revenue pooling and lead to unequal raw product costs between similarly situated handlers and non-uniform payments to producers.

An additional function of the base differential, as described in the Order Reform Recommended Decision, is to generate the additional monies necessary for the FMMO pools to balance the reliance on over-order premiums. This was of particular concern in marketing orders with low Class I differentials and low Class I utilization, for which the decision noted “there is a risk that handlers may not face equal raw product costs for various reasons. Thus, having a larger proportion of the actual value of Class I milk in the market order pool in these areas, than is now the case, should promote pricing equity among market participants.” 63 FR 4802, 4909 (Jan. 30, 1998). As this decision seeks to update Class I differentials, maintaining the balance of what proportion of the value of Class I should be reflected in the marketwide pool remains a consideration. Negotiations for over-order premiums are not conducted in a vacuum but are done with the benefit of both parties knowing minimum FMMO values and the costs represented in the minimum values the plant is responsible for paying. If Class I processors believe they are being double charged, they can use that information in their over-order premium negotiations.

Maintaining the \$1.60 per cwt base differential would ensure Class I prices typically remain the highest, which is of particular importance in locations where the base differential is the effective differential. Without a base differential value in these locations, there would be little difference between the Class I price and the manufacturing price, and, thus, no financial incentive to supply the fluid market would exist to ensure the FMMO policy objective is met. Accordingly, this decision finds a \$1.60 per cwt base differential remains an appropriate minimum value to ensure Class I demand is met.

While the Department appreciates the effort put forth to submit a comprehensive option in Proposal 19, the record of this proceeding does not support its adoption. Proposal 19 contains a base differential of \$2.20, which is an increase of \$0.60 from the current level. However, the record lacks data to quantify costs in excess of the \$1.60 base value.

Proponents described using the average of the USDSS model’s May and October results as a starting point for consideration but did not provide evidence as to why, under a minimum pricing system, the average rather than the minimum values observed in the May results was appropriate or preferable. Furthermore, the record does

not contain evidence to support how the deviations made from the model’s averages are appropriate. Proponents described their own marketing expertise but presented insufficient evidence to determine if the proposed differentials would result in Class I prices in excess of what is appropriate for a minimum pricing system. Accordingly, this decision does not recommend adoption of Proposal 19.

However, this decision continues to find there is record evidence to support raising the Class I differentials from current levels. The record of this proceeding demonstrates the cost of servicing the Class I market has increased since the Class I differentials were adopted in 2000 and amended in the southeastern FMMOs in 2008. Evidence reflects the market structure of Class I plants and the milk supply have changed considerably in the last 25 years. That was supported in witness testimony, as well as USDSS model results, which clearly show the location value of milk has changed. The Department continues to find the USDSS model to be the best available tool for determining the location value of milk given the vast array of factors that contribute to how milk is produced, transported, processed, and distributed in the U.S.

When the differentials were adopted during Order Reform, testimony reflects the Department used USDSS model results as a starting point and made adjustments for various reasons. The Order Reform Recommended Decision described several options the Department considered. Of the differential surface ultimately adopted, AMS wrote, “. . . [n]ine differential zones provide the basis for establishing the price structure. These zones were established based on results of the USDSS model, knowledge of current supply and demand conditions, and recognition of other marketing conditions such as fluid versus manufacturing markets, urban versus rural areas, and surplus versus deficit markets.” 63 FR 4802, 4905 (Jan. 30, 1998). The decision went on to outline additional reasons for adjustments including ensuring price alignment with neighboring zones and adequate marketwide pool draws.

The USDSS model estimates results for an efficient milk supply and distribution network, provided at its lowest cost. The USDSS study authors acknowledged when using the model results to determine Class I differentials, adjustments would be appropriate as there are factors unaccounted for in the model, such as FMMO provisions,

abnormal traffic patterns, and competitive relationships.

Accordingly, this decision continues to recommend that Class I differentials be amended, as appropriate, to better reflect the current cost of serving the Class I market. When determining appropriate levels, the Department began with the USDSS model’s May results, referred to hereinafter as “May results.” The May results are the lower of the two months provided in evidence, which is an appropriate starting point for determining minimum prices. The Department then evaluated the results on a regional basis and made adjustments based on three principles and two additional considerations.

First, adjustments were made where necessary to better align Class I handler equity. This means the proposed Class I differentials should not give one handler an uneconomic cost advantage relative to an actual or potential competing handler. Second, adjustments were made to maintain producer equity and prevent uneconomic rewards or penalties to producers who deliver or could deliver milk to the same plant or market. Third, adjustments were made to ensure the marketwide pools continue to provide orderly marketing conditions. The combination of handler and producer equity goals is further achieved through the size and shape of pricing zones. The model results are determined at specific locations, or “nodes,” in the model. Model results can be displayed on a map or in a list of counties to convey the price surface, but the methodology for doing so, as explained by the study authors, was a mathematical tool which interpolated values between distances. Additional information about markets can be added to the model results through knowledge about the economic or geographic (roads, natural barriers, etc.) conditions in specific locations. This may lead to a decision to change the shape or contours of the pricing surface that is estimated from the model results. Lastly, adjustments were made to reflect unique challenges associated with servicing dense urban environments. The changes by regions and any changes from the recommended decision for specific locations—made in this final decision are described below.

The general process began with roughly \$0.20 differential bands generated from the May results. The May and October results formed a soft boundary for differential adjustments. The current differentials formed a hard lower boundary, which were rounded to the nearest dime to eliminate \$0.05 differences between zones, consistent

with the USDSS model results which were in \$0.10 increments.

Northeast

The recommended Class I differentials in the Northeast region continue to largely follow the May results with minimal changes. The differential for Portland, Maine, continues to be raised to \$4.50 to match the results in Concord, New Hampshire, and ensure handler equity. Albany County, New York, and Rensselaer County, New York, were moved to the same differential by increasing the Albany differential \$0.10 to meet the Rensselaer differential, as plants in those counties are located just across a bridge from one another but were assigned different prices by the model.

Comments on the recommended decision from NMPF and Upstate Niagara expressed concern with inconsistent Class I differentials across the area of western New York. NMPF and Upstate Niagara commented that the proposed differentials in the recommended decision would require milk supplying Class I destinations in that region to move from higher to lower differential zones, largely due to the geography of the Great Lakes. They requested the Department consider a flatter differential area by raising some counties from \$3.80 to \$3.90 and decreasing others from \$4.00 to \$3.90 to facilitate the movement of milk in different directions. Without an adjustment, they argue, producers will not have the necessary incentive to supply Class I handlers in the region.

After closer review of the record, this decision recommends increasing the Class I differentials in the following counties from \$3.80 to \$3.90: Niagara, Erie, Orleans, Genesee, Wyoming, Livingston, Yates, Ontario, Monroe, and Wayne. This decision also recommends decreasing the currently proposed Class I differentials from \$4.00 to \$3.90 in the counties of Lewis, Jefferson, and St. Lawrence. These changes will create a consistent \$3.90 zone that addresses milk movements in the region. This decision is consistent with record testimony concerning the market in western New York and expected increases in capacity and demand in the region which may potentially require milk to be sourced from outside of the immediate local area.

MDIA, NMPF, and MIG commented on the recommended decision's proposed Class I differentials in Maine and New Hampshire. MDIA requested that the proposed Class I differential for Cumberland County, Maine, be increased from \$4.50 to \$4.85 to restore the previous \$0.25 variance between the

Portland and Boston areas and ensure handler equity in the region. The current spread, MDIA argued, will incentivize Maine producers to ship to handlers in Boston, rather than those located in Cumberland County, Maine (Portland). Similarly, NMPF requested an increase from \$4.50 to \$4.70 for 6 counties in Maine and New Hampshire to maintain producer and handler equity. Lastly, MIG commented in opposition to the Department's proposal to align certain counties in Maine and New Hampshire, at levels \$0.20 above the model results.

The Department considered MDIA, NMPF, and MIG's comments in the context of the overall marketing dynamic in the northeast marketing areas and concluded that the Class I differential for Cumberland County, Maine should remain at \$4.50, as indicated in the recommended decision. This will align the Portland area with nearby Merrimack County, New Hampshire (Concord) to ensure handler equity in the region. The larger increase in Suffolk County, Massachusetts (Boston) reflects the increase in costs to service that market and fluid milk demand. Accordingly, no changes were made to the Class I differentials assigned in this region from the recommended decision to the final decision.

Differentials in most New Jersey counties are proposed to be \$0.10 to \$0.20 above the May results, but within the May and October range, to reflect testimony on the cost of servicing urban areas and transportation concerns. NMPF requested the differentials be aligned across southern New Jersey to ensure handlers competing in the same market face the same raw milk costs. The recommended decision proposed changes to the current Class I differentials at varied levels for certain counties in southern New Jersey. More specifically, the proposal for Cumberland County, New Jersey was \$4.70, while the proposal for neighboring Burlington, Atlantic and Cape May counties was \$4.80. However, a review of the record reveals these fluid milk plants compete for sales in the same market and should face similar raw milk costs. Therefore, this decision decreases the Class I differentials for Burlington, Atlantic, and Cape May counties from \$4.80 to \$4.70. This change will also align the differentials with the May results and maintain uniform Class I differentials across the region, as has been the case historically.

The differential for Washington, DC, continues to be \$0.10 above the May result to reflect testimony on servicing an urban area.

In eastern Pennsylvania and northern Maryland, NMPF's comments to the recommended decision requested a \$0.10 increase for 7 counties to maintain a historical \$0.10 price difference with Berks County, Pennsylvania, and to promote handler equity. Similarly, in the Philadelphia and Baltimore corridor, which includes areas in Maryland, Delaware, and southern Pennsylvania, NMPF requested \$0.10 to \$0.20 increases in 15 counties due to milk movements in the region and handler equity concerns. The Department considered NMPF's requests to increase the differentials in Pennsylvania, Maryland, and Delaware. However, the proposed differentials are aligned with the USDSS model results and record evidence does not support the requested increases. Accordingly, no additional changes were made to the Class I differentials proposed in Pennsylvania, Maryland, and Delaware from the recommended decision to the final decision.

Appalachian

The variation between the model results in May and October are more significant in the three southeastern orders. As discussed by several witnesses, this region experiences unique marketing conditions with high Class I utilization and deficit local milk supply. Due to the substantial seasonality of the local milk supply, it requires significant but variable volumes of supplemental milk supplies from outside the region as well as changes in milk movements of regular suppliers to the market throughout the year. The Transportation Credit Balancing Fund (TCBF) and the recently implemented Distributing Plant Delivery Credit (DPDC) are programs to compensate handlers for some of the additional and variable transportation costs associated with supplying the Class I markets in these orders during different periods of the year. The reimbursement rates for these programs include adjustments for any gain in Class I differentials from supply point to receiving plant. Therefore, any changes in the difference between Class I differentials would be reflected in the calculated rate for eligible payments in both the TCBF and DPDC in all three southeastern orders.

The Class I differentials in the Appalachian region are largely formed in \$0.20 and \$0.30 bands based on the May results starting with \$3.70 in southern Indiana and, moving southeast, increasing to \$6.00 along the North and South Carolina coasts. In most areas, the proposed differentials are within \$0.10 (+/-) of the May

results. There are a few exceptions where the proposed differentials are \$0.20 less than the May results to better align handler equity. For example, in Spartanburg County, South Carolina, the proposed differential is \$5.60, \$0.20 less than the May results. This maintains the current competitive relationship between this area and the Atlanta, Georgia area, and with the competing handlers in North Carolina.

The Department received comments on the Class I differentials proposed in the recommended decision in the Appalachian region from NMPF, IDFA, MIG, and New Dairy. NMPF requested a \$0.20 increase in 9 Virginia counties to align with the differential proposed for nearby Kanawha County, West Virginia. NMPF explained that the handlers in these areas all compete for the same market and receive milk from the same milkshed. NMPF also requested a \$0.20 increase to 40 additional Virginia counties to reduce the spread in the proposed differentials in Virginia and northern North Carolina, as well as a series of changes to the proposed differentials in other Virginia, West Virginia, and North Carolina counties considering logistical and geographical challenges. Conversely, IDFA, MIG, and New Dairy commented in strong opposition to the proposed increases and requested general downward adjustments.

The Department considered all comments on the Class I differentials proposed for the Appalachian region. First, rather than increasing the differentials for certain Virginia counties by \$0.20 to align with Kanawha County, West Virginia, this final decision decreases the proposed differentials for Kanawha County, West Virginia by \$0.20 to \$4.30. As discussed later in this decision with regard to the Mideast region, this change effectively aligns the region and addresses handler equity concerns described on the record in both West Virginia and neighboring Ohio counties that compete in the same market. Second, with regard to all other requested adjustments in this region, this decision finds that the Class I differentials proposed in the recommended decision are aligned with the model results and record evidence does not support additional changes. As such, no additional changes were made to the Class I differentials assigned in this region from the recommended decision to the final decision.

Southeast

The proposed Class I differentials in the Southeast FMMO start at \$3.20 in southwest Missouri and increase moving southeast to \$6.00 in southeast

Georgia. The proposed differentials continue to follow the May results closely, within \$0.10 (+/-), with a few modifications. The East Baton Rouge Parish differential was reduced by \$0.20 from the May results to be consistent with the May result of \$5.20 for competing areas such as Lafayette Parish. Tangipahoa Parish was placed in the \$5.40 zone, or \$0.30 below the May result. These decreases are meant to ensure handler equity while still acknowledging the thinner and steeper surface reflected in the May results in the southeastern U.S.

Rutherford County, Tennessee, is also proposed to be modified to be consistent with neighboring Davidson County, Tennessee, at \$4.60 (\$0.20 below the May result) to provide for handler equity. In Missouri, Webster County was placed in the \$3.20 zone to match the Greene, Hickory, and Polk County differentials. This addresses handler equity concerns and results in a \$0.10 proposed decrease for Webster County from the May result.

NMPF provided specific comments on the Class I differentials proposed in the recommended decision for the southeast region and requested a series of increases in 12 counties located in Tennessee and Kentucky. NMPF's rationale for these requests was based on historical and expected milk movements and known producer equity concerns among those delivering milk from the same milkshed to the same plant locations. The Department considered NMPF's request to increase the Class I differentials in this region. However, the differentials proposed in the recommended decision are aligned with the model results and record evidence does not support the requested increases. Accordingly, no changes were made to the Class I differentials assigned in this region from the recommended decision to the final decision.

Florida

The proposed Class I differentials for Florida largely follow the May results with modification to address handler equity concerns. The differentials start at \$6.00 in the Florida panhandle region and increase going south with mostly \$0.40 bands ending at \$7.40 in south Florida. Processing plants in central Florida were placed in the same \$6.80 band to match the May result in Volusia County due to handler equity concerns. This necessitated decreases from the May results of \$0.10 in Orange County, \$0.10 in Hillsborough County, and \$0.20 in Polk County. For similar handler equity concerns, Broward County is proposed to match the May result in

Dade County of \$7.40 in the southernmost part of Florida.

In its comments on the recommended decision, NMPF requested a series of increases of \$0.20 to \$0.40 to the Class I differentials proposed for 14 Florida counties. NMPF cited producer equity concerns and their ability to ensure a sufficient supply of fluid milk to meet consumer demand in high-population areas such as Miami. The Department considered NMPF's requests to increase the differentials in Florida. However, the proposed differentials are generally aligned with the model results and record evidence does not support additional increases. Accordingly, no changes were made to the Class I differentials proposed in this region from the recommended decision to the final decision.

Upper Midwest

In the Upper Midwest region, this decision continues to propose deviations from the May results to ensure producer equity and ensure the marketwide pool provides for orderly marketing. The Upper Midwest FMMO is unique in its low Class I utilization, which creates challenges in setting a differential surface that sends the proper signals to producers supplying the Class I market, while also ensuring producer equity and orderly marketing among producers supplying the region's plants. Record evidence indicates a large differential range in the region would not result in equity between producers and could result in disorderly marketing. Therefore, the differential surface was flattened from the May results, in general, by raising the Class I differentials in the western part of the region—in the eastern Dakotas and much of Minnesota—and lowering the differentials in the eastern part—in northern Illinois, southeastern Minnesota, and Wisconsin.

Differentials in five counties, Dakota, Hennepin, Ramsey, Scott, and Washington, in the Minneapolis/St. Paul metropolitan area of Minnesota, are raised \$0.10 higher than neighboring counties to reflect higher costs of serving an urban area and incentivize Class I service relative to surrounding manufacturing plants. In addition, they are set at the same differential of \$2.90 to promote handler equity among fluid processing plants in the metropolitan area. The new differential for these counties, except for Hennepin, are \$0.10 to \$0.20 above the May results. The differential for Hennepin, \$0.30 above the May results, is set the same as its peer counties to ensure that handlers in this county are able to compete for

available milk supplies on an equitable basis.

Differentials in the regions supplying the Chicago, Illinois, area are adjusted to ensure handler equity. Generally, the differentials in this area are set at \$3.10 to \$3.20. The record reflects bottling plants in eastern Iowa, northern Illinois, southeastern Wisconsin, northern Indiana, and southwest Michigan all compete for Class I sales into the Chicago area. Thus, Class I differentials in northern Illinois are lowered \$0.20 and \$0.10 in Kane and Winnebago counties, respectively, from the May results. Similarly, comparisons and adjustments were made to the May results to align with northern Indiana and southwest Michigan counties supplying the Chicago area.

The Department received a comment from NMPF concerning the Class I differentials assigned to eastern North Dakota and western Minnesota. NMPF stated the Department's recommended decision changed the historical relationship in the Class I differentials assigned to Cass County, North Dakota, and four, adjacent western Minnesota counties compared to the rest of western Minnesota. More specifically, these counties were proposed at \$2.70, while the surrounding counties were proposed at \$2.80. Without a change, NMPF commented, dairy farmers would be disincentivized to supply Class I handlers in the recommended \$2.70 zone. Considering these comments, this decision increases the Class I differentials for Cass County, North Dakota, and Clay, Becker, Hubbard, and Wilkin counties in Minnesota from \$2.70 to \$2.80. These changes will help to align these counties with the neighboring counties in Minnesota where the record reveals the reserve supply is located. The increase will also incentivize the supply of milk to Class I plants in the area to ensure fluid milk availability to populations throughout North Dakota and northwestern Minnesota.

Central

The proposed Class I differentials in the Central FMMO start at \$2.30 in western Colorado and increase moving east to \$4.00 in southern Illinois. This decision continues to align the production area of northern Colorado with the large production areas of New Mexico, the Texas Panhandle, and southwest Kansas at \$2.50. This required increasing the differential in Weld, Boulder, and Morgan counties of Colorado by \$0.10 to \$0.20 from the May model results. In order to encourage milk to service Class I demand, some counties in the greater

Denver area, including Colorado Springs, are proposed to remain aligned with the May results of \$2.70, while others are proposed to increase as much as \$0.20 above the May results to provide for handler equity.

In southern Illinois, testimony reflects plants compete for sales within a similar distribution area. Therefore, counties were grouped into a \$3.60 zone. This represents an increase of \$0.10 for some plants, while others remained at the May result of \$3.60. In Iowa, all counties with distributing plants remain aligned with the May result of \$2.70.

Douglas County, Nebraska, and Minnehaha County, South Dakota, proposed Class I differentials are \$2.70 and \$2.60, an increase of \$0.20 and \$0.10, respectively, from the May results. These increases continue to recognize handler equity both to the east with Polk County, Iowa, and to the north with Cass County, North Dakota.

In Kansas, the two counties with distributing plants, Reno and Sedgwick, are proposed to be aligned at \$2.90; as they are neighboring counties, the same differential levels would provide for handler equity. This increase also provides handler equity and price alignment with Oklahoma plants to the south.

In Oklahoma, Lincoln, Cleveland, and Grady counties continue to be proposed at the same differential of \$3.30. Lincoln and Cleveland counties continue to be proposed in alignment with the May results, which represents a \$0.20 increase for Grady County. The \$3.30 differential for these three counties provides for handler equity and price alignment both to the north in Kansas and the south in Texas.

The Department received specific comments on the Class I differentials proposed in the recommended decision for the Central FMMO region from NMPF, DFA, and DFA's Mountain Area Council in collaboration with Colorado dairy farmers. NMPF's comments focused on producer and handler equity concerns in the region and included a request for a \$0.20 increase in the proposed Class I differentials for 23 Colorado counties. DFA and its Mountain Area Council provided similar comments and argued further that the USDSS model is inappropriate for the Colorado market because of the unique circumstances in that market where a single Class III handler absorbs nearly all the milk produced in Colorado. The DFA Mountain Area Council also reiterated hearing testimony on Colorado milk production costs.

The Department considered all comments received on the Class I

differentials in the State of Colorado. Record evidence, however, does not justify a change in the proposed differentials. While the record reflects the USDSS model did not account for a variety of milk cost of production factors and plant supply relationships, this decision has consistently articulated consideration of producer costs is not appropriate when determining Class I differential levels. As such, no changes were made to the Class I differentials proposed in Colorado from the recommended decision to the final decision.

NMPF also commented on the Class I differentials proposed for 35 counties across Oklahoma, Missouri, and Arkansas, covered by both the Central and Southeast FMMOs. NMPF requested that the Department align these counties at \$3.40 because handlers in the tri-state area all compete for the same markets and are supplied by the same milkshed. This decision finds, however, that record evidence does not justify an additional increase or a reason to align the tri-state area at \$3.40, as the proposed differentials generally follow the model results. As such, no changes were made to the Class I differentials proposed in this region from the recommended decision to the final decision.

Mideast

Differentials in the Mideast region were evaluated on a state-by-state basis. Michigan differentials are set at the May results, \$3.00 in the upper peninsula and \$3.30 in the lower peninsula, because there were no additional producer or handler equity issues to address. Indiana is divided into three differential zones moving north to south (\$3.30, \$3.60, and \$3.70) which align with the May results. This decision continues to propose Class I differentials for Lake and Huntington counties \$0.40 and \$0.10 lower, respectively, from the May results to provide handler equity in the northern Indiana zone. This decision continues to propose an increase to the Class I differentials in Madison and Wayne counties by \$0.10 and \$0.20, respectively, from the May results to provide handler equity in the central Indiana zone of \$3.60. Southern Indiana counties are proposed at the May result of \$3.70.

Proposed differentials in Ohio generally follow the May results within \$0.10 (+/-) and zones were determined based on handler equity concerns. Moving northwest to southeast, proposed differential zones are \$3.30, \$3.60, \$3.80, \$4.00, and \$4.30. The five differential zones align within a \$0.10

(+/-) range of the May results. The exception is Cuyahoga County with a proposed \$0.20 decrease from the May result to provide for handler equity with Wayne and Stark counties.

Considering additional handler equity concerns in southern Ohio, as expressed in comments received from United Dairy, and competition among plants in the region as revealed in hearing testimony, this decision decreases the Class I differentials from \$4.00 to \$3.80 in the counties of Noble, Belmont, Morgan, Jefferson, and Perry, Ohio. United Dairy noted in its comments that current Class I differentials in the region are aligned, yet the recommended decision amended the differentials at higher levels for some counties. United Dairy added that the proposed Class I differentials in the recommended decision set the minimum raw milk price for some Class I handlers located in southern Ohio \$0.20 higher than those in neighboring central Ohio counties. United Dairy asserted that with such a large price difference, it would be at a competitive disadvantage relative to its current price relationships with competitors. Upon further review, this decision finds the Class I differentials proposed in the recommended decision would create competitive disadvantages for plants located in southern Ohio and, thus, a decrease in these counties was appropriate.

West Virginia differentials range from \$4.00 to \$4.80, moving northwest to southeast, and are largely consistent with the May results. However, considering handler equity concerns in West Virginia, as expressed in comments received from NMPF, United Dairy, and the West Virginia Department of Agriculture, this decision decreases the Class I differentials in Cabell, Putnam, Clay, and Kanawha Counties in West Virginia from \$4.50 to \$4.30. NMPF, United Dairy, and the West Virginia Department of Agriculture all highlighted handler equity concerns in their comments because of significantly higher differentials in Kanawha County, West Virginia compared to neighboring West Virginia, Virginia, and southern Ohio counties. To address these concerns, this decision will align the Class I differentials in Cabell, Putnam, Clay, and Kanawha Counties in West Virginia with nearby counties that compete in the same market.

MIG provided specific comments regarding Pennsylvania, urging the Department to lower additional Class I differentials to ensure handler equity with unregulated areas of the State. The Department reviewed relevant record

evidence and found no justification to modify the proposed Class I differentials from the recommended decision to the final decision. While the proposed differentials in western Pennsylvania are higher than the May results, they generally follow the model results that showed multiple differential zones through the state moving west to east. As such, this decision continues to propose a Class I differential for Butler, Fayette, Lawrence, and Mercer counties of \$4.00, \$0.10 lower than the May results, to encourage service to the demand areas of Western Pennsylvania.

Southwest

The proposed Class I differentials in the Southwest FMMO start at \$2.30 in northwest New Mexico and increase moving southeast to \$4.80 in southeast Texas. Testimony reflects the Texas Panhandle and southeastern New Mexico regions contain mostly manufacturing plants and draw milk from the same supply region in the Panhandle. For producer equity concerns, these regions are proposed to be in a \$2.50 zone. This aligns with the May results for the eastern New Mexico plant locations, necessitating a proposed increase of \$0.10 to \$0.30 in counties within the Panhandle region to reach a uniform \$2.50 zone. In Lubbock County, Texas, the differential is proposed at \$2.60, a decrease of \$0.20 from the May result, recognizing handler equity in the Panhandle region and producer equity considerations with manufacturing plants competing for milk supplies. Dallas County, Texas, continues to be proposed in alignment with the May result of \$3.70 and a \$0.10 increase is proposed for Tarrant County to maintain handler equity. Bexar County, Texas is proposed at \$4.30, a \$0.10 increase from the May result, and Harris and Montgomery counties are proposed at \$4.80, a \$0.20 increase from the May result to reflect difficulties in servicing congested urban areas.

Upon review of comments received from NMPF and Plains Dairy regarding Class I differentials in New Mexico, this decision proposes to increase the Class I differentials for Bernalillo, Los Alamos, Sandoval, Santa Fe, Socorro, Torrance, and Valencia counties from \$2.40 to \$2.50. NMPF commented specifically that, as proposed in the recommended decision, there would be a \$0.10 disincentive to supply the Class I market in Bernalillo County, New Mexico (Albuquerque). NMPF argued an increase is needed in these counties to ensure there remains an incentive to supply the Class I market in Albuquerque from the reserve supply available in New Mexico, as reflected in

hearing testimony. This change aligns the differentials for the fluid market of Albuquerque with nearby manufacturing markets that compete for the same milk supply and would not disincentivize service to the Class I market in Albuquerque.

Plains Dairy was the only Class I handler to comment in support of the recommended Class I differentials and for use of the USDSS model results. Plains Dairy requested a series of decreases in the southwest region to align with the May results. While this decision increases some of the Class I differentials included in Plains Dairy's comments, it creates a consistent \$2.50 zone in New Mexico so as to not disincentivize milk movements to the milk demand location in Bernalillo County, New Mexico. This change is supported by record testimony concerning the location of the milk supply and demand locations in New Mexico.

This decision also recognizes the competitive relationship between plants located in the Texas panhandle that draw from a common local milk supply, as also discussed by Plains Dairy in its comments. While Plains Dairy requests decreases in some locations, NMPF requests increases in other locations in Texas and neighboring Oklahoma counties. Because processors and manufacturing plants located in the panhandle compete for a shared milk supply, as revealed in the hearing record, this decision finds lowering the differentials in the region to the May results would both disrupt this competitive relationship and disincentivize service to the Class I market. Considering resulting producer and handler equity concerns, deviations from the model results are appropriate for the Southwest region.

MIG also provided specific comments questioning the Department's proposed Class I differentials in certain Texas and New Mexico counties where the model suggested a Class I differential lower than current levels, but the Department proposed an increase. The record of this proceeding reflects the model estimates for some supply locations in Texas and New Mexico were higher than the demand areas where the bottling plants are located. The record does not indicate why such a price relationship is suggested given that economic theory would assume the opposite—the demand areas should have higher differential levels to incentivize milk to supply bottling plants in those locations. During the national hearing, the model authors testified that while the model results entered into evidence give estimates for the 3,108 counties in

the contiguous United States, the model only produces estimates for 663 demand locations. The model then uses a Kriging process which interpolates estimates for the counties between the demand locations. As such, when determining the proposed differentials, adjustments from the model were made to some demand locations in the Texas and New Mexico areas to not disincentivize milk movements from supply to demand locations.

Arizona

In Arizona, the metropolitan area of Phoenix encompasses both Maricopa and Pinal counties. This decision continues to propose an increase to the Class I differentials for these counties by \$0.30 and \$0.20, respectively, above the May results to reflect the higher cost of servicing an urban area, in addition to providing handler equity with Clark County, Nevada. The differential for Yuma County is proposed at \$2.50, an increase of \$0.40 from the May result to maintain handler equity between Maricopa County, Arizona, and Los Angeles, California.

In its comments on the recommended decision, MIG indicated its opposition to the proposed increase in Kern County, California to align with Yuma County, Arizona. The record reflects there are additional costs to service the Los Angeles market that are not accounted for in the USDSS model and, thus, the differentials as proposed in the recommended decision would incentivize milk to service the Los Angeles market. MIG argued the proposed differentials will incentivize dairy farmers in Arizona to supply the California market rather than the Phoenix area, where demand is high. However, the record does not indicate the proposed differentials would cause a milk shortage for the Phoenix market as hearing evidence demonstrates the supply for Phoenix comes from its surrounding area.

Considering the same urban area, NMPF requested an increase from \$2.60 to \$2.80 in Maricopa County, Arizona due to a number of logistical, geographical and climate-related challenges when servicing Phoenix. The Department considered NMPF's comments, however, this decision finds that record evidence does not justify a change in the proposed differentials. Additional costs of servicing the urban area were already considered in determining the proposed differentials, and as already articulated in the decision, producer costs are not an appropriate consideration when determining Class I differential levels. As such, no changes were made to the

Class I differentials assigned in this region from the recommended decision to the final decision.

California

For California, testimony was given regarding additional transportation costs from excessive traffic congestion and geographic obstacles in southern California that were not accounted for in the model. Accordingly, this decision continues to propose an increase to the Class I differential in San Diego by \$0.20 from the May result to \$2.80. To maintain handler equity within the southern California region, the differentials for Orange, Riverside, and Los Angeles counties are proposed to be \$2.80. This is \$0.40, \$0.50 and \$0.60 above the May results in Orange, Riverside, and Los Angeles counties, respectively. Ventura County is proposed to increase \$0.40 from the May result, to \$2.60, to address producer equity concerns and ensure price alignment with the surrounding counties. For Kern County, the primary milk supply area for much of this region, the differential is proposed to be \$2.50. This also serves to encourage Kern County milk to move south to distributing plants, rather than north to manufacturing plants where the proposed differential is \$2.20.

The differentials in the remaining San Joaquin Valley counties, Tulare, Kings, Fresno, Madera, Merced, Stanislaus, and San Joaquin, are proposed to be \$2.20 based on testimony indicating these counties are considered one supply area. Of these counties, Madera County has the highest increase from the May result, \$0.40, to maintain handler equity as well as maintain producer equity for the producer milk in this area.

The proposed \$2.20 differential zone is then carried into the Sacramento Valley counties of Sacramento, Yolo, Colusa, and Glenn, an increase of \$0.20 to \$0.30 from the May results. These counties, along with those in the San Joaquin Valley, supply milk for distributing plants in the San Francisco Bay area. The proposed Class I differentials for Alameda, Contra Costa, Solano, Napa, Marin, and Sonoma counties continue to be proposed at \$2.40 to encourage milk to service the San Francisco Bay area. This represents an increase of \$0.40 to \$0.50 from the May model results for these supply counties to maintain handler equity.

San Francisco and counties south along the central California coast are further from a milk supply. The differentials in that area are proposed at \$2.50 and include San Francisco, San Mateo, Santa Cruz, Santa Clara, San Benito, Monterey, San Luis Obispo, and

Santa Barbara counties, representing increases from the May results of \$0.20 to \$0.50.

Similar to the Sacramento Valley, the differentials for the counties of Mendocino, Lake, and Humboldt, which are located along the northeast California coast and supply the San Francisco Bay area, are proposed to be \$2.20 to provide for producer equity.

The Department received specific comments from MIG, NMPF, and Crystal Creamery regarding the Class I differentials proposed in California. MIG and Crystal Creamery commented in opposition to the Department's deviations from the USDSS model results in the region and emphasized specific concerns with the Class I differentials proposed for the Fresno area. NMPF requested an increase from \$2.60 to \$2.80 to the Class I differentials for San Bernardino County to align with neighboring counties where handlers compete for the same milk supply.

The Department reviewed and considered these comments and reexamined relevant record evidence. The proposed differentials reflect consideration of the cost to supply the multiple California metropolitan demand centers given its unique geography and significant logistical supply challenges. Witnesses testified and the model authors indicated the USDSS model was not capable of taking these factors into consideration. Therefore, the record supported differential levels higher than the model results. The differentials in the metropolitan areas were raised with consideration for record evidence pertaining to handler equity, geography and traffic congestion. These increases then necessitated changes to the supply regions. A review of the record evidence regarding milk movements in southern California similarly finds no justification for change. Given the large size of San Bernadino County, the largest county in the state, this decision does not find justification to increase the differential applicable to the entire county, given only a small portion is located next to Los Angeles County. Considering this analysis, no changes were made to the Class I differentials assigned in this region from the recommended decision to the final decision.

Western Unregulated States

Differentials in Nevada generally follow the May results, except for a few modifications. In northern Nevada, to provide for handler equity, Washoe County is proposed to increase \$0.10 from the May result to align with the neighboring \$2.00 California zone.

Eureka, Nye, and Esmerelda counties are proposed at \$2.20, resulting in changes from the May results of plus or minus \$0.10.

The proposed Class I differentials in Utah start at \$2.00 in the north and increase moving south up to \$2.50 in the southwest part of the State. While most of the proposed differentials are aligned with the May results, the counties of Davis, Morgan, Salt Lake, Tooele, Utah, and Weber are recommended at \$2.20, an increase of \$0.10. This aligns those counties with counties to the north and west, ensuring both producer and handler equity.

The proposed Class I differentials in the state of Montana start at \$1.70 and increase to \$2.40 in the southeast part of the state. Most of the proposed differentials are aligned with the May results. The only county with a proposed differential that is more than \$0.10 different from the May result is Golden Valley which is lowered \$0.20 to ensure handler equity with the counties to its north and south.

The proposed differentials in the unregulated portions of the state of Idaho start at \$1.70 and increase to \$2.20. While most of the proposed differentials are within \$0.10 of the May results, the county of Cassia is decreased \$0.20 for handler equity with plants to the south into Utah. This brings the unregulated Idaho counties in alignment with counties to the north and south, ensuring both producer and handler equity with those areas.

Lastly, the proposed differentials in Wyoming generally follow the May results as there were no producer or handler equity concerns to address. Except for Laramie, Wyoming, which is proposed at \$2.50 to align with neighboring Northeast Colorado. This

represents a \$0.20 increase compared to the May results.

The Department received specific requests from NMPF, DFA, and an individual dairy farmer for changes to the Class I differentials proposed for certain counties in northwestern Nevada to address alleged producer equity concerns. NMPF and DFA suggested a flat pricing surface of \$2.20 for 6 Nevada counties, while the dairy farmer requested a \$0.30 increase for Churchill County, Nevada, specifically. The Department reviewed record evidence relevant to the requested changes in Nevada and found no justification for change. The proposed differentials generally follow the May results with a slight increase in Washoe county to encourage milk movements to service the demand in Reno, NV. As such, no changes were made to the Class I differentials assigned in this region from the recommended decision to the final decision.

Pacific Northwest

In the Pacific Northwest, the proposed Class I differential in Seattle increased \$0.30 above the May result to reflect unique geography and the cost of serving an urban market. Likewise, the proposed differential in Portland, Oregon, was increased from the May result to align with Seattle to provide for producer and handler equity. Testimony reflected both cities are equidistant to milk supplies in south central Washington, and both have similar supply issues. The remaining proposed differentials reflect a \$0.20 banding around the May results.

MIG commented that the Department deviated from the model results in the Pacific Northwest without justification. It also stated that the \$0.20 banding of the Class I differentials is inconsistent

with the Department’s proposals for other regions and highlighted several specific differentials of concern. The Department reviewed the record regarding the differentials in the Pacific Northwest FMMO. While MIG contends Portland and Seattle are not comparable demand areas, the record shows similar population areas facing similar geographic and traffic congestion issues that cause milk supply logistical issues necessitating an increase over the model results. The differential for Spokane, Washington was proposed at the model result as it does not face some of the same logistical challenges. The model-recommended \$2.40 differential for Spokane, which is higher than the surrounding areas, will encourage milk to move to the demand location. As for the banding of differentials in the middle of the Pacific Northwest-marketing area, as referenced in MIGs comment, the model suggested a more gradual differential gradient between the milk supply and demand centers. However, the record does not demonstrate that there are plants located in many of those areas to justify the numerous differential areas. The decision does not find such additional differential values necessary to move milk from supply and demand areas. As such, no changes were made to the Class I differentials assigned in this region from the recommended decision to the final decision.

Summary

In total, the Class I differentials proposed in this decision reflect a simple average of \$0.01 higher than the May results (\$3.81 versus \$3.80) for the 3,108 counties in the contiguous U.S.

The following is a general description of the changes from the May results:

Number of counties	Range of difference	Number of plants
5	–\$0.40 to –\$0.60	1
227	–\$0.20 to –\$0.30	13
2,648	–\$0.10 to +\$0.10	171
187	+\$0.20 to +\$0.30	34
41	+\$0.40 to \$0.60	23

An analysis shows the proposed differentials, on a weighted average basis for FMMO Class I milk (2019–2023), increased \$1.24 per cwt. Based on pooled Class I milk during 2019–2023, the current weighted Class I differential was \$2.63 per cwt. The differentials proposed in this decision would have increased the weighted average to \$3.87 per cwt.

This final decision details all requested changes to the proposed Class

I differentials from the recommended decision to the final decision. The Department reviewed and considered all 33 comments received on the Class I differentials but found, as detailed by region above, that any additional changes not made in this final decision were either already considered or were not supported by record evidence.

Other Issues

In post-hearing briefs, some stakeholders objected to NMPF’s use of producer costs of production for proposing updated Class I differential levels. As described above, such costs were not considered in the development of the Class I differentials recommended in this decision.

As discussed above, with regard to the Appalachian region, another argument made in post-hearing briefs and in

comments centered on the amended TCBF provisions in the Appalachian and Southeast FMMOs and newly established DPDC provisions in the Appalachian, Florida, and Southeast FMMOs. These provisions became effective March 1, 2024, and were a result of a regional rulemaking proceeding to address the chronic milk supply issues of those regions 89 FR 6401 (Feb.1, 2024). As the proceeding resulted in increased transportation cost related assessments on Class I handlers, some stakeholders argue no changes should be made to the Class I differentials until the impact of these regional changes can be observed. MIG, New Dairy, NMPF, and IDFA reiterated these concerns in their comments on the recommended decision and requested the Class I differentials in these orders be reduced by the amount of the TCBF and DPDC payments.

The Appalachian, Florida, and Southeast FMMOs adopted marketwide service payment provisions that authorize year-round assessments on Class I milk, paid by handlers, for payment to handlers for Class I deliveries made to their plants according to the TCBF and DPDC provisions. Under the marketwide service provisions of the AMAA, marketwide service programs are only authorized to pay monies to handlers 7 U.S.C. 608c(5)(j). Therefore, it would not be appropriate to delay consideration of Class I differential levels, monies which are paid to producers (both cooperative and independent), for TCBF and DPDC payments which are made only to handlers. As was stated in the recommended decision, if Class I differential levels are changed as a result of this proceeding, thus, impacting the market conditions which led to the creation of the marketwide service programs, stakeholders could petition USDA to make changes to the TCBF and DPDC provisions.

Demand Elasticity

IDFA, and Nestle USA, commented that Class I differentials should not be increased until a thorough econometric study is conducted to inform decision-making. This study, they argued, should center around the relationship between fluid milk prices and retail consumer demand, otherwise referred to by these and other commentators as changes in demand elasticity. Several Class I processors such as United Dairy, Crystal Creamery, New Dairy, and Lamers Dairy, as well as the trade association Pennsylvania Association of Milk Dealers, provided similar comments that described, in their view, changes in

consumer demand because of higher prices and competition from alternative beverages in the marketplace. MIG, IDFA, and PAMD go further in their comments, repeating arguments made at the hearing and in post-hearing briefs centered around the notion that USDA is not authorized to raise differentials because it would decrease demand, which they believe is a violation of the AMAA. More specifically, IDFA and MIG commented that the AMAA requires that FMMOs: (1) consider economic conditions which affect market supply and consumer demand, and (2) be in the public interest. IDFA acknowledged the Department's explanation in the recommended decision that the AMAA does not explicitly state that FMMO provisions should encourage Class I sales. However, IDFA opined that the AMAA does so implicitly. In its view, per the AMAA, FMMOs should never reduce quantity demanded by consumers.

During the hearing and in post-hearing briefs, Class I processors and manufacturers similarly argued that the Department should consider the impact to Class I sales when evaluating changes as they allege the AMAA objective of ensuring adequate milk supplies implies the FMMO should encourage fluid consumption. They further argued that consumer demand for fluid milk is elastic and, therefore, raising Class I differentials would be disorderly as it would result in a decline in Class I sales.

As to whether fluid milk has an inelastic or elastic demand, four studies were entered onto the record, some drawing opposite conclusions. One study found the consumer demand for regular milk to be inelastic, while specialty milk (*i.e.*, lactose free) to be price elastic. A second study concluded consumer demand was elastic, but less so than was determined in the fourth study on the record. Another witness reviewed time series data published within the last 20 years, concluding that consumer demand for fluid milk remains inelastic with respect to milk prices.

The recommended decision highlighted the fourth study which looked at cross-sectional data over relatively short periods of time as an example. This econometric study, entered on behalf of IDFA and emphasized by IDFA and MIG in their comments on the recommended decision, found the retail level demand for fluid milk to be elastic. An analysis of the IDFA study indicates that other than product prices and quantities, no other variables were considered that could explain changes in demand. Some

variables that are generally recognized to be determinants of demand outside of price include, but are not limited to, household income, demographics, and measures of preferences. While the IDFA study found retail price affects retail milk demand, it did not demonstrate price was the only factor that impacts demand. By design, the study estimated that only prices for milk and competing products could account for changes in quantities sold. Certainly, more studies may be warranted given the evolution of the dairy industry in the last 25 years. However, a conclusion of the long-term consumer demand elasticity of fluid milk cannot be drawn from the varying results of the four studies contained in the record.

MIG and IDFA arguments around elasticity rely on the premise that fluid milk product demand at the retail level is elastic and thus, any increase in Class I prices would lower consumer demand, which they assert would not be in the public interest and violate the AMAA policy objective. The AMAA authorizes marketing orders to provide for more orderly marketing conditions. In the context of milk prices, the AMAA states FMMOs shall “. . . insure a sufficient quantity of pure and wholesome milk, and be in the public interest . . .” 7 U.S.C. 608c(18). This decision emphasizes that one objective of FMMOs is to ensure minimum milk prices reflect supply and demand conditions. In so doing, FMMOs satisfy the AMAA's public interest requirement by ensuring buyers are purchasing raw milk at minimum prices that reflect current market conditions.

Upon review of comments received and all record evidence, the Department maintains the changes proposed in this decision would ensure the FMMO pricing provisions reflect current supply and demand conditions. This decision does not find that the AMAA explicitly states or implies FMMO provisions should encourage Class I sales and thus, a determination of fluid milk consumer demand elasticity is not required. As described in detail throughout this decision, the record of this proceeding reveals the cost of supplying the Class I market has increased. This was demonstrated through the USDSS model, which was an academic exercise to quantify the location-specific cost of servicing Class I plants, and corroborated through witness testimony concerning increasing transportation costs and distances traveled for milk to supply Class I plants.

b. Class II Differential

The FMMO system currently prices milk used in Class II products

uniformly. The Class II skim milk price is computed as the advanced Class IV skim price plus \$0.70 per cwt. The Class II butterfat price is the Class III butterfat price for the month, plus the same amount expressed as \$0.007 per pound. The \$0.70 differential between the Class IV and Class II skim milk prices, adopted in the Order Reform Final Decision, was based on an estimate of the cost of drying condensed milk and re-wetting the solids for use in Class II products, which was seen as an economic, upper-bound constraint on the use of fresh milk in Class II processing.

Proposal 21, submitted by AFBF, seeks to update the Class II differential to \$1.56 per cwt. AFBF derived the proposed level by updating the factors originally used to determine drying cost. Those include the NFDM make allowance and the nonfat solids yield factor used in the FMMO formulas, and butterfat and nonfat solids levels in FMMO pooled milk. As rewetting solids, the practice of first reconstituting powdered milk with water, is no longer a common practice, AFBF argued such cost no longer needs to be considered. AFBF opined a \$1.56 Class II differential would not be high enough to incentivize the substitution of Class IV products for fresh milk. AFBF claimed the additional Class II value added to the marketwide pool because of the higher differential would reduce the occurrence of negative PPDs and depooling.

Opponents of Proposal 21 argued such a large Class II differential increase would incentivize the substitution of Class IV products in the manufacture of Class II products. Class I processors, who also have Class II production, argued such an increase would put them at a competitive disadvantage with standalone Class II manufacturers. They indicated processors who produce both products are required to pool all milk received at the plant but processors who only produce Class II products can opt to pool milk.

As indicated in the recommended decision, record evidence does not support adoption of Proposal 21. Mathematically, the formula used by AFBF to compute an updated Class II differential mimics the calculation from Order Reform. However, it is clear from record testimony that more than doubling the current Class II differential, as proposed by AFBF, would result in handler equity issues and increased substitution of Class IV products in lieu of fresh fluid milk in Class II products. Class II production is unusual, if not unique, among dairy processing facilities as some products

are produced at Class I plants, and others at standalone Class II plants. Because all milk received at Class I plants is required to be pooled, regardless of use, this can result in the same products having different regulatory burdens depending on the type of plant where it was produced. That phenomenon has existed since 2000. However, the record shows that instances of milk in Class II products produced from Class II plants not being pooled could dramatically increase with adoption of Proposal 21. The result would be a competitive disadvantage for Class I plants by creating a pricing inequity that would produce disorderly marketing conditions.

AMS received four comments specific to the Class II differential. NMPF and the Arizona Farm Bureau Federation commented in support of the decision to maintain the current Class II differential. Comments filed in opposition to the recommended decision, from AFBF and the Tennessee Farm Bureau, requested that USDA reconsider increasing the Class II differential for the final decision for reasons previously communicated on the record, which were specifically addressed and rejected in the recommended decision. Therefore, this final decision continues to find it appropriate to maintain the current Class II differential. Accordingly, Proposal 21 is denied.

Conforming Changes

Proposal 22, authored by AMS, would authorize changes, where necessary, in the respective marketing orders to conform with any amendments resulting from this proceeding. The record contains no opposition to the proposal. Accordingly, this decision recommends a series of conforming changes to ensure the proposed amendments to the uniform pricing formulas applicable to the respective marketing orders can be effectuated. The proposed changes are as follows:

1. Amending 7 CFR 1000.43 to remove references to 1135.11, as the order is no longer in effect. Also adding 7 CFR 1000.43(e) which would define skim milk used in ultra-pasteurized or aseptically processed and packaged fluid milk products eligible for the Class I ESL adjustment be limited to available Class I producer milk classified pursuant to the allocation process contained in Section 1000.44(a);

2. Amending 7 CFR 1000.50 to remove all references to NASS and replace them with AMS;

3. Amending the following counties (and FIPS code) in 7 CFR 1000.52, to be consistent with the Federal Information

Procession Series maintained by the Federal Communication Commission: Yellowstone, MT (30113) has been merged into Gallatin and Park Counties, MT (30031) (30067), Shannon, SD (46113) has been renamed Oglala Lakota, SD (46102), Bedford City, VA (51515) has been merged into Bedford County, VA (51019), and Clifton Forge City, VA (51560) has been merged into Alleghany County, VA (51005). Additionally, amending the FIPS code for Pierce, WA (53053) as it was original printed incorrectly. The differentials are also listed in order of FIPS code, not state abbreviation, in order to be listed alphabetically by state;

4. Amending 7 CFR 1000.76, provisions governing partially regulated distributing plants to add "applicable" to references to the Class I price throughout the section to indicate application of a Class I ESL adjustment, when applicable, and remove the reference in 7 CFR 1000.76(b)(1)(i) to 7 CFR 1135.11 as the latter is no longer in effect;

5. Amend the introductory paragraphs of 7 CFR 1001.60, 1005.60, 1006.60, 1007.60, 1030.60, 1032.60, 1033.60, 1051.60, 1124.60, 1126.60, and 1131.60, sections which calculate the handler's value of milk in each FMMO. Section .60 of each order would be revised with the addition of an instruction to compute an adjustment to a handler's producer milk obligation for Class I producer milk eligible for the Class I ESL adjustment. The adjustment would be calculated by multiplying the monthly Class I ESL adjustment by the monthly pounds of eligible Class I skim milk. The instruction would be inserted prior to the instruction regarding reconstituted milk for each order. Other paragraphs are proposed to be redesignated to reflect the insertion;

6. Further amending 7 CFR 1005.60(g), 1006.60(g)–(i), and 1007.60(g) to remove language pertaining to transportation cost reimbursement during the months of January 2005 through March 2005 and September 2017, which is no longer in effect;

7. Amending 7 CFR 1005.51, 1006.51, and 1007.51 to remove Class I price adjustments in the Appalachian, Florida, and Southeast FMMOs. The order language would no longer be necessary with the proposed amendments to the Class I differentials; and

8. Amending 7 CFR 1170.8 to remove the collection of 500-pound barrel price information. The order language would no longer be necessary with the proposed amendments to cheese survey.

Rulings on Proposed Findings and Conclusions

AMS has also considered proposed findings submitted in post-hearing briefs, officially noticed documents, and comments and exceptions filed in response to the recommended decision to formulate this proposed FMMO. These briefs, proposed findings and conclusions, comments and exceptions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the claims to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Northeast, Southeast, Appalachian, Florida, Upper Midwest, Central, Mideast, California, Southwest, Pacific Northwest, and Arizona FMMOs were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to the aforementioned marketing agreements and orders:

a. The tentative marketing agreements and the orders, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

b. The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable with respect to the price of feeds, available supplies of feeds, and other economic conditions that affect market supply and demand for milk in the marketing area, and the minimum prices specified in the proposed marketing agreements and the orders are such prices as will reflect the aforesaid factors, ensure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

c. The proposed marketing agreements and the orders will regulate the handling of milk in the same manner as and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, the marketing agreements upon which a hearing have been held.

d. All milk and milk products handled by handlers, as defined in the marketing agreements and the orders as hereby proposed to be amended, are in the current of interstate commerce or

directly burden, obstruct, or affect interstate commerce in milk or its products.

Recommended Marketing Agreements and Orders

The recommended marketing agreements are not included in this decision because the regulatory provisions thereof would be the same as those contained in the orders, as hereby proposed to be amended. The following orders regulating the handling of milk in the Northeast, Appalachian, Florida, Southeast, Upper Midwest, Central, Mideast, California, Pacific Northwest, Southwest, and Arizona marketing areas are recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

January 2024 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the orders, as amended and as hereby proposed to be amended the uniform pricing provisions in the Northeast, Appalachian, Florida, Southeast, Upper Midwest, Central, Mideast, California, Pacific Northwest, Southwest, and Arizona FMMOs, are approved or favored by producers, as defined under the terms of the orders (as amended and as hereby proposed to be amended), who during such representative period were engaged in the production of milk for sale within the aforesaid marketing areas.

Referendum Order To Determine Producer Approval; Determination of Representative Period; and Designation of Referendum Agent

It is hereby directed that a referendum be conducted and completed on December 31, 2024, in accordance with the procedures for the conduct of referenda (7 CFR 900.300–311), to determine whether the issuance of the order regulating the handling of milk in the Northeast, Appalachian, Florida, Southeast, Upper Midwest, Central, Mideast, California, Pacific Northwest, Southwest, and Arizona marketing areas is approved or favored by producers, as defined under the terms of the order, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area. The representative period for the conduct of such referenda is hereby determined to be January 2024. The agent of the Secretary of Agriculture to conduct such referenda is hereby designated to be the Director of Operations and Accountability, Dairy Program, AMS, USDA.

List of Subjects in 7 CFR Parts 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1051, 1124, 1126, 1131, and 1170

Milk marketing orders.

Order Amending the Orders Regulating the Handling of Milk in the Northeast, Appalachian, Florida, Southeast, Upper Midwest, Central, Mideast, California, Pacific Northwest, Southwest, and Arizona Marketing Areas

(This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.)

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) Findings. A public hearing was held upon certain proposed amendments to the marketing agreement and to the orders regulating the handling of milk in the Northeast, Southeast, Appalachian, Florida, Upper Midwest, Central, Mideast, California, Southwest, Pacific Northwest, and Arizona marketing areas. The hearing was held pursuant to the provisions of the AMAA, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is determined that:

(1) The said orders as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the AMAA;

(2) The parity prices of milk, as determined pursuant to section 2 of the AMAA, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing area. The minimum prices specified in the orders as hereby amended are such prices as will reflect the aforesaid factors, ensure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said orders, as hereby amended, regulate the handling of milk in the same manner as and are applicable only to persons in the respective classes of industrial or

commercial activity specified in, marketing agreements upon which a hearing has been held.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Northeast, Southeast, Appalachian, Florida, Upper Midwest, Central, Mideast, California, Southwest, Pacific Northwest, and Arizona marketing areas shall be in conformity to and in compliance with the terms and conditions of the orders, as amended, and as hereby amended, as follows:

For the reasons set forth in the preamble, AMS proposes to amend 7 CFR chapter X as follows:

PART 1000—GENERAL PROVISIONS OF FEDERAL MILK MARKETING ORDERS

■ 1. The authority citation for 7 CFR part 1000 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

■ 2. Amend § 1000.43 by:

■ a. In paragraph (a) and paragraph (b) introductory text, removing the words “and § 1135.11 of this chapter”;

■ b. In paragraph (b)(2) removing the words “or § 1135.11 of this chapter”; and

■ c. Adding paragraph (e).

The addition reads as follows:

§ 1000.43 General classification rules.

* * * * *

(e) Any skim milk used in ultra-pasteurized or aseptically processed and packaged fluid milk products shall be allocated in combination with Class I milk and the quantity of producer milk eligible to be priced shall be limited to available Class I producer milk classified pursuant to § 1000.44(a).

■ 3. Revise and republish § 1000.50 to read as follows:

§ 1000.50 Class prices, component prices, and advanced pricing factors.

Class prices per hundredweight of milk containing 3.5 percent butterfat, component prices, and advanced pricing factors shall be as follows. The prices and pricing factors described in paragraphs (a), (b), (c), (e), (f), and (g) of this section shall be based on a weighted average of the most recent 2 weekly prices announced by the Agricultural Marketing Service (AMS) before the 24th day of the month. These prices shall be announced on or before the 23rd day of the month and shall apply to milk received during the following month. The prices described in paragraphs (g) through (p) of this section shall be based on a weighted

average for the preceding month of weekly prices announced by AMS on or before the 5th day of the month and shall apply to milk received during the preceding month. The price described in paragraph (d) of this section shall be derived from the Class II skim milk price announced on or before the 23rd day of the month preceding the month to which it applies and the butterfat price announced on or before the 5th day of the month following the month to which it applies.

(a) *Class I price.* The Class I price per hundredweight, rounded to the nearest cent, shall be 0.965 times the Class I skim milk price plus 3.5 times the Class I butterfat price.

(b) *Class I skim milk price.* The Class I skim milk price per hundredweight shall be the adjusted Class I differential specified in § 1000.52, plus the higher of the advanced pricing factors computed in paragraph (q)(1) or (2) of this section rounded to the nearest cent.

(c) *Class I butterfat price.* The Class I butterfat price per pound shall be the adjusted Class I differential specified in § 1000.52 divided by 100, plus the advanced butterfat price computed in paragraph (q)(3) of this section.

(d) *Class II price.* The Class II price per hundredweight, rounded to the nearest cent, shall be .965 times the Class II skim milk price plus 3.5 times the Class II butterfat price.

(e) *Class II skim milk price.* The Class II skim milk price per hundredweight shall be the advanced Class IV skim milk price computed in paragraph (q)(2) of this section plus 70 cents.

(f) *Class II nonfat solids price.* The Class II nonfat solids price per pound, rounded to the nearest one-hundredth cent, shall be the Class II skim milk price divided by 9.3.

(g) *Class II butterfat price.* The Class II butterfat price per pound shall be the butterfat price plus \$0.007.

(h) *Class III price.* The Class III price per hundredweight, rounded to the nearest cent, shall be 0.965 times the Class III skim milk price plus 3.5 times the butterfat price.

(i) *Class III skim milk price.* The Class III skim milk price per hundredweight, rounded to the nearest cent, shall be the protein price per pound times 3.30 plus the other solids price per pound times 6.00.

(j) *Class IV price.* The Class IV price per hundredweight, rounded to the nearest cent, shall be 0.965 times the Class IV skim milk price plus 3.5 times the butterfat price.

(k) *Class IV skim milk price.* The Class IV skim milk price per hundredweight, rounded to the nearest cent, shall be the

nonfat solids price per pound times 9.30.

(l) *Butterfat price.* The butterfat price per pound, rounded to the nearest one-hundredth cent, shall be the U.S. average AMS AA Butter survey price reported by the Department for the month, less 22.72 cents, with the result multiplied by 1.211.

(m) *Nonfat solids price.* The nonfat solids price per pound, rounded to the nearest one-hundredth cent, shall be the U.S. average AMS nonfat dry milk survey price reported by the Department for the month, less 23.93 cents and multiplying the result by 0.99.

(n) *Protein price.* The protein price per pound, rounded to the nearest one-hundredth cent, shall be computed as follows:

(1) The U.S. average AMS survey price for 40-lb. block cheese reported by the Department for the month;

(2) Subtract 25.19 cents from the price computed pursuant to paragraph (n)(1) of this section and multiply the result by 1.383;

(3) Add to the amount computed pursuant to paragraph (n)(2) of this section an amount computed as follows:

(i) Subtract 25.19 cents from the price computed pursuant to paragraph (n)(1) of this section and multiply the result by 1.589; and

(ii) Subtract 0.91 times the butterfat price computed pursuant to paragraph (l) of this section from the amount computed pursuant to paragraph (n)(3)(i) of this section; and

(iii) Multiply the amount computed pursuant to paragraph (n)(3)(ii) of this section by 1.17.

(o) *Other solids price.* The other solids price per pound, rounded to the nearest one-hundredth cent, shall be the U.S. average AMS dry whey survey price reported by the Department for the month minus 26.68 cents, with the result multiplied by 1.03.

(p) *Somatic cell adjustment.* The somatic cell adjustment per hundredweight of milk shall be determined as follows:

(1) Multiply 0.0005 by the weighted average price computed pursuant to paragraph (n)(1) of this section and round to the 5th decimal place;

(2) Subtract the somatic cell count of the milk (reported in thousands) from 350; and

(3) Multiply the amount computed in paragraph (p)(1) of this section by the amount computed in paragraph (p)(2) of this section and round to the nearest full cent.

(q) *Advanced pricing factors.* For the purpose of computing the Class I skim milk price, the Class II skim milk price, the Class II nonfat solids price, and the

Class I butterfat price for the following month, the following pricing factors shall be computed using the weighted average of the 2 most recent AMS U.S. average weekly survey prices announced before the 24th day of the month:

(1) An advanced Class III skim milk price per hundredweight, rounded to the nearest cent, shall be computed as follows:

(i) Following the procedure set forth in paragraphs (n) and (o) of this section, but using the weighted average of the 2 most recent AMS U.S. average weekly survey prices announced before the 24th day of the month, compute a protein price and an other solids price;

(ii) Multiply the protein price computed in paragraph (q)(1)(i) of this section by 3.30;

(iii) Multiply the other solids price per pound computed in paragraph (q)(1)(i) of this section by 6.0; and

(iv) Add the amounts computed in paragraphs (q)(1)(ii) and (iii) of this section.

(2) An advanced Class IV skim milk price per hundredweight, rounded to

the nearest cent, shall be computed as follows:

(i) Following the procedure set forth in paragraph (m) of this section, but using the weighted average of the 2 most recent AMS U.S. average weekly survey prices announced before the 24th day of the month, compute a nonfat solids price; and

(ii) Multiply the nonfat solids price computed in paragraph (q)(2)(i) of this section by 9.30.

(3) An advanced butterfat price per pound rounded to the nearest one-hundredth cent, shall be calculated by computing a weighted average of the 2 most recent U.S. average AMS AA Butter survey prices announced before the 24th day of the month, subtracting 22.72 cents from this average, and multiplying the result by 1.211.

(r) *Class I Extended Shelf Life (ESL) adjustment.* The Class I ESL adjustment, whether positive or negative, rounded to the nearest cent, shall be computed as follows:

(1) Compute the simple average of the advanced pricing factors computed in paragraphs (q)(1) and (2) of this section;

(2) Add the following:

(i) Determine the higher of the advanced pricing factors computed in paragraphs (q)(1) and (2) of this section, for each of the preceding 13 to 36 months;

(ii) Calculate the average of the advanced pricing factors computed in paragraphs (q)(1) and (2) of this section, for each of the preceding 13 to 36 months;

(iii) For each of the preceding 13 to 36 months, subtract the amount computed in paragraph (r)(2)(ii) of this section from the amount computed in paragraph (r)(2)(i) of this section; and

(iv) Compute the average of the differences computed in paragraph (r)(2)(iii) of this section.

(3) Subtract the higher of the advanced pricing factors computed in paragraphs (q)(1) and (2) of this section. ■ 4. Revise and republish § 1000.52 to read as follows:

§ 1000.52 Adjusted Class I differentials.

The Class I differential adjusted for location to be used in § 1000.50(b) and (c) shall be as follows:

County/parish/city	State	FIPS code	Class I differential adjusted for location
AUTAUGA	AL	01001	5.80
BALDWIN	AL	01003	5.80
BARBOUR	AL	01005	5.80
BIBB	AL	01007	5.60
BLOUNT	AL	01009	5.40
BULLOCK	AL	01011	5.80
BUTLER	AL	01013	5.80
CALHOUN	AL	01015	5.60
CHAMBERS	AL	01017	5.60
CHEROKEE	AL	01019	5.40
CHILTON	AL	01021	5.60
CHOCTAW	AL	01023	5.80
CLARKE	AL	01025	5.80
CLAY	AL	01027	5.60
CLEBURNE	AL	01029	5.60
COFFEE	AL	01031	5.80
COLBERT	AL	01033	4.90
CONECUH	AL	01035	5.80
COOSA	AL	01037	5.60
COVINGTON	AL	01039	5.80
CRENSHAW	AL	01041	5.80
CULLMAN	AL	01043	5.40
DALE	AL	01045	5.80
DALLAS	AL	01047	5.80
DE KALB	AL	01049	5.40
ELMORE	AL	01051	5.80
ESCAMBIA	AL	01053	5.80
ETOWAH	AL	01055	5.40
FAYETTE	AL	01057	5.40
FRANKLIN	AL	01059	5.20
GENEVA	AL	01061	5.80
GREENE	AL	01063	5.60
HALE	AL	01065	5.60
HENRY	AL	01067	5.80
HOUSTON	AL	01069	5.80
JACKSON	AL	01071	5.20
JEFFERSON	AL	01073	5.60
LAMAR	AL	01075	5.40

County/parish/city	State	FIPS code	Class I differential adjusted for location
LAUDERDALE	AL	01077	4.90
LAWRENCE	AL	01079	5.20
LEE	AL	01081	5.80
LIMESTONE	AL	01083	5.20
LOWNDES	AL	01085	5.80
MACON	AL	01087	5.80
MADISON	AL	01089	5.20
MARENGO	AL	01091	5.80
MARION	AL	01093	5.20
MARSHALL	AL	01095	5.40
MOBILE	AL	01097	5.80
MONROE	AL	01099	5.80
MONTGOMERY	AL	01101	5.80
MORGAN	AL	01103	5.40
PERRY	AL	01105	5.60
PICKENS	AL	01107	5.40
PIKE	AL	01109	5.80
RANDOLPH	AL	01111	5.60
RUSSELL	AL	01113	5.80
ST. CLAIR	AL	01115	5.60
SHELBY	AL	01117	5.60
SUMTER	AL	01119	5.60
TALLADEGA	AL	01121	5.60
TALLAPOOSA	AL	01123	5.60
TUSCALOOSA	AL	01125	5.60
WALKER	AL	01127	5.40
WASHINGTON	AL	01129	5.80
WILCOX	AL	01131	5.80
WINSTON	AL	01133	5.40
APACHE	AZ	04001	2.30
COCHISE	AZ	04003	2.40
COCONINO	AZ	04005	2.40
GILA	AZ	04007	2.40
GRAHAM	AZ	04009	2.40
GREENLEE	AZ	04011	2.40
LA PAZ	AZ	04012	2.50
MARICOPA	AZ	04013	2.60
MOHAVE	AZ	04015	2.50
NAVAJO	AZ	04017	2.30
PIMA	AZ	04019	2.40
PINAL	AZ	04021	2.60
SANTA CRUZ	AZ	04023	2.40
YAVAPAI	AZ	04025	2.40
YUMA	AZ	04027	2.50
ARKANSAS	AR	05001	4.60
ASHLEY	AR	05003	4.90
BAXTER	AR	05005	3.60
BENTON	AR	05007	3.20
BOONE	AR	05009	3.30
BRADLEY	AR	05011	4.60
CALHOUN	AR	05013	4.60
CARROLL	AR	05015	3.30
CHICOT	AR	05017	4.90
CLARK	AR	05019	4.00
CLAY	AR	05021	4.30
CLEBURNE	AR	05023	4.00
CLEVELAND	AR	05025	4.60
COLUMBIA	AR	05027	4.30
CONWAY	AR	05029	4.00
CRAIGHEAD	AR	05031	4.30
CRAWFORD	AR	05033	3.30
CRITTENDEN	AR	05035	4.60
CROSS	AR	05037	4.30
DALLAS	AR	05039	4.30
DESHA	AR	05041	4.90
DREW	AR	05043	4.60
FAULKNER	AR	05045	4.00
FRANKLIN	AR	05047	3.60
FULTON	AR	05049	4.00
GARLAND	AR	05051	4.00
GRANT	AR	05053	4.30

County/parish/city	State	FIPS code	Class I differential adjusted for location
GREENE	AR	05055	4.30
HEMPSTEAD	AR	05057	4.00
HOT SPRING	AR	05059	4.30
HOWARD	AR	05061	4.00
INDEPENDENCE	AR	05063	4.00
IZARD	AR	05065	4.00
JACKSON	AR	05067	4.30
JEFFERSON	AR	05069	4.60
JOHNSON	AR	05071	3.60
LAFAYETTE	AR	05073	4.30
LAWRENCE	AR	05075	4.30
LEE	AR	05077	4.60
LINCOLN	AR	05079	4.60
LITTLE RIVER	AR	05081	3.60
LOGAN	AR	05083	3.60
LONOKE	AR	05085	4.30
MADISON	AR	05087	3.30
MARION	AR	05089	3.60
MILLER	AR	05091	4.00
MISSISSIPPI	AR	05093	4.30
MONROE	AR	05095	4.60
MONTGOMERY	AR	05097	4.00
NEVADA	AR	05099	4.30
NEWTON	AR	05101	3.60
OUACHITA	AR	05103	4.30
PERRY	AR	05105	4.00
PHILLIPS	AR	05107	4.60
PIKE	AR	05109	4.00
POINSETT	AR	05111	4.30
POLK	AR	05113	3.60
POPE	AR	05115	3.60
PRAIRIE	AR	05117	4.30
PULASKI	AR	05119	4.30
RANDOLPH	AR	05121	4.00
ST. FRANCIS	AR	05123	4.60
SALINE	AR	05125	4.30
SCOTT	AR	05127	3.60
SEARCY	AR	05129	3.60
SEBASTIAN	AR	05131	3.60
SEVIER	AR	05133	3.60
SHARP	AR	05135	4.00
STONE	AR	05137	4.00
UNION	AR	05139	4.60
VAN BUREN	AR	05141	4.00
WASHINGTON	AR	05143	3.30
WHITE	AR	05145	4.30
WOODRUFF	AR	05147	4.30
YELL	AR	05149	3.60
ALAMEDA	CA	06001	2.40
ALPINE	CA	06003	1.80
AMADOR	CA	06005	1.80
BUTTE	CA	06007	2.00
CALAVERAS	CA	06009	1.80
COLUSA	CA	06011	2.20
CONTRA COSTA	CA	06013	2.40
DEL NORTE	CA	06015	2.20
EL DORADO	CA	06017	1.80
FRESNO	CA	06019	2.20
GLENN	CA	06021	2.20
HUMBOLDT	CA	06023	2.20
IMPERIAL	CA	06025	2.50
INYO	CA	06027	2.20
KERN	CA	06029	2.50
KINGS	CA	06031	2.20
LAKE	CA	06033	2.20
LASSEN	CA	06035	2.00
LOS ANGELES	CA	06037	2.80
MADERA	CA	06039	2.20
MARIN	CA	06041	2.40
MARIPOSA	CA	06043	1.80
MENDOCINO	CA	06045	2.20

County/parish/city	State	FIPS code	Class I differential adjusted for location
MERCED	CA	06047	2.20
MODOC	CA	06049	2.00
MONO	CA	06051	2.00
MONTEREY	CA	06053	2.50
NAPA	CA	06055	2.40
NEVADA	CA	06057	2.00
ORANGE	CA	06059	2.80
PLACER	CA	06061	2.00
PLUMAS	CA	06063	2.00
RIVERSIDE	CA	06065	2.80
SACRAMENTO	CA	06067	2.20
SAN BENITO	CA	06069	2.50
SAN BERNARDINO	CA	06071	2.60
SAN DIEGO	CA	06073	2.80
SAN FRANCISCO	CA	06075	2.50
SAN JOAQUIN	CA	06077	2.20
SAN LUIS OBISPO	CA	06079	2.50
SAN MATEO	CA	06081	2.50
SANTA BARBARA	CA	06083	2.50
SANTA CLARA	CA	06085	2.50
SANTA CRUZ	CA	06087	2.50
SHASTA	CA	06089	2.00
SIERRA	CA	06091	2.00
SISKIYOU	CA	06093	2.00
SOLANO	CA	06095	2.40
SONOMA	CA	06097	2.40
STANISLAUS	CA	06099	2.20
SUTTER	CA	06101	2.20
TEHAMA	CA	06103	2.20
TRINITY	CA	06105	2.00
TULARE	CA	06107	2.20
TUOLUMNE	CA	06109	1.80
VENTURA	CA	06111	2.60
YOLO	CA	06113	2.20
YUBA	CA	06115	2.00
ADAMS	CO	08001	2.70
ALAMOSA	CO	08003	2.50
ARAPAHOE	CO	08005	2.70
ARCHULETA	CO	08007	2.30
BACA	CO	08009	2.50
BENT	CO	08011	2.50
BOULDER	CO	08013	2.50
BROOMFIELD	CO	08014	2.50
CHAFFEE	CO	08015	2.50
CHEYENNE	CO	08017	2.50
CLEAR CREEK	CO	08019	2.50
CONEJOS	CO	08021	2.50
COSTILLA	CO	08023	2.50
CROWLEY	CO	08025	2.70
CUSTER	CO	08027	2.70
DELTA	CO	08029	2.30
DENVER	CO	08031	2.70
DOLORES	CO	08033	2.30
DOUGLAS	CO	08035	2.70
EAGLE	CO	08037	2.50
ELBERT	CO	08039	2.70
EL PASO	CO	08041	2.70
FREMONT	CO	08043	2.70
GARFIELD	CO	08045	2.30
GILPIN	CO	08047	2.50
GRAND	CO	08049	2.50
GUNNISON	CO	08051	2.50
HINSDALE	CO	08053	2.30
HUERFANO	CO	08055	2.70
JACKSON	CO	08057	2.50
JEFFERSON	CO	08059	2.70
KIOWA	CO	08061	2.50
KIT CARSON	CO	08063	2.50
LAKE	CO	08065	2.50
LA PLATA	CO	08067	2.30
LARIMER	CO	08069	2.50

County/parish/city	State	FIPS code	Class I differential adjusted for location
LAS ANIMAS	CO	08071	2.50
LINCOLN	CO	08073	2.70
LOGAN	CO	08075	2.50
MESA	CO	08077	2.30
MINERAL	CO	08079	2.50
MOFFAT	CO	08081	2.30
MONTEZUMA	CO	08083	2.30
MONTROSE	CO	08085	2.30
MORGAN	CO	08087	2.50
OTERO	CO	08089	2.70
OURAY	CO	08091	2.30
PARK	CO	08093	2.70
PHILLIPS	CO	08095	2.50
PITKIN	CO	08097	2.50
PROWERS	CO	08099	2.50
PUEBLO	CO	08101	2.70
RIO BLANCO	CO	08103	2.30
RIO GRANDE	CO	08105	2.50
ROUTT	CO	08107	2.50
SAGUACHE	CO	08109	2.50
SAN JUAN	CO	08111	2.30
SAN MIGUEL	CO	08113	2.30
SEDGWICK	CO	08115	2.50
SUMMIT	CO	08117	2.50
TELLER	CO	08119	2.70
WASHINGTON	CO	08121	2.50
WELD	CO	08123	2.50
YUMA	CO	08125	2.50
FAIRFIELD	CT	09001	5.00
HARTFORD	CT	09003	4.80
LITCHFIELD	CT	09005	4.80
MIDDLESEX	CT	09007	4.80
NEW HAVEN	CT	09009	4.80
NEW LONDON	CT	09011	4.80
TOLLAND	CT	09013	4.80
WINDHAM	CT	09015	4.80
KENT	DE	10001	4.60
NEW CASTLE	DE	10003	4.40
SUSSEX	DE	10005	4.80
DISTRICT OF COLUMBIA	DC	11001	4.70
ALACHUA	FL	12001	6.40
BAKER	FL	12003	6.40
BAY	FL	12005	6.00
BRADFORD	FL	12007	6.40
BREVARD	FL	12009	6.80
BROWARD	FL	12011	7.40
CALHOUN	FL	12013	6.00
CHARLOTTE	FL	12015	7.00
CITRUS	FL	12017	6.80
CLAY	FL	12019	6.40
COLLIER	FL	12021	7.40
COLUMBIA	FL	12023	6.40
DE SOTO	FL	12027	7.00
DIXIE	FL	12029	6.40
DUVAL	FL	12031	6.40
ESCAMBIA	FL	12033	5.80
FLAGLER	FL	12035	6.80
FRANKLIN	FL	12037	6.00
GADSDEN	FL	12039	6.00
GILCHRIST	FL	12041	6.40
GLADES	FL	12043	7.00
GULF	FL	12045	6.00
HAMILTON	FL	12047	6.40
HARDEE	FL	12049	7.00
HENDRY	FL	12051	7.40
HERNANDO	FL	12053	6.80
HIGHLANDS	FL	12055	7.00
HILLSBOROUGH	FL	12057	6.80
HOLMES	FL	12059	6.00
INDIAN RIVER	FL	12061	7.00
JACKSON	FL	12063	6.00

County/parish/city	State	FIPS code	Class I differential adjusted for location
JEFFERSON	FL	12065	6.00
LAFAYETTE	FL	12067	6.40
LAKE	FL	12069	6.80
LEE	FL	12071	7.00
LEON	FL	12073	6.00
LEVY	FL	12075	6.40
LIBERTY	FL	12077	6.00
MADISON	FL	12079	6.00
MANATEE	FL	12081	7.00
MARION	FL	12083	6.80
MARTIN	FL	12085	7.00
MIAMI-DADE	FL	12086	7.40
MONROE	FL	12087	7.40
NASSAU	FL	12089	6.40
OKALOOSA	FL	12091	5.80
OKEECHOBEE	FL	12093	7.00
ORANGE	FL	12095	6.80
OSCEOLA	FL	12097	6.80
PALM BEACH	FL	12099	7.40
PASCO	FL	12101	6.80
PINELLAS	FL	12103	6.80
POLK	FL	12105	6.80
PUTNAM	FL	12107	6.40
ST. JOHNS	FL	12109	6.40
ST. LUCIE	FL	12111	7.00
SANTA ROSA	FL	12113	5.80
SARASOTA	FL	12115	7.00
SEMINOLE	FL	12117	6.80
SUMTER	FL	12119	6.80
SUWANNEE	FL	12121	6.40
TAYLOR	FL	12123	6.40
UNION	FL	12125	6.40
VOLUSIA	FL	12127	6.80
WAKULLA	FL	12129	6.00
WALTON	FL	12131	6.00
WASHINGTON	FL	12133	6.00
APPLING	GA	13001	6.00
ATKINSON	GA	13003	6.00
BACON	GA	13005	6.00
BAKER	GA	13007	5.80
BALDWIN	GA	13009	5.80
BANKS	GA	13011	5.60
BARROW	GA	13013	5.80
BARTOW	GA	13015	5.60
BEN HILL	GA	13017	6.00
BERRIEN	GA	13019	6.00
BIBB	GA	13021	5.80
BLECKLEY	GA	13023	5.80
BRANTLEY	GA	13025	6.00
BROOKS	GA	13027	6.00
BRYAN	GA	13029	6.00
BULLOCH	GA	13031	6.00
BURKE	GA	13033	6.00
BUTTS	GA	13035	5.80
CALHOUN	GA	13037	5.80
CAMDEN	GA	13039	6.00
CANDLER	GA	13043	6.00
CARROLL	GA	13045	5.60
CATOOSA	GA	13047	5.40
CHARLTON	GA	13049	6.00
CHATHAM	GA	13051	6.00
CHATTAHOOCHEE	GA	13053	5.80
CHATTOOGA	GA	13055	5.40
CHEROKEE	GA	13057	5.60
CLARKE	GA	13059	5.80
CLAY	GA	13061	5.80
CLAYTON	GA	13063	5.80
CLINCH	GA	13065	6.00
COBB	GA	13067	5.60
COFFEE	GA	13069	6.00
COLQUITT	GA	13071	6.00

County/parish/city	State	FIPS code	Class I differential adjusted for location
COLUMBIA	GA	13073	5.80
COOK	GA	13075	6.00
COWETA	GA	13077	5.80
CRAWFORD	GA	13079	5.80
CRISP	GA	13081	5.80
DADE	GA	13083	5.40
DAWSON	GA	13085	5.60
DECATUR	GA	13087	6.00
DE KALB	GA	13089	5.80
DODGE	GA	13091	5.80
DOOLY	GA	13093	5.80
DOUGHERTY	GA	13095	5.80
DOUGLAS	GA	13097	5.60
EARLY	GA	13099	5.80
ECHOLS	GA	13101	6.00
EFFINGHAM	GA	13103	6.00
ELBERT	GA	13105	5.80
EMANUEL	GA	13107	6.00
EVANS	GA	13109	6.00
FANNIN	GA	13111	5.60
FAYETTE	GA	13113	5.80
FLOYD	GA	13115	5.60
FORSYTH	GA	13117	5.60
FRANKLIN	GA	13119	5.60
FULTON	GA	13121	5.80
GILMER	GA	13123	5.60
GLASCOCK	GA	13125	5.80
GLYNN	GA	13127	6.00
GORDON	GA	13129	5.60
GRADY	GA	13131	6.00
GREENE	GA	13133	5.80
GWINNETT	GA	13135	5.80
HABERSHAM	GA	13137	5.60
HALL	GA	13139	5.60
HANCOCK	GA	13141	5.80
HARALSON	GA	13143	5.60
HARRIS	GA	13145	5.80
HART	GA	13147	5.60
HEARD	GA	13149	5.60
HENRY	GA	13151	5.80
HOUSTON	GA	13153	5.80
IRWIN	GA	13155	6.00
JACKSON	GA	13157	5.80
JASPER	GA	13159	5.80
JEFF DAVIS	GA	13161	6.00
JEFFERSON	GA	13163	5.80
JENKINS	GA	13165	6.00
JOHNSON	GA	13167	5.80
JONES	GA	13169	5.80
LAMAR	GA	13171	5.80
LANIER	GA	13173	6.00
LAURENS	GA	13175	5.80
LEE	GA	13177	5.80
LIBERTY	GA	13179	6.00
LINCOLN	GA	13181	5.80
LONG	GA	13183	6.00
LOWNDES	GA	13185	6.00
LUMPKIN	GA	13187	5.60
MCDUFFIE	GA	13189	5.80
MCINTOSH	GA	13191	6.00
MACON	GA	13193	5.80
MADISON	GA	13195	5.80
MARION	GA	13197	5.80
MERIWETHER	GA	13199	5.80
MILLER	GA	13201	5.80
MITCHELL	GA	13205	5.80
MONROE	GA	13207	5.80
MONTGOMERY	GA	13209	6.00
MORGAN	GA	13211	5.80
MURRAY	GA	13213	5.40
MUSCOGEE	GA	13215	5.80

County/parish/city	State	FIPS code	Class I differential adjusted for location
NEWTON	GA	13217	5.80
OCONEE	GA	13219	5.80
OGLETHORPE	GA	13221	5.80
PAULDING	GA	13223	5.60
PEACH	GA	13225	5.80
PICKENS	GA	13227	5.60
PIERCE	GA	13229	6.00
PIKE	GA	13231	5.80
POLK	GA	13233	5.60
PULASKI	GA	13235	5.80
PUTNAM	GA	13237	5.80
QUITMAN	GA	13239	5.80
RABUN	GA	13241	5.60
RANDOLPH	GA	13243	5.80
RICHMOND	GA	13245	6.00
ROCKDALE	GA	13247	5.80
SCHLEY	GA	13249	5.80
SCREVEN	GA	13251	6.00
SEMINOLE	GA	13253	6.00
SPALDING	GA	13255	5.80
STEPHENS	GA	13257	5.60
STEWART	GA	13259	5.80
SUMTER	GA	13261	5.80
TALBOT	GA	13263	5.80
TALIAFERRO	GA	13265	5.80
TATTNALL	GA	13267	6.00
TAYLOR	GA	13269	5.80
TELFAIR	GA	13271	6.00
TERRELL	GA	13273	5.80
THOMAS	GA	13275	6.00
TIFT	GA	13277	5.80
TOOMBS	GA	13279	6.00
TOWNS	GA	13281	5.60
TREUTLEN	GA	13283	6.00
TROUP	GA	13285	5.60
TURNER	GA	13287	5.80
TWIGGS	GA	13289	5.80
UNION	GA	13291	5.60
UPSON	GA	13293	5.80
WALKER	GA	13295	5.40
WALTON	GA	13297	5.80
WARE	GA	13299	6.00
WARREN	GA	13301	5.80
WASHINGTON	GA	13303	5.80
WAYNE	GA	13305	6.00
WEBSTER	GA	13307	5.80
WHEELER	GA	13309	6.00
WHITE	GA	13311	5.60
WHITFIELD	GA	13313	5.40
WILCOX	GA	13315	5.80
WILKES	GA	13317	5.80
WILKINSON	GA	13319	5.80
WORTH	GA	13321	5.80
ADA	ID	16001	1.70
ADAMS	ID	16003	2.00
BANNOCK	ID	16005	2.00
BEAR LAKE	ID	16007	2.20
BENEWAH	ID	16009	2.40
BINGHAM	ID	16011	2.00
BLAINE	ID	16013	1.80
BOISE	ID	16015	1.70
BONNER	ID	16017	2.40
BONNEVILLE	ID	16019	2.00
BOUNDARY	ID	16021	2.40
BUTTE	ID	16023	2.00
CAMAS	ID	16025	1.80
CANYON	ID	16027	1.70
CARIBOU	ID	16029	2.00
CASSIA	ID	16031	1.70
CLARK	ID	16033	2.00
CLEARWATER	ID	16035	2.00

County/parish/city	State	FIPS code	Class I differential adjusted for location
CUSTER	ID	16037	1.80
ELMORE	ID	16039	1.70
FRANKLIN	ID	16041	2.00
FREMONT	ID	16043	2.00
GEM	ID	16045	1.70
GOODING	ID	16047	1.70
IDAHO	ID	16049	2.00
JEFFERSON	ID	16051	2.00
JEROME	ID	16053	1.70
KOOTENAI	ID	16055	2.40
LATAH	ID	16057	2.20
LEMHI	ID	16059	1.80
LEWIS	ID	16061	2.00
LINCOLN	ID	16063	1.70
MADISON	ID	16065	2.00
MINIDOKA	ID	16067	1.70
NEZ PERCE	ID	16069	2.00
ONEIDA	ID	16071	2.00
OWYHEE	ID	16073	1.80
PAYETTE	ID	16075	1.70
POWER	ID	16077	2.00
SHOSHONE	ID	16079	2.20
TETON	ID	16081	2.00
TWIN FALLS	ID	16083	1.70
VALLEY	ID	16085	1.80
WASHINGTON	ID	16087	1.70
ADAMS	IL	17001	3.20
ALEXANDER	IL	17003	4.00
BOND	IL	17005	3.60
BOONE	IL	17007	3.10
BROWN	IL	17009	3.40
BUREAU	IL	17011	3.40
CALHOUN	IL	17013	3.60
CARROLL	IL	17015	3.20
CASS	IL	17017	3.40
CHAMPAIGN	IL	17019	3.60
CHRISTIAN	IL	17021	3.60
CLARK	IL	17023	3.60
CLAY	IL	17025	3.60
CLINTON	IL	17027	3.60
COLES	IL	17029	3.60
COOK	IL	17031	3.20
CRAWFORD	IL	17033	3.60
CUMBERLAND	IL	17035	3.60
DE KALB	IL	17037	3.20
DE WITT	IL	17039	3.40
DOUGLAS	IL	17041	3.60
DU PAGE	IL	17043	3.20
EDGAR	IL	17045	3.60
EDWARDS	IL	17047	3.60
EFFINGHAM	IL	17049	3.60
FAYETTE	IL	17051	3.60
FORD	IL	17053	3.60
FRANKLIN	IL	17055	3.60
FULTON	IL	17057	3.40
GALLATIN	IL	17059	4.00
GREENE	IL	17061	3.60
GRUNDY	IL	17063	3.40
HAMILTON	IL	17065	3.60
HANCOCK	IL	17067	3.20
HARDIN	IL	17069	4.00
HENDERSON	IL	17071	3.20
HENRY	IL	17073	3.20
IROQUOIS	IL	17075	3.60
JACKSON	IL	17077	3.60
JASPER	IL	17079	3.60
JEFFERSON	IL	17081	3.60
JERSEY	IL	17083	3.60
JO DAVIESS	IL	17085	3.10
JOHNSON	IL	17087	4.00
KANE	IL	17089	3.20

County/parish/city	State	FIPS code	Class I differential adjusted for location
KANKAKEE	IL	17091	3.40
KENDALL	IL	17093	3.20
KNOX	IL	17095	3.40
LAKE	IL	17097	3.10
LA SALLE	IL	17099	3.40
LAWRENCE	IL	17101	3.60
LEE	IL	17103	3.20
LIVINGSTON	IL	17105	3.40
LOGAN	IL	17107	3.40
MCDONOUGH	IL	17109	3.40
MCHENRY	IL	17111	3.10
MCLEAN	IL	17113	3.40
MACON	IL	17115	3.40
MACOUPIN	IL	17117	3.60
MADISON	IL	17119	3.60
MARION	IL	17121	3.60
MARSHALL	IL	17123	3.40
MASON	IL	17125	3.40
MASSAC	IL	17127	4.00
MENARD	IL	17129	3.40
MERCER	IL	17131	3.20
MONROE	IL	17133	3.60
MONTGOMERY	IL	17135	3.60
MORGAN	IL	17137	3.40
MOULTRIE	IL	17139	3.60
OGLE	IL	17141	3.20
PEORIA	IL	17143	3.40
PERRY	IL	17145	3.60
PIATT	IL	17147	3.40
PIKE	IL	17149	3.40
POPE	IL	17151	4.00
PULASKI	IL	17153	4.00
PUTNAM	IL	17155	3.40
RANDOLPH	IL	17157	3.60
RICHLAND	IL	17159	3.60
ROCK ISLAND	IL	17161	3.20
ST. CLAIR	IL	17163	3.60
SALINE	IL	17165	4.00
SANGAMON	IL	17167	3.40
SCHUYLER	IL	17169	3.40
SCOTT	IL	17171	3.40
SHELBY	IL	17173	3.60
STARK	IL	17175	3.40
STEPHENSON	IL	17177	3.10
TAZEWELL	IL	17179	3.40
UNION	IL	17181	4.00
VERMILION	IL	17183	3.60
WABASH	IL	17185	3.60
WARREN	IL	17187	3.20
WASHINGTON	IL	17189	3.60
WAYNE	IL	17191	3.60
WHITE	IL	17193	3.60
WHITESIDE	IL	17195	3.20
WILL	IL	17197	3.20
WILLIAMSON	IL	17199	4.00
WINNEBAGO	IL	17201	3.10
WOODFORD	IL	17203	3.40
ADAMS	IN	18001	3.30
ALLEN	IN	18003	3.30
BARTHOLOMEW	IN	18005	3.70
BENTON	IN	18007	3.60
BLACKFORD	IN	18009	3.30
BOONE	IN	18011	3.60
BROWN	IN	18013	3.70
CARROLL	IN	18015	3.60
CASS	IN	18017	3.30
CLARK	IN	18019	4.00
CLAY	IN	18021	3.60
CLINTON	IN	18023	3.60
CRAWFORD	IN	18025	4.00
DAVIESS	IN	18027	3.70

County/parish/city	State	FIPS code	Class I differential adjusted for location
DEARBORN	IN	18029	3.70
DECATUR	IN	18031	3.70
DEKALB	IN	18033	3.30
DELAWARE	IN	18035	3.60
DUBOIS	IN	18037	3.70
ELKHART	IN	18039	3.30
FAYETTE	IN	18041	3.60
FLOYD	IN	18043	4.00
FOUNTAIN	IN	18045	3.60
FRANKLIN	IN	18047	3.70
FULTON	IN	18049	3.30
GIBSON	IN	18051	3.70
GRANT	IN	18053	3.30
GREENE	IN	18055	3.70
HAMILTON	IN	18057	3.60
HANCOCK	IN	18059	3.60
HARRISON	IN	18061	4.00
HENDRICKS	IN	18063	3.60
HENRY	IN	18065	3.60
HOWARD	IN	18067	3.60
HUNTINGTON	IN	18069	3.30
JACKSON	IN	18071	3.70
JASPER	IN	18073	3.60
JAY	IN	18075	3.30
JEFFERSON	IN	18077	4.00
JENNINGS	IN	18079	3.70
JOHNSON	IN	18081	3.60
KNOX	IN	18083	3.70
KOSCIUSKO	IN	18085	3.30
LAGRANGE	IN	18087	3.30
LAKE	IN	18089	3.30
LA PORTE	IN	18091	3.30
LAWRENCE	IN	18093	3.70
MADISON	IN	18095	3.60
MARION	IN	18097	3.60
MARSHALL	IN	18099	3.30
MARTIN	IN	18101	3.70
MIAMI	IN	18103	3.30
MONROE	IN	18105	3.70
MONTGOMERY	IN	18107	3.60
MORGAN	IN	18109	3.60
NEWTON	IN	18111	3.60
NOBLE	IN	18113	3.30
OHIO	IN	18115	3.70
ORANGE	IN	18117	3.70
OWEN	IN	18119	3.60
PARKE	IN	18121	3.60
PERRY	IN	18123	4.00
PIKE	IN	18125	3.70
PORTER	IN	18127	3.30
POSEY	IN	18129	3.70
PULASKI	IN	18131	3.30
PUTNAM	IN	18133	3.60
RANDOLPH	IN	18135	3.60
RIPLEY	IN	18137	3.70
RUSH	IN	18139	3.60
ST. JOSEPH	IN	18141	3.30
SCOTT	IN	18143	4.00
SHELBY	IN	18145	3.60
SPENCER	IN	18147	4.00
STARKE	IN	18149	3.30
STEUBEN	IN	18151	3.30
SULLIVAN	IN	18153	3.70
SWITZERLAND	IN	18155	4.00
TIPPECANOE	IN	18157	3.60
TIPTON	IN	18159	3.60
UNION	IN	18161	3.60
VANDERBURGH	IN	18163	3.70
VERMILLION	IN	18165	3.60
VIGO	IN	18167	3.60
WABASH	IN	18169	3.30

County/parish/city	State	FIPS code	Class I differential adjusted for location
WARREN	IN	18171	3.60
WARRICK	IN	18173	3.70
WASHINGTON	IN	18175	4.00
WAYNE	IN	18177	3.60
WELLS	IN	18179	3.30
WHITE	IN	18181	3.60
WHITLEY	IN	18183	3.30
ADAIR	IA	19001	2.70
ADAMS	IA	19003	2.90
ALLAMAKEE	IA	19005	2.90
APPANOOSE	IA	19007	2.90
AUDUBON	IA	19009	2.70
BENTON	IA	19011	2.90
BLACK HAWK	IA	19013	2.90
BOONE	IA	19015	2.70
BREMER	IA	19017	2.90
BUCHANAN	IA	19019	2.90
BUENA VISTA	IA	19021	2.60
BUTLER	IA	19023	2.90
CALHOUN	IA	19025	2.70
CARROLL	IA	19027	2.70
CASS	IA	19029	2.70
CEDAR	IA	19031	3.10
CERRO GORDO	IA	19033	2.90
CHEROKEE	IA	19035	2.60
CHICKASAW	IA	19037	2.90
CLARKE	IA	19039	2.90
CLAY	IA	19041	2.60
CLAYTON	IA	19043	2.90
CLINTON	IA	19045	3.10
CRAWFORD	IA	19047	2.60
DALLAS	IA	19049	2.70
DAVIS	IA	19051	2.90
DECATUR	IA	19053	2.90
DELAWARE	IA	19055	2.90
DES MOINES	IA	19057	3.10
DICKINSON	IA	19059	2.70
DUBUQUE	IA	19061	3.10
EMMET	IA	19063	2.70
FAYETTE	IA	19065	2.90
FLOYD	IA	19067	2.90
FRANKLIN	IA	19069	2.70
FREMONT	IA	19071	2.70
GREENE	IA	19073	2.70
GRUNDY	IA	19075	2.90
GUTHRIE	IA	19077	2.70
HAMILTON	IA	19079	2.70
HANCOCK	IA	19081	2.70
HARDIN	IA	19083	2.70
HARRISON	IA	19085	2.60
HENRY	IA	19087	2.90
HOWARD	IA	19089	2.80
HUMBOLDT	IA	19091	2.70
IDA	IA	19093	2.60
IOWA	IA	19095	2.90
JACKSON	IA	19097	3.10
JASPER	IA	19099	2.90
JEFFERSON	IA	19101	2.90
JOHNSON	IA	19103	2.90
JONES	IA	19105	3.10
KEOKUK	IA	19107	2.90
KOSSUTH	IA	19109	2.70
LEE	IA	19111	3.10
LINN	IA	19113	2.90
LOUISA	IA	19115	3.10
LUCAS	IA	19117	2.90
LYON	IA	19119	2.60
MADISON	IA	19121	2.70
MAHASKA	IA	19123	2.90
MARION	IA	19125	2.90
MARSHALL	IA	19127	2.90

County/parish/city	State	FIPS code	Class I differential adjusted for location
MILLS	IA	19129	2.70
MITCHELL	IA	19131	2.80
MONONA	IA	19133	2.60
MONROE	IA	19135	2.90
MONTGOMERY	IA	19137	2.70
MUSCATINE	IA	19139	3.10
O'BRIEN	IA	19141	2.60
OSCEOLA	IA	19143	2.70
PAGE	IA	19145	2.90
PALO ALTO	IA	19147	2.70
PLYMOUTH	IA	19149	2.60
POCAHONTAS	IA	19151	2.70
POLK	IA	19153	2.70
POTTAWATTAMIE	IA	19155	2.70
POWESHIEK	IA	19157	2.90
RINGGOLD	IA	19159	2.90
SAC	IA	19161	2.60
SCOTT	IA	19163	3.10
SHELBY	IA	19165	2.60
SIOUX	IA	19167	2.60
STORY	IA	19169	2.70
TAMA	IA	19171	2.90
TAYLOR	IA	19173	2.90
UNION	IA	19175	2.90
VAN BUREN	IA	19177	2.90
WAPELLO	IA	19179	2.90
WARREN	IA	19181	2.70
WASHINGTON	IA	19183	2.90
WAYNE	IA	19185	2.90
WEBSTER	IA	19187	2.70
WINNEBAGO	IA	19189	2.70
WINNESHIEK	IA	19191	2.80
WOODBURY	IA	19193	2.60
WORTH	IA	19195	2.80
WRIGHT	IA	19197	2.70
ALLEN	KS	20001	2.90
ANDERSON	KS	20003	2.90
ATCHISON	KS	20005	2.90
BARBER	KS	20007	2.60
BARTON	KS	20009	2.60
BOURBON	KS	20011	3.20
BROWN	KS	20013	2.90
BUTLER	KS	20015	2.90
CHASE	KS	20017	2.70
CHAUTAUQUA	KS	20019	2.90
CHEROKEE	KS	20021	3.20
CHEYENNE	KS	20023	2.50
CLARK	KS	20025	2.60
CLAY	KS	20027	2.70
CLOUD	KS	20029	2.70
COFFEY	KS	20031	2.90
COMANCHE	KS	20033	2.60
COWLEY	KS	20035	2.90
CRAWFORD	KS	20037	3.20
DECATUR	KS	20039	2.50
DICKINSON	KS	20041	2.70
DONIPHAN	KS	20043	2.90
DOUGLAS	KS	20045	2.90
EDWARDS	KS	20047	2.60
ELK	KS	20049	2.90
ELLIS	KS	20051	2.50
ELLSWORTH	KS	20053	2.60
FINNEY	KS	20055	2.50
FORD	KS	20057	2.50
FRANKLIN	KS	20059	2.90
GEARY	KS	20061	2.70
GOVE	KS	20063	2.50
GRAHAM	KS	20065	2.50
GRANT	KS	20067	2.50
GRAY	KS	20069	2.50
GREELEY	KS	20071	2.50

County/parish/city	State	FIPS code	Class I differential adjusted for location
GREENWOOD	KS	20073	2.90
HAMILTON	KS	20075	2.50
HARPER	KS	20077	2.90
HARVEY	KS	20079	2.90
HASKELL	KS	20081	2.50
HODGEMAN	KS	20083	2.50
JACKSON	KS	20085	2.90
JEFFERSON	KS	20087	2.90
JEWELL	KS	20089	2.60
JOHNSON	KS	20091	3.20
KEARNY	KS	20093	2.50
KINGMAN	KS	20095	2.90
KIOWA	KS	20097	2.60
LABETTE	KS	20099	3.20
LANE	KS	20101	2.50
LEAVENWORTH	KS	20103	2.90
LINCOLN	KS	20105	2.60
LINN	KS	20107	3.20
LOGAN	KS	20109	2.50
LYON	KS	20111	2.90
MCPHERSON	KS	20113	2.70
MARION	KS	20115	2.70
MARSHALL	KS	20117	2.70
MEADE	KS	20119	2.50
MIAMI	KS	20121	3.20
MITCHELL	KS	20123	2.60
MONTGOMERY	KS	20125	3.20
MORRIS	KS	20127	2.70
MORTON	KS	20129	2.50
NEMAHA	KS	20131	2.70
NEOSHO	KS	20133	2.90
NESS	KS	20135	2.50
NORTON	KS	20137	2.50
OSAGE	KS	20139	2.90
OSBORNE	KS	20141	2.50
OTTAWA	KS	20143	2.70
PAWNEE	KS	20145	2.50
PHILLIPS	KS	20147	2.50
POTTAWATOMIE	KS	20149	2.70
PRATT	KS	20151	2.60
RAWLINS	KS	20153	2.50
RENO	KS	20155	2.90
REPUBLIC	KS	20157	2.60
RICE	KS	20159	2.60
RILEY	KS	20161	2.70
ROOKS	KS	20163	2.50
RUSH	KS	20165	2.50
RUSSELL	KS	20167	2.50
SALINE	KS	20169	2.70
SCOTT	KS	20171	2.50
SEDGWICK	KS	20173	2.90
SEWARD	KS	20175	2.50
SHAWNEE	KS	20177	2.90
SHERIDAN	KS	20179	2.50
SHERMAN	KS	20181	2.50
SMITH	KS	20183	2.50
STAFFORD	KS	20185	2.60
STANTON	KS	20187	2.50
STEVENS	KS	20189	2.50
SUMNER	KS	20191	2.90
THOMAS	KS	20193	2.50
TREGO	KS	20195	2.50
WABAUNSEE	KS	20197	2.90
WALLACE	KS	20199	2.50
WASHINGTON	KS	20201	2.70
WICHITA	KS	20203	2.50
WILSON	KS	20205	2.90
WOODSON	KS	20207	2.90
WYANDOTTE	KS	20209	3.20
ADAIR	KY	21001	4.20
ALLEN	KY	21003	4.20

County/parish/city	State	FIPS code	Class I differential adjusted for location
ANDERSON	KY	21005	4.20
BALLARD	KY	21007	4.00
BARREN	KY	21009	4.20
BATH	KY	21011	4.20
BELL	KY	21013	4.80
BOONE	KY	21015	4.00
BOURBON	KY	21017	4.20
BOYD	KY	21019	4.20
BOYLE	KY	21021	4.20
BRACKEN	KY	21023	4.00
BREATHITT	KY	21025	4.50
BRECKINRIDGE	KY	21027	4.00
BULLITT	KY	21029	4.00
BUTLER	KY	21031	4.20
CALDWELL	KY	21033	4.00
CALLOWAY	KY	21035	4.20
CAMPBELL	KY	21037	4.00
CARLISLE	KY	21039	4.00
CARROLL	KY	21041	4.00
CARTER	KY	21043	4.20
CASEY	KY	21045	4.20
CHRISTIAN	KY	21047	4.20
CLARK	KY	21049	4.20
CLAY	KY	21051	4.50
CLINTON	KY	21053	4.50
CRITTENDEN	KY	21055	4.00
CUMBERLAND	KY	21057	4.50
DAVISS	KY	21059	4.00
EDMONSON	KY	21061	4.20
ELLIOTT	KY	21063	4.20
ESTILL	KY	21065	4.20
FAYETTE	KY	21067	4.20
FLEMING	KY	21069	4.20
FLOYD	KY	21071	4.50
FRANKLIN	KY	21073	4.00
FULTON	KY	21075	4.00
GALLATIN	KY	21077	4.00
GARRARD	KY	21079	4.20
GRANT	KY	21081	4.00
GRAVES	KY	21083	4.20
GRAYSON	KY	21085	4.00
GREEN	KY	21087	4.20
GREENUP	KY	21089	4.20
HANCOCK	KY	21091	4.00
HARDIN	KY	21093	4.20
HARLAN	KY	21095	4.80
HARRISON	KY	21097	4.20
HART	KY	21099	4.20
HENDERSON	KY	21101	4.00
HENRY	KY	21103	4.00
HICKMAN	KY	21105	4.00
HOPKINS	KY	21107	4.00
JACKSON	KY	21109	4.20
JEFFERSON	KY	21111	4.00
JESSAMINE	KY	21113	4.20
JOHNSON	KY	21115	4.50
KENTON	KY	21117	4.00
KNOTT	KY	21119	4.50
KNOX	KY	21121	4.50
LARUE	KY	21123	4.20
LAUREL	KY	21125	4.50
LAWRENCE	KY	21127	4.20
LEE	KY	21129	4.20
LESLIE	KY	21131	4.50
LETCHER	KY	21133	4.80
LEWIS	KY	21135	4.20
LINCOLN	KY	21137	4.20
LIVINGSTON	KY	21139	4.00
LOGAN	KY	21141	4.20
LYON	KY	21143	4.00
MCCRACKEN	KY	21145	4.00

County/parish/city	State	FIPS code	Class I differential adjusted for location
MCCREARY	KY	21147	4.50
MCLEAN	KY	21149	4.00
MADISON	KY	21151	4.20
MAGOFFIN	KY	21153	4.50
MARION	KY	21155	4.20
MARSHALL	KY	21157	4.00
MARTIN	KY	21159	4.50
MASON	KY	21161	4.20
MEADE	KY	21163	4.00
MENIFEE	KY	21165	4.20
MERCER	KY	21167	4.20
METCALFE	KY	21169	4.20
MONROE	KY	21171	4.50
MONTGOMERY	KY	21173	4.20
MORGAN	KY	21175	4.20
MUHLENBERG	KY	21177	4.00
NELSON	KY	21179	4.20
NICHOLAS	KY	21181	4.20
OHIO	KY	21183	4.00
OLDHAM	KY	21185	4.00
OWEN	KY	21187	4.00
OWSLEY	KY	21189	4.50
PENDLETON	KY	21191	4.00
PERRY	KY	21193	4.50
PIKE	KY	21195	4.50
POWELL	KY	21197	4.20
PULASKI	KY	21199	4.50
ROBERTSON	KY	21201	4.20
ROCKCASTLE	KY	21203	4.20
ROWAN	KY	21205	4.20
RUSSELL	KY	21207	4.50
SCOTT	KY	21209	4.00
SHELBY	KY	21211	4.00
SIMPSON	KY	21213	4.20
SPENCER	KY	21215	4.00
TAYLOR	KY	21217	4.20
TODD	KY	21219	4.20
TRIGG	KY	21221	4.20
TRIMBLE	KY	21223	4.00
UNION	KY	21225	4.00
WARREN	KY	21227	4.20
WASHINGTON	KY	21229	4.20
WAYNE	KY	21231	4.50
WEBSTER	KY	21233	4.00
WHITLEY	KY	21235	4.50
WOLFE	KY	21237	4.20
WOODFORD	KY	21239	4.20
ACADIA	LA	22001	5.20
ALLEN	LA	22003	4.90
ASCENSION	LA	22005	5.20
ASSUMPTION	LA	22007	5.20
AVOYELLES	LA	22009	5.20
BEAUREGARD	LA	22011	4.90
BIENVILLE	LA	22013	4.60
BOSSIER	LA	22015	4.30
CADDO	LA	22017	4.30
CALCASIEU	LA	22019	4.90
CALDWELL	LA	22021	4.90
CAMERON	LA	22023	4.90
CATAHOULA	LA	22025	5.20
CLAIBORNE	LA	22027	4.30
CONCORDIA	LA	22029	5.20
DE SOTO	LA	22031	4.30
EAST BATON ROUGE	LA	22033	5.20
EAST CARROLL	LA	22035	5.20
EAST FELICIANA	LA	22037	5.20
EVANGELINE	LA	22039	4.90
FRANKLIN	LA	22041	4.90
GRANT	LA	22043	4.90
IBERIA	LA	22045	5.20
IBERVILLE	LA	22047	5.20

County/parish/city	State	FIPS code	Class I differential adjusted for location
JACKSON	LA	22049	4.60
JEFFERSON	LA	22051	5.60
JEFFERSON DAVIS	LA	22053	4.90
LAFAYETTE	LA	22055	5.20
LAFOURCHE	LA	22057	5.60
LA SALLE	LA	22059	4.90
LINCOLN	LA	22061	4.60
LIVINGSTON	LA	22063	5.40
MADISON	LA	22065	5.20
MOREHOUSE	LA	22067	4.90
NATCHITOCHES	LA	22069	4.60
ORLEANS	LA	22071	5.60
OUACHITA	LA	22073	4.90
PLAQUEMINES	LA	22075	5.60
POINTE COUPEE	LA	22077	5.20
RAPIDES	LA	22079	4.90
RED RIVER	LA	22081	4.60
RICHLAND	LA	22083	4.90
SABINE	LA	22085	4.60
ST. BERNARD	LA	22087	5.60
ST. CHARLES	LA	22089	5.60
ST. HELENA	LA	22091	5.40
ST. JAMES	LA	22093	5.20
ST. JOHN THE BAPTIST	LA	22095	5.60
ST. LANDRY	LA	22097	5.20
ST. MARTIN	LA	22099	5.20
ST. MARY	LA	22101	5.20
ST. TAMMANY	LA	22103	5.60
TANGIPAHOA	LA	22105	5.40
TENSAS	LA	22107	5.20
TERREBONNE	LA	22109	5.60
UNION	LA	22111	4.60
VERMILION	LA	22113	5.20
VERNON	LA	22115	4.60
WASHINGTON	LA	22117	5.60
WEBSTER	LA	22119	4.30
WEST BATON ROUGE	LA	22121	5.20
WEST CARROLL	LA	22123	4.90
WEST FELICIANA	LA	22125	5.20
WINN	LA	22127	4.60
ANDROSCOGGIN	ME	23001	4.20
AROOSTOOK	ME	23003	3.90
CUMBERLAND	ME	23005	4.50
FRANKLIN	ME	23007	4.20
HANCOCK	ME	23009	3.90
KENNEBEC	ME	23011	4.20
KNOX	ME	23013	4.20
LINCOLN	ME	23015	4.20
OXFORD	ME	23017	4.20
PENOBSCOT	ME	23019	3.90
PISCATAQUIS	ME	23021	3.90
SAGadahoc	ME	23023	4.20
SOMERSET	ME	23025	3.90
WALDO	ME	23027	3.90
WASHINGTON	ME	23029	3.90
YORK	ME	23031	4.50
ALLEGANY	MD	24001	4.10
ANNE ARUNDEL	MD	24003	4.60
BALTIMORE	MD	24005	4.40
CALVERT	MD	24009	4.80
CAROLINE	MD	24011	4.60
CARROLL	MD	24013	4.40
CECIL	MD	24015	4.40
CHARLES	MD	24017	4.80
DORCHESTER	MD	24019	4.80
FREDERICK	MD	24021	4.40
GARRETT	MD	24023	4.10
HARFORD	MD	24025	4.40
HOWARD	MD	24027	4.60
KENT	MD	24029	4.60
MONTGOMERY	MD	24031	4.60

County/parish/city	State	FIPS code	Class I differential adjusted for location
PRINCE GEORGE'S	MD	24033	4.60
QUEEN ANNE'S	MD	24035	4.60
ST. MARY'S	MD	24037	4.80
SOMERSET	MD	24039	4.80
TALBOT	MD	24041	4.60
WASHINGTON	MD	24043	4.20
WICOMICO	MD	24045	4.80
WORCESTER	MD	24047	4.80
BALTIMORE CITY	MD	24510	4.60
BARNSTABLE	MA	25001	5.10
BERKSHIRE	MA	25003	4.50
BRISTOL	MA	25005	5.10
DUKES	MA	25007	5.10
ESSEX	MA	25009	5.10
FRANKLIN	MA	25011	4.70
HAMPDEN	MA	25013	4.70
HAMPSHIRE	MA	25015	4.70
MIDDLESEX	MA	25017	5.10
NANTUCKET	MA	25019	5.10
NORFOLK	MA	25021	5.10
PLYMOUTH	MA	25023	5.10
SUFFOLK	MA	25025	5.10
WORCESTER	MA	25027	4.90
ALCONA	MI	26001	3.30
ALGER	MI	26003	3.00
ALLEGAN	MI	26005	3.30
ALPENA	MI	26007	3.30
ANTRIM	MI	26009	3.30
ARENAC	MI	26011	3.30
BARAGA	MI	26013	3.00
BARRY	MI	26015	3.30
BAY	MI	26017	3.30
BENZIE	MI	26019	3.30
BERRIEN	MI	26021	3.30
BRANCH	MI	26023	3.30
CALHOUN	MI	26025	3.30
CASS	MI	26027	3.30
CHARLEVOIX	MI	26029	3.30
CHEBOYGAN	MI	26031	3.30
CHIPPEWA	MI	26033	3.00
CLARE	MI	26035	3.30
CLINTON	MI	26037	3.30
CRAWFORD	MI	26039	3.30
DELTA	MI	26041	2.80
DICKINSON	MI	26043	2.80
EATON	MI	26045	3.30
EMMET	MI	26047	3.30
GENESEE	MI	26049	3.30
GLADWIN	MI	26051	3.30
GOGEBIC	MI	26053	2.80
GRAND TRAVERSE	MI	26055	3.30
GRATIOT	MI	26057	3.30
HILLSDALE	MI	26059	3.30
HOUGHTON	MI	26061	3.00
HURON	MI	26063	3.30
INGHAM	MI	26065	3.30
IONIA	MI	26067	3.30
IOSCO	MI	26069	3.30
IRON	MI	26071	2.80
ISABELLA	MI	26073	3.30
JACKSON	MI	26075	3.30
KALAMAZOO	MI	26077	3.30
KALKASKA	MI	26079	3.30
KENT	MI	26081	3.30
KEWEENAW	MI	26083	3.00
LAKE	MI	26085	3.30
LAPEER	MI	26087	3.30
LEELANAU	MI	26089	3.30
LENAWEE	MI	26091	3.30
LIVINGSTON	MI	26093	3.30
LUCE	MI	26095	3.00

County/parish/city	State	FIPS code	Class I differential adjusted for location
MACKINAC	MI	26097	3.00
MACOMB	MI	26099	3.30
MANISTEE	MI	26101	3.30
MARQUETTE	MI	26103	3.00
MASON	MI	26105	3.30
MECOSTA	MI	26107	3.30
MENOMINEE	MI	26109	2.80
MIDLAND	MI	26111	3.30
MISSAUKEE	MI	26113	3.30
MONROE	MI	26115	3.30
MONTCALM	MI	26117	3.30
MONTMORENCY	MI	26119	3.30
MUSKEGON	MI	26121	3.30
NEWAYGO	MI	26123	3.30
OAKLAND	MI	26125	3.30
OCEANA	MI	26127	3.30
OGEAW	MI	26129	3.30
ONTONAGON	MI	26131	2.80
OSCEOLA	MI	26133	3.30
OSCODA	MI	26135	3.30
OTSEGO	MI	26137	3.30
OTTAWA	MI	26139	3.30
PRESQUE ISLE	MI	26141	3.30
ROSCOMMON	MI	26143	3.30
SAGINAW	MI	26145	3.30
ST. CLAIR	MI	26147	3.30
ST. JOSEPH	MI	26149	3.30
SANILAC	MI	26151	3.30
SCHOOLCRAFT	MI	26153	3.00
SHIAWASSEE	MI	26155	3.30
TUSCOLA	MI	26157	3.30
VAN BUREN	MI	26159	3.30
WASHTENAW	MI	26161	3.30
WAYNE	MI	26163	3.30
WEXFORD	MI	26165	3.30
AITKIN	MN	27001	2.80
ANOKA	MN	27003	2.80
BECKER	MN	27005	2.80
BELTRAMI	MN	27007	2.30
BENTON	MN	27009	2.80
BIG STONE	MN	27011	2.70
BLUE EARTH	MN	27013	2.80
BROWN	MN	27015	2.80
CARLTON	MN	27017	2.80
CARVER	MN	27019	2.80
CASS	MN	27021	2.80
CHIPPEWA	MN	27023	2.80
CHISAGO	MN	27025	2.80
CLAY	MN	27027	2.80
CLEARWATER	MN	27029	2.30
COOK	MN	27031	2.30
COTTONWOOD	MN	27033	2.80
CROW WING	MN	27035	2.80
DAKOTA	MN	27037	2.90
DODGE	MN	27039	2.80
DOUGLAS	MN	27041	2.80
FARIBAULT	MN	27043	2.80
FILLMORE	MN	27045	2.80
FREEBORN	MN	27047	2.80
GOODHUE	MN	27049	2.80
GRANT	MN	27051	2.80
HENNEPIN	MN	27053	2.90
HOUSTON	MN	27055	2.80
HUBBARD	MN	27057	2.80
ISANTI	MN	27059	2.80
ITASCA	MN	27061	2.30
JACKSON	MN	27063	2.80
KANABEC	MN	27065	2.80
KANDIYOHI	MN	27067	2.80
KITTSO	MN	27069	2.30
KOOCHICHING	MN	27071	2.30

County/parish/city	State	FIPS code	Class I differential adjusted for location
LAC QUI PARLE	MN	27073	2.70
LAKE	MN	27075	2.30
LAKE OF THE WOODS	MN	27077	2.30
LE SUEUR	MN	27079	2.80
LINCOLN	MN	27081	2.60
LYON	MN	27083	2.70
MCLEOD	MN	27085	2.80
MAHNOMEN	MN	27087	2.60
MARSHALL	MN	27089	2.30
MARTIN	MN	27091	2.80
MEEKER	MN	27093	2.80
MILLE LACS	MN	27095	2.80
MORRISON	MN	27097	2.80
MOWER	MN	27099	2.80
MURRAY	MN	27101	2.70
NICOLLET	MN	27103	2.80
NOBLES	MN	27105	2.70
NORMAN	MN	27107	2.60
OLMSTED	MN	27109	2.80
OTTER TAIL	MN	27111	2.80
PENNINGTON	MN	27113	2.30
PINE	MN	27115	2.80
PIPESTONE	MN	27117	2.60
POLK	MN	27119	2.30
POPE	MN	27121	2.80
RAMSEY	MN	27123	2.90
RED LAKE	MN	27125	2.30
REDWOOD	MN	27127	2.80
RENVILLE	MN	27129	2.80
RICE	MN	27131	2.80
ROCK	MN	27133	2.60
ROSEAU	MN	27135	2.30
ST. LOUIS	MN	27137	2.30
SCOTT	MN	27139	2.90
SHERBURNE	MN	27141	2.80
SIBLEY	MN	27143	2.80
STEARNS	MN	27145	2.80
STEELE	MN	27147	2.80
STEVENS	MN	27149	2.80
SWIFT	MN	27151	2.80
TODD	MN	27153	2.80
TRAVERSE	MN	27155	2.70
WABASHA	MN	27157	2.80
WADENA	MN	27159	2.80
WASECA	MN	27161	2.80
WASHINGTON	MN	27163	2.90
WATONWAN	MN	27165	2.80
WILKIN	MN	27167	2.80
WINONA	MN	27169	2.80
WRIGHT	MN	27171	2.80
YELLOW MEDICINE	MN	27173	2.70
ADAMS	MS	28001	5.20
ALCORN	MS	28003	4.90
AMITE	MS	28005	5.40
ATTALA	MS	28007	5.20
BENTON	MS	28009	4.90
BOLIVAR	MS	28011	4.90
CALHOUN	MS	28013	5.20
CARROLL	MS	28015	5.20
CHICKASAW	MS	28017	5.20
CHOCTAW	MS	28019	5.20
CLAIBORNE	MS	28021	5.20
CLARKE	MS	28023	5.60
CLAY	MS	28025	5.20
COAHOMA	MS	28027	4.90
COPIAH	MS	28029	5.40
COVINGTON	MS	28031	5.60
DE SOTO	MS	28033	4.60
FORREST	MS	28035	5.80
FRANKLIN	MS	28037	5.20
GEORGE	MS	28039	5.80

County/parish/city	State	FIPS code	Class I differential adjusted for location
GREENE	MS	28041	5.80
GRENADA	MS	28043	5.20
HANCOCK	MS	28045	5.80
HARRISON	MS	28047	5.80
HINDS	MS	28049	5.40
HOLMES	MS	28051	5.20
HUMPHREYS	MS	28053	5.20
ISSAQUENA	MS	28055	5.20
ITAWAMBA	MS	28057	5.20
JACKSON	MS	28059	5.80
JASPER	MS	28061	5.60
JEFFERSON	MS	28063	5.20
JEFFERSON DAVIS	MS	28065	5.60
JONES	MS	28067	5.60
KEMPER	MS	28069	5.40
LAFAYETTE	MS	28071	4.90
LAMAR	MS	28073	5.80
LAUDERDALE	MS	28075	5.60
LAWRENCE	MS	28077	5.60
LEAKE	MS	28079	5.40
LEE	MS	28081	5.20
LEFLORE	MS	28083	5.20
LINCOLN	MS	28085	5.40
LOWNDES	MS	28087	5.20
MADISON	MS	28089	5.40
MARION	MS	28091	5.60
MARSHALL	MS	28093	4.90
MONROE	MS	28095	5.20
MONTGOMERY	MS	28097	5.20
NESHOBA	MS	28099	5.40
NEWTON	MS	28101	5.60
NOXUBEE	MS	28103	5.40
OKTIBBEHA	MS	28105	5.20
PANOLA	MS	28107	4.90
PEARL RIVER	MS	28109	5.80
PERRY	MS	28111	5.80
PIKE	MS	28113	5.40
PONTOTOC	MS	28115	4.90
PRENTISS	MS	28117	4.90
QUITMAN	MS	28119	4.90
RANKIN	MS	28121	5.40
SCOTT	MS	28123	5.40
SHARKEY	MS	28125	5.20
SIMPSON	MS	28127	5.60
SMITH	MS	28129	5.60
STONE	MS	28131	5.80
SUNFLOWER	MS	28133	4.90
TALLAHATCHIE	MS	28135	4.90
TATE	MS	28137	4.90
TIPPAH	MS	28139	4.90
TISHOMINGO	MS	28141	4.90
TUNICA	MS	28143	4.60
UNION	MS	28145	4.90
WALTHALL	MS	28147	5.60
WARREN	MS	28149	5.20
WASHINGTON	MS	28151	4.90
WAYNE	MS	28153	5.80
WEBSTER	MS	28155	5.20
WILKINSON	MS	28157	5.20
WINSTON	MS	28159	5.40
YALOBUSHA	MS	28161	4.90
YAZOO	MS	28163	5.20
ADAIR	MO	29001	3.20
ANDREW	MO	29003	2.90
ATCHISON	MO	29005	2.70
AUDRAIN	MO	29007	3.40
BARRY	MO	29009	3.20
BARTON	MO	29011	3.20
BATES	MO	29013	3.20
BENTON	MO	29015	3.20
BOLLINGER	MO	29017	3.60

County/parish/city	State	FIPS code	Class I differential adjusted for location
BOONE	MO	29019	3.40
BUCHANAN	MO	29021	3.20
BUTLER	MO	29023	4.00
CALDWELL	MO	29025	3.20
CALLAWAY	MO	29027	3.40
CAMDEN	MO	29029	3.40
CAPE GIRARDEAU	MO	29031	3.60
CARROLL	MO	29033	3.20
CARTER	MO	29035	4.00
CASS	MO	29037	3.20
CEDAR	MO	29039	3.20
CHARITON	MO	29041	3.20
CHRISTIAN	MO	29043	3.30
CLARK	MO	29045	3.20
CLAY	MO	29047	3.20
CLINTON	MO	29049	3.20
COLE	MO	29051	3.40
COOPER	MO	29053	3.40
CRAWFORD	MO	29055	3.60
DADE	MO	29057	3.20
DALLAS	MO	29059	3.30
DAVIESS	MO	29061	3.20
DE KALB	MO	29063	3.20
DENT	MO	29065	3.60
DOUGLAS	MO	29067	3.30
DUNKLIN	MO	29069	4.30
FRANKLIN	MO	29071	3.60
GASCONADE	MO	29073	3.60
GENTRY	MO	29075	2.90
GREENE	MO	29077	3.20
GRUNDY	MO	29079	3.20
HARRISON	MO	29081	2.90
HENRY	MO	29083	3.20
HICKORY	MO	29085	3.20
HOLT	MO	29087	2.90
HOWARD	MO	29089	3.40
HOWELL	MO	29091	3.60
IRON	MO	29093	3.60
JACKSON	MO	29095	3.20
JASPER	MO	29097	3.20
JEFFERSON	MO	29099	3.60
JOHNSON	MO	29101	3.20
KNOX	MO	29103	3.20
LACLEDE	MO	29105	3.30
LAFAYETTE	MO	29107	3.20
LAWRENCE	MO	29109	3.20
LEWIS	MO	29111	3.20
LINCOLN	MO	29113	3.60
LINN	MO	29115	3.20
LIVINGSTON	MO	29117	3.20
MCDONALD	MO	29119	3.20
MACON	MO	29121	3.20
MADISON	MO	29123	3.60
MARIES	MO	29125	3.60
MARION	MO	29127	3.20
MERCER	MO	29129	2.90
MILLER	MO	29131	3.40
MISSISSIPPI	MO	29133	4.00
MONITEAU	MO	29135	3.40
MONROE	MO	29137	3.40
MONTGOMERY	MO	29139	3.40
MORGAN	MO	29141	3.40
NEW MADRID	MO	29143	4.00
NEWTON	MO	29145	3.20
NODAWAY	MO	29147	2.90
OREGON	MO	29149	4.00
OSAGE	MO	29151	3.60
OZARK	MO	29153	3.60
PEMISCOT	MO	29155	4.30
PERRY	MO	29157	3.60
PETTIS	MO	29159	3.40

County/parish/city	State	FIPS code	Class I differential adjusted for location
PHELPS	MO	29161	3.60
PIKE	MO	29163	3.40
PLATTE	MO	29165	3.20
POLK	MO	29167	3.20
PULASKI	MO	29169	3.40
PUTNAM	MO	29171	2.90
RALLS	MO	29173	3.40
RANDOLPH	MO	29175	3.40
RAY	MO	29177	3.20
REYNOLDS	MO	29179	3.60
RIPLEY	MO	29181	4.00
ST. CHARLES	MO	29183	3.60
ST. CLAIR	MO	29185	3.20
STE. GENEVIEVE	MO	29186	3.60
ST. FRANCOIS	MO	29187	3.60
ST. LOUIS	MO	29189	3.60
SALINE	MO	29195	3.40
SCHUYLER	MO	29197	3.20
SCOTLAND	MO	29199	3.20
SCOTT	MO	29201	4.00
SHANNON	MO	29203	3.60
SHELBY	MO	29205	3.20
STODDARD	MO	29207	4.00
STONE	MO	29209	3.30
SULLIVAN	MO	29211	3.20
TANEY	MO	29213	3.30
TEXAS	MO	29215	3.60
VERNON	MO	29217	3.20
WARREN	MO	29219	3.60
WASHINGTON	MO	29221	3.60
WAYNE	MO	29223	4.00
WEBSTER	MO	29225	3.20
WORTH	MO	29227	2.90
WRIGHT	MO	29229	3.30
ST. LOUIS CITY	MO	29510	3.60
BEAVERHEAD	MT	30001	1.80
BIG HORN	MT	30003	2.40
BLAINE	MT	30005	2.00
BROADWATER	MT	30007	1.80
CARBON	MT	30009	2.40
CARTER	MT	30011	2.40
CASCADE	MT	30013	1.80
CHOUTEAU	MT	30015	1.80
CUSTER	MT	30017	2.40
DANIELS	MT	30019	2.30
DAWSON	MT	30021	2.40
DEER LODGE	MT	30023	1.80
FALLON	MT	30025	2.40
FERGUS	MT	30027	2.00
FLATHEAD	MT	30029	2.00
GALLATIN	MT	30031	2.00
GARFIELD	MT	30033	2.40
GLACIER	MT	30035	1.80
GOLDEN VALLEY	MT	30037	2.00
GRANITE	MT	30039	1.80
HILL	MT	30041	1.80
JEFFERSON	MT	30043	1.80
JUDITH BASIN	MT	30045	2.00
LAKE	MT	30047	2.00
LEWIS AND CLARK	MT	30049	1.70
LIBERTY	MT	30051	1.80
LINCOLN	MT	30053	2.00
MCCONE	MT	30055	2.40
MADISON	MT	30057	1.80
MEAGHER	MT	30059	1.80
MINERAL	MT	30061	2.00
MISSOULA	MT	30063	1.80
MUSSELSHELL	MT	30065	2.40
PARK	MT	30067	2.00
PETROLEUM	MT	30069	2.40
PHILLIPS	MT	30071	2.30

County/parish/city	State	FIPS code	Class I differential adjusted for location
PONDERA	MT	30073	1.70
POWDER RIVER	MT	30075	2.40
POWELL	MT	30077	1.80
PRAIRIE	MT	30079	2.40
RAVALLI	MT	30081	1.80
RICHLAND	MT	30083	2.40
ROOSEVELT	MT	30085	2.30
ROSEBUD	MT	30087	2.40
SANDERS	MT	30089	2.00
SHERIDAN	MT	30091	2.30
SILVER BOW	MT	30093	1.80
STILLWATER	MT	30095	2.40
SWEET GRASS	MT	30097	2.00
TETON	MT	30099	1.70
TOOLE	MT	30101	1.80
TREASURE	MT	30103	2.40
VALLEY	MT	30105	2.30
WHEATLAND	MT	30107	2.00
WIBAUX	MT	30109	2.40
YELLOWSTONE	MT	30111	2.40
ADAMS	NE	31001	2.60
ANTELOPE	NE	31003	2.60
ARTHUR	NE	31005	2.40
BANNER	NE	31007	2.40
BLAINE	NE	31009	2.50
BOONE	NE	31011	2.60
BOX BUTTE	NE	31013	2.40
BOYD	NE	31015	2.50
BROWN	NE	31017	2.50
BUFFALO	NE	31019	2.50
BURT	NE	31021	2.60
BUTLER	NE	31023	2.60
CASS	NE	31025	2.70
CEDAR	NE	31027	2.60
CHASE	NE	31029	2.50
CHERRY	NE	31031	2.40
CHEYENNE	NE	31033	2.40
CLAY	NE	31035	2.60
COLFAX	NE	31037	2.60
CUMING	NE	31039	2.60
CUSTER	NE	31041	2.50
DAKOTA	NE	31043	2.60
DAWES	NE	31045	2.40
DAWSON	NE	31047	2.50
DEUEL	NE	31049	2.40
DIXON	NE	31051	2.60
DODGE	NE	31053	2.60
DOUGLAS	NE	31055	2.70
DUNDY	NE	31057	2.50
FILLMORE	NE	31059	2.60
FRANKLIN	NE	31061	2.60
FRONTIER	NE	31063	2.50
FURNAS	NE	31065	2.50
GAGE	NE	31067	2.70
GARDEN	NE	31069	2.40
GARFIELD	NE	31071	2.50
GOSPER	NE	31073	2.50
GRANT	NE	31075	2.40
GREELEY	NE	31077	2.60
HALL	NE	31079	2.60
HAMILTON	NE	31081	2.60
HARLAN	NE	31083	2.50
HAYES	NE	31085	2.50
HITCHCOCK	NE	31087	2.50
HOLT	NE	31089	2.50
HOOKE	NE	31091	2.40
HOWARD	NE	31093	2.60
JEFFERSON	NE	31095	2.60
JOHNSON	NE	31097	2.70
KEARNEY	NE	31099	2.60
KEITH	NE	31101	2.50

County/parish/city	State	FIPS code	Class I differential adjusted for location
KEYA PAHA	NE	31103	2.50
KIMBALL	NE	31105	2.40
KNOX	NE	31107	2.60
LANCASTER	NE	31109	2.60
LINCOLN	NE	31111	2.50
LOGAN	NE	31113	2.40
LOUP	NE	31115	2.50
MCPHERSON	NE	31117	2.40
MADISON	NE	31119	2.60
MERRICK	NE	31121	2.60
MORRILL	NE	31123	2.40
NANCE	NE	31125	2.60
NEMAHA	NE	31127	2.70
NUCKOLLS	NE	31129	2.60
OTOE	NE	31131	2.70
PAWNEE	NE	31133	2.70
PERKINS	NE	31135	2.50
PHELPS	NE	31137	2.50
PIERCE	NE	31139	2.60
PLATTE	NE	31141	2.60
POLK	NE	31143	2.60
RED WILLOW	NE	31145	2.50
RICHARDSON	NE	31147	2.70
ROCK	NE	31149	2.50
SALINE	NE	31151	2.60
SARPY	NE	31153	2.70
SAUNDERS	NE	31155	2.60
SCOTTS BLUFF	NE	31157	2.40
SEWARD	NE	31159	2.60
SHERIDAN	NE	31161	2.40
SHERMAN	NE	31163	2.50
SIOUX	NE	31165	2.40
STANTON	NE	31167	2.60
THAYER	NE	31169	2.60
THOMAS	NE	31171	2.40
THURSTON	NE	31173	2.60
VALLEY	NE	31175	2.50
WASHINGTON	NE	31177	2.60
WAYNE	NE	31179	2.60
WEBSTER	NE	31181	2.60
WHEELER	NE	31183	2.50
YORK	NE	31185	2.60
CHURCHILL	NV	32001	1.90
CLARK	NV	32003	2.60
DOUGLAS	NV	32005	1.80
ELKO	NV	32007	2.00
ESMERALDA	NV	32009	2.20
EUREKA	NV	32011	2.20
HUMBOLDT	NV	32013	1.90
LANDER	NV	32015	2.00
LINCOLN	NV	32017	2.50
LYON	NV	32019	1.90
MINERAL	NV	32021	2.00
NYE	NV	32023	2.20
PERSHING	NV	32027	1.90
STOREY	NV	32029	1.90
WASHOE	NV	32031	2.00
WHITE PINE	NV	32033	2.20
CARSON CITY	NV	32510	1.90
BELKNAP	NH	33001	4.50
CARROLL	NH	33003	4.50
CHESHIRE	NH	33005	4.50
COOS	NH	33007	4.20
GRAFTON	NH	33009	4.40
HILLSBOROUGH	NH	33011	4.50
MERRIMACK	NH	33013	4.50
ROCKINGHAM	NH	33015	4.50
STRAFFORD	NH	33017	4.50
SULLIVAN	NH	33019	4.50
ATLANTIC	NJ	34001	4.70
BERGEN	NJ	34003	5.00

County/parish/city	State	FIPS code	Class I differential adjusted for location
BURLINGTON	NJ	34005	4.70
CAMDEN	NJ	34007	4.70
CAPE MAY	NJ	34009	4.70
CUMBERLAND	NJ	34011	4.70
ESSEX	NJ	34013	5.00
GLOUCESTER	NJ	34015	4.70
HUDSON	NJ	34017	5.00
HUNTERDON	NJ	34019	4.70
MERCER	NJ	34021	4.70
MIDDLESEX	NJ	34023	4.90
MONMOUTH	NJ	34025	4.90
MORRIS	NJ	34027	4.90
OCEAN	NJ	34029	4.90
PASSAIC	NJ	34031	5.00
SALEM	NJ	34033	4.70
SOMERSET	NJ	34035	4.90
SUSSEX	NJ	34037	4.70
UNION	NJ	34039	5.00
WARREN	NJ	34041	4.70
BERNALILLO	NM	35001	2.50
CATRON	NM	35003	2.30
CHAVES	NM	35005	2.50
CIBOLA	NM	35006	2.30
COLFAX	NM	35007	2.50
CURRY	NM	35009	2.50
DE BACA	NM	35011	2.50
DONA ANA	NM	35013	2.50
EDDY	NM	35015	2.50
GRANT	NM	35017	2.50
GUADALUPE	NM	35019	2.50
HARDING	NM	35021	2.50
HIDALGO	NM	35023	2.50
LEA	NM	35025	2.50
LINCOLN	NM	35027	2.50
LOS ALAMOS	NM	35028	2.50
LUNA	NM	35029	2.50
MCKINLEY	NM	35031	2.30
MORA	NM	35033	2.50
OTERO	NM	35035	2.50
QUAY	NM	35037	2.50
RIO ARriba	NM	35039	2.30
ROOSEVELT	NM	35041	2.50
SANDOVAL	NM	35043	2.50
SAN JUAN	NM	35045	2.30
SAN MIGUEL	NM	35047	2.50
SANTA FE	NM	35049	2.50
SIERRA	NM	35051	2.50
SOCORRO	NM	35053	2.50
TAOS	NM	35055	2.50
TORRANCE	NM	35057	2.50
UNION	NM	35059	2.50
VALENCIA	NM	35061	2.50
ALBANY	NY	36001	4.40
ALLEGANY	NY	36003	3.90
BRONX	NY	36005	5.10
BROOME	NY	36007	4.00
CATTARAUGUS	NY	36009	3.90
CAYUGA	NY	36011	3.90
CHAUTAUQUA	NY	36013	3.90
CHEMUNG	NY	36015	4.00
CHENANGO	NY	36017	4.00
CLINTON	NY	36019	4.20
COLUMBIA	NY	36021	4.40
CORTLAND	NY	36023	3.90
DELAWARE	NY	36025	4.20
DUTCHESS	NY	36027	4.70
ERIE	NY	36029	3.90
ESSEX	NY	36031	4.20
FRANKLIN	NY	36033	4.10
FULTON	NY	36035	4.10
GENESEE	NY	36037	3.90

County/parish/city	State	FIPS code	Class I differential adjusted for location
GREENE	NY	36039	4.40
HAMILTON	NY	36041	4.10
HERKIMER	NY	36043	4.00
JEFFERSON	NY	36045	3.90
KINGS	NY	36047	5.10
LEWIS	NY	36049	3.90
LIVINGSTON	NY	36051	3.90
MADISON	NY	36053	3.90
MONROE	NY	36055	3.90
MONTGOMERY	NY	36057	4.10
NASSAU	NY	36059	5.10
NEW YORK	NY	36061	5.10
NIAGARA	NY	36063	3.90
ONEIDA	NY	36065	3.90
ONONDAGA	NY	36067	3.90
ONTARIO	NY	36069	3.90
ORANGE	NY	36071	4.70
ORLEANS	NY	36073	3.90
OSWEGO	NY	36075	3.90
OTSEGO	NY	36077	4.10
PUTNAM	NY	36079	4.70
QUEENS	NY	36081	5.10
RENSSELAER	NY	36083	4.40
RICHMOND	NY	36085	5.10
ROCKLAND	NY	36087	5.00
ST. LAWRENCE	NY	36089	3.90
SARATOGA	NY	36091	4.20
SCHENECTADY	NY	36093	4.20
SCHOHARIE	NY	36095	4.20
SCHUYLER	NY	36097	3.90
SENECA	NY	36099	3.90
STEUBEN	NY	36101	3.90
SUFFOLK	NY	36103	5.10
SULLIVAN	NY	36105	4.40
TIOGA	NY	36107	4.00
TOMPKINS	NY	36109	3.90
ULSTER	NY	36111	4.40
WARREN	NY	36113	4.20
WASHINGTON	NY	36115	4.20
WAYNE	NY	36117	3.90
WESTCHESTER	NY	36119	5.00
WYOMING	NY	36121	3.90
YATES	NY	36123	3.90
ALAMANCE	NC	37001	5.40
ALEXANDER	NC	37003	5.60
ALLEGHANY	NC	37005	5.40
ANSON	NC	37007	5.80
ASHE	NC	37009	5.40
AVERY	NC	37011	5.40
BEAUFORT	NC	37013	5.80
BERTIE	NC	37015	5.60
BLADEN	NC	37017	5.80
BRUNSWICK	NC	37019	6.00
BUNCOMBE	NC	37021	5.40
BURKE	NC	37023	5.60
CABARRUS	NC	37025	5.60
CALDWELL	NC	37027	5.60
CAMDEN	NC	37029	5.60
CARTERET	NC	37031	6.00
CASWELL	NC	37033	5.40
CATAWBA	NC	37035	5.60
CHATHAM	NC	37037	5.60
CHEROKEE	NC	37039	5.40
CHOWAN	NC	37041	5.60
CLAY	NC	37043	5.60
CLEVELAND	NC	37045	5.60
COLUMBUS	NC	37047	6.00
CRAVEN	NC	37049	6.00
CUMBERLAND	NC	37051	5.80
CURRITUCK	NC	37053	5.60
DARE	NC	37055	5.80

County/parish/city	State	FIPS code	Class I differential adjusted for location
DAVIDSON	NC	37057	5.60
DAVIE	NC	37059	5.60
DUPLIN	NC	37061	5.80
DURHAM	NC	37063	5.40
EDGECOMBE	NC	37065	5.60
FORSYTH	NC	37067	5.40
FRANKLIN	NC	37069	5.60
GASTON	NC	37071	5.60
GATES	NC	37073	5.60
GRAHAM	NC	37075	5.40
GRANVILLE	NC	37077	5.40
GREENE	NC	37079	5.80
GUILFORD	NC	37081	5.40
HALIFAX	NC	37083	5.60
HARNETT	NC	37085	5.80
HAYWOOD	NC	37087	5.40
HENDERSON	NC	37089	5.60
HERTFORD	NC	37091	5.60
HOKE	NC	37093	5.80
HYDE	NC	37095	5.80
IREDELL	NC	37097	5.60
JACKSON	NC	37099	5.60
JOHNSTON	NC	37101	5.80
JONES	NC	37103	6.00
LEE	NC	37105	5.60
LENOIR	NC	37107	5.80
LINCOLN	NC	37109	5.60
MCDOWELL	NC	37111	5.60
MACON	NC	37113	5.60
MADISON	NC	37115	5.40
MARTIN	NC	37117	5.80
MECKLENBURG	NC	37119	5.60
MITCHELL	NC	37121	5.40
MONTGOMERY	NC	37123	5.60
MOORE	NC	37125	5.60
NASH	NC	37127	5.60
NEW HANOVER	NC	37129	6.00
NORTHAMPTON	NC	37131	5.60
ONSLOW	NC	37133	6.00
ORANGE	NC	37135	5.40
PAMLICO	NC	37137	6.00
PASQUOTANK	NC	37139	5.60
PENDER	NC	37141	6.00
PERQUIMANS	NC	37143	5.60
PERSON	NC	37145	5.40
PITT	NC	37147	5.80
POLK	NC	37149	5.60
RANDOLPH	NC	37151	5.60
RICHMOND	NC	37153	5.80
ROBESON	NC	37155	5.80
ROCKINGHAM	NC	37157	5.40
ROWAN	NC	37159	5.60
RUTHERFORD	NC	37161	5.60
SAMPSON	NC	37163	5.80
SCOTLAND	NC	37165	5.80
STANLY	NC	37167	5.60
STOKES	NC	37169	5.40
SURRY	NC	37171	5.40
SWAIN	NC	37173	5.40
TRANSYLVANIA	NC	37175	5.60
TYRRELL	NC	37177	5.80
UNION	NC	37179	5.80
VANCE	NC	37181	5.40
WAKE	NC	37183	5.60
WARREN	NC	37185	5.40
WASHINGTON	NC	37187	5.80
WATAUGA	NC	37189	5.40
WAYNE	NC	37191	5.80
WILKES	NC	37193	5.40
WILSON	NC	37195	5.80
YADKIN	NC	37197	5.40

County/parish/city	State	FIPS code	Class I differential adjusted for location
YANCEY	NC	37199	5.40
ADAMS	ND	38001	2.40
BARNES	ND	38003	2.60
BENSON	ND	38005	2.30
BILLINGS	ND	38007	2.40
BOTTINEAU	ND	38009	2.30
BOWMAN	ND	38011	2.40
BURKE	ND	38013	2.30
BURLEIGH	ND	38015	2.40
CASS	ND	38017	2.80
CAVALIER	ND	38019	2.30
DICKEY	ND	38021	2.60
DIVIDE	ND	38023	2.30
DUNN	ND	38025	2.40
EDDY	ND	38027	2.40
EMMONS	ND	38029	2.40
FOSTER	ND	38031	2.40
GOLDEN VALLEY	ND	38033	2.40
GRAND FORKS	ND	38035	2.30
GRANT	ND	38037	2.40
GRIGGS	ND	38039	2.60
HETTINGER	ND	38041	2.40
KIDDER	ND	38043	2.40
LA MOURE	ND	38045	2.60
LOGAN	ND	38047	2.40
MCHENRY	ND	38049	2.30
MCINTOSH	ND	38051	2.40
MCKENZIE	ND	38053	2.40
MCLEAN	ND	38055	2.40
MERCER	ND	38057	2.40
MORTON	ND	38059	2.40
MOUNTRAIL	ND	38061	2.30
NELSON	ND	38063	2.30
OLIVER	ND	38065	2.40
PEMBINA	ND	38067	2.30
PIERCE	ND	38069	2.30
RAMSEY	ND	38071	2.30
RANSOM	ND	38073	2.60
RENVILLE	ND	38075	2.30
RICHLAND	ND	38077	2.60
ROLETTE	ND	38079	2.30
SARGENT	ND	38081	2.60
SHERIDAN	ND	38083	2.40
SIOUX	ND	38085	2.40
SLOPE	ND	38087	2.40
STARK	ND	38089	2.40
STEELE	ND	38091	2.60
STUTSMAN	ND	38093	2.40
TOWNER	ND	38095	2.30
TRAILL	ND	38097	2.60
WALSH	ND	38099	2.30
WARD	ND	38101	2.30
WELLS	ND	38103	2.40
WILLIAMS	ND	38105	2.30
ADAMS	OH	39001	4.00
ALLEN	OH	39003	3.30
ASHLAND	OH	39005	3.80
ASHTABULA	OH	39007	3.80
ATHENS	OH	39009	4.00
AUGLAIZE	OH	39011	3.60
BELMONT	OH	39013	3.80
BROWN	OH	39015	4.00
BUTLER	OH	39017	3.80
CARROLL	OH	39019	3.80
CHAMPAIGN	OH	39021	3.60
CLARK	OH	39023	3.60
CLERMONT	OH	39025	4.00
CLINTON	OH	39027	3.80
COLUMBIANA	OH	39029	4.00
COSHOCTON	OH	39031	3.80
CRAWFORD	OH	39033	3.60

County/parish/city	State	FIPS code	Class I differential adjusted for location
CUYAHOGA	OH	39035	3.80
DARKE	OH	39037	3.60
DEFIANCE	OH	39039	3.30
DELAWARE	OH	39041	3.60
ERIE	OH	39043	3.60
FAIRFIELD	OH	39045	3.80
FAYETTE	OH	39047	3.80
FRANKLIN	OH	39049	3.60
FULTON	OH	39051	3.30
GALLIA	OH	39053	4.30
GEAUGA	OH	39055	3.80
GREENE	OH	39057	3.60
GUERNSEY	OH	39059	3.80
HAMILTON	OH	39061	3.80
HANCOCK	OH	39063	3.60
HARDIN	OH	39065	3.60
HARRISON	OH	39067	3.80
HENRY	OH	39069	3.30
HIGHLAND	OH	39071	4.00
HOCKING	OH	39073	4.00
HOLMES	OH	39075	3.80
HURON	OH	39077	3.60
JACKSON	OH	39079	4.00
JEFFERSON	OH	39081	3.80
KNOX	OH	39083	3.80
LAKE	OH	39085	3.80
LAWRENCE	OH	39087	4.30
LICKING	OH	39089	3.80
LOGAN	OH	39091	3.60
LORAIN	OH	39093	3.80
LUCAS	OH	39095	3.30
MADISON	OH	39097	3.60
MAHONING	OH	39099	4.00
MARION	OH	39101	3.60
MEDINA	OH	39103	3.80
MEIGS	OH	39105	4.30
MERCER	OH	39107	3.30
MIAMI	OH	39109	3.60
MONROE	OH	39111	4.00
MONTGOMERY	OH	39113	3.60
MORGAN	OH	39115	3.90
MORROW	OH	39117	3.60
MUSKINGUM	OH	39119	3.80
NOBLE	OH	39121	3.80
OTTAWA	OH	39123	3.60
PAULDING	OH	39125	3.30
PERRY	OH	39127	3.80
PICKAWAY	OH	39129	3.80
PIKE	OH	39131	4.00
PORTAGE	OH	39133	3.80
PREBLE	OH	39135	3.60
PUTNAM	OH	39137	3.30
RICHLAND	OH	39139	3.60
ROSS	OH	39141	4.00
SANDUSKY	OH	39143	3.60
SCIOTO	OH	39145	4.00
SENECA	OH	39147	3.60
SHELBY	OH	39149	3.60
STARK	OH	39151	3.80
SUMMIT	OH	39153	3.80
TRUMBULL	OH	39155	4.00
TUSCARAWAS	OH	39157	3.80
UNION	OH	39159	3.60
VAN WERT	OH	39161	3.30
VINTON	OH	39163	4.00
WARREN	OH	39165	3.80
WASHINGTON	OH	39167	4.00
WAYNE	OH	39169	3.80
WILLIAMS	OH	39171	3.30
WOOD	OH	39173	3.60
WYANDOT	OH	39175	3.60

County/parish/city	State	FIPS code	Class I differential adjusted for location
ADAIR	OK	40001	3.30
ALFALFA	OK	40003	2.60
ATOKA	OK	40005	3.60
BEAVER	OK	40007	2.50
BECKHAM	OK	40009	2.60
BLAINE	OK	40011	2.90
BRYAN	OK	40013	3.60
CADDO	OK	40015	2.90
CANADIAN	OK	40017	2.90
CARTER	OK	40019	3.30
CHEROKEE	OK	40021	3.30
CHOCTAW	OK	40023	3.60
CIMARRON	OK	40025	2.50
CLEVELAND	OK	40027	3.30
COAL	OK	40029	3.60
COMANCHE	OK	40031	2.90
COTTON	OK	40033	3.30
CRAIG	OK	40035	3.20
CREEK	OK	40037	3.30
CUSTER	OK	40039	2.60
DELAWARE	OK	40041	3.20
DEWEY	OK	40043	2.60
ELLIS	OK	40045	2.60
GARFIELD	OK	40047	2.90
GARVIN	OK	40049	3.30
GRADY	OK	40051	3.30
GRANT	OK	40053	2.90
GREER	OK	40055	2.60
HARMON	OK	40057	2.60
HARPER	OK	40059	2.60
HASKELL	OK	40061	3.60
HUGHES	OK	40063	3.30
JACKSON	OK	40065	2.90
JEFFERSON	OK	40067	3.30
JOHNSTON	OK	40069	3.60
KAY	OK	40071	2.90
KINGFISHER	OK	40073	2.90
KIOWA	OK	40075	2.90
LATIMER	OK	40077	3.60
LE FLORE	OK	40079	3.60
LINCOLN	OK	40081	3.30
LOGAN	OK	40083	3.30
LOVE	OK	40085	3.30
MCCLAIN	OK	40087	3.30
MCCURTAIN	OK	40089	3.60
MCINTOSH	OK	40091	3.30
MAJOR	OK	40093	2.60
MARSHALL	OK	40095	3.60
MAYES	OK	40097	3.20
MURRAY	OK	40099	3.30
MUSKOGEE	OK	40101	3.30
NOBLE	OK	40103	3.20
NOWATA	OK	40105	3.20
OKFUSKEE	OK	40107	3.30
OKLAHOMA	OK	40109	3.30
OKMULGEE	OK	40111	3.30
OSAGE	OK	40113	3.20
OTTAWA	OK	40115	3.20
PAWNEE	OK	40117	3.20
PAYNE	OK	40119	3.30
PITTSBURG	OK	40121	3.60
PONTOTOC	OK	40123	3.30
POTTAWATOMIE	OK	40125	3.30
PUSHMATAHA	OK	40127	3.60
ROGER MILLS	OK	40129	2.60
ROGERS	OK	40131	3.20
SEMINOLE	OK	40133	3.30
SEQUOYAH	OK	40135	3.30
STEPHENS	OK	40137	3.30
TEXAS	OK	40139	2.50
TILLMAN	OK	40141	2.90

County/parish/city	State	FIPS code	Class I differential adjusted for location
TULSA	OK	40143	3.30
WAGONER	OK	40145	3.30
WASHINGTON	OK	40147	3.20
WASHITA	OK	40149	2.60
WOODS	OK	40151	2.60
WOODWARD	OK	40153	2.60
BAKER	OR	41001	2.20
BENTON	OR	41003	2.20
CLACKAMAS	OR	41005	2.70
CLATSOP	OR	41007	2.20
COLUMBIA	OR	41009	2.20
COOS	OR	41011	2.20
CROOK	OR	41013	2.20
CURRY	OR	41015	2.20
DESCHUTES	OR	41017	2.20
DOUGLAS	OR	41019	2.20
GILLIAM	OR	41021	2.20
GRANT	OR	41023	2.20
HARNEY	OR	41025	2.20
HOOD RIVER	OR	41027	2.20
JACKSON	OR	41029	2.20
JEFFERSON	OR	41031	2.20
JOSEPHINE	OR	41033	2.20
KLAMATH	OR	41035	2.20
LAKE	OR	41037	2.20
LANE	OR	41039	2.20
LINCOLN	OR	41041	2.20
LINN	OR	41043	2.20
MALHEUR	OR	41045	1.80
MARION	OR	41047	2.20
MORROW	OR	41049	2.20
MULTNOMAH	OR	41051	2.70
POLK	OR	41053	2.20
SHERMAN	OR	41055	2.20
TILLAMOOK	OR	41057	2.20
UMATILLA	OR	41059	2.20
UNION	OR	41061	2.20
WALLOWA	OR	41063	2.20
WASCO	OR	41065	2.20
WASHINGTON	OR	41067	2.20
WHEELER	OR	41069	2.20
YAMHILL	OR	41071	2.20
ADAMS	PA	42001	4.30
ALLEGHENY	PA	42003	4.00
ARMSTRONG	PA	42005	4.00
BEAVER	PA	42007	4.00
BEDFORD	PA	42009	4.10
BERKS	PA	42011	4.30
BLAIR	PA	42013	4.00
BRADFORD	PA	42015	4.00
BUCKS	PA	42017	4.50
BUTLER	PA	42019	4.00
CAMBRIA	PA	42021	4.00
CAMERON	PA	42023	4.00
CARBON	PA	42025	4.30
CENTRE	PA	42027	4.00
CHESTER	PA	42029	4.30
CLARION	PA	42031	4.00
CLEARFIELD	PA	42033	4.00
CLINTON	PA	42035	4.00
COLUMBIA	PA	42037	4.10
CRAWFORD	PA	42039	4.00
CUMBERLAND	PA	42041	4.20
DAUPHIN	PA	42043	4.20
DELAWARE	PA	42045	4.40
ELK	PA	42047	4.00
ERIE	PA	42049	3.90
FAYETTE	PA	42051	4.00
FOREST	PA	42053	4.00
FRANKLIN	PA	42055	4.20
FULTON	PA	42057	4.10

County/parish/city	State	FIPS code	Class I differential adjusted for location
GREENE	PA	42059	4.00
HUNTINGDON	PA	42061	4.10
INDIANA	PA	42063	4.00
JEFFERSON	PA	42065	4.00
JUNIATA	PA	42067	4.10
LACKAWANNA	PA	42069	4.30
LANCASTER	PA	42071	4.30
LAWRENCE	PA	42073	4.00
LEBANON	PA	42075	4.20
LEHIGH	PA	42077	4.30
LUZERNE	PA	42079	4.20
LYCOMING	PA	42081	4.10
MCKEAN	PA	42083	3.90
MERCER	PA	42085	4.00
MIFFLIN	PA	42087	4.10
MONROE	PA	42089	4.40
MONTGOMERY	PA	42091	4.40
MONTOUR	PA	42093	4.10
NORTHAMPTON	PA	42095	4.40
NORTHUMBERLAND	PA	42097	4.10
PERRY	PA	42099	4.20
PHILADELPHIA	PA	42101	4.60
PIKE	PA	42103	4.40
POTTER	PA	42105	3.90
SCHUYLKILL	PA	42107	4.20
SNYDER	PA	42109	4.10
SOMERSET	PA	42111	4.10
SULLIVAN	PA	42113	4.10
SUSQUEHANNA	PA	42115	4.20
TIOGA	PA	42117	4.00
UNION	PA	42119	4.10
VENANGO	PA	42121	4.00
WARREN	PA	42123	3.90
WASHINGTON	PA	42125	4.00
WAYNE	PA	42127	4.30
WESTMORELAND	PA	42129	4.00
WYOMING	PA	42131	4.20
YORK	PA	42133	4.30
BRISTOL	RI	44001	5.10
KENT	RI	44003	5.10
NEWPORT	RI	44005	5.10
PROVIDENCE	RI	44007	5.10
WASHINGTON	RI	44009	5.10
ABBEVILLE	SC	45001	5.80
AIKEN	SC	45003	6.00
ALLENDALE	SC	45005	6.00
ANDERSON	SC	45007	5.60
BAMBERG	SC	45009	6.00
BARNWELL	SC	45011	6.00
BEAUFORT	SC	45013	6.00
BERKELEY	SC	45015	6.00
CALHOUN	SC	45017	6.00
CHARLESTON	SC	45019	6.00
CHEROKEE	SC	45021	5.60
CHESTER	SC	45023	5.80
CHESTERFIELD	SC	45025	5.80
CLARENDON	SC	45027	6.00
COLLETON	SC	45029	6.00
DARLINGTON	SC	45031	6.00
DILLON	SC	45033	6.00
DORCHESTER	SC	45035	6.00
EDGEFIELD	SC	45037	5.80
FAIRFIELD	SC	45039	5.80
FLORENCE	SC	45041	6.00
GEORGETOWN	SC	45043	6.00
GREENVILLE	SC	45045	5.60
GREENWOOD	SC	45047	5.80
HAMPTON	SC	45049	6.00
HORRY	SC	45051	6.00
JASPER	SC	45053	6.00
KERSHAW	SC	45055	6.00

County/parish/city	State	FIPS code	Class I differential adjusted for location
LANCASTER	SC	45057	5.80
LAURENS	SC	45059	5.80
LEE	SC	45061	6.00
LEXINGTON	SC	45063	6.00
MCCORMICK	SC	45065	5.80
MARION	SC	45067	6.00
MARLBORO	SC	45069	5.80
NEWBERRY	SC	45071	5.80
OONEE	SC	45073	5.60
ORANGEBURG	SC	45075	6.00
PICKENS	SC	45077	5.60
RICHLAND	SC	45079	6.00
SALUDA	SC	45081	5.80
SPARTANBURG	SC	45083	5.60
SUMTER	SC	45085	6.00
UNION	SC	45087	5.80
WILLIAMSBURG	SC	45089	6.00
YORK	SC	45091	5.60
AURORA	SD	46003	2.60
BEADLE	SD	46005	2.60
BENNETT	SD	46007	2.40
BON HOMME	SD	46009	2.60
BROOKINGS	SD	46011	2.60
BROWN	SD	46013	2.60
BRULE	SD	46015	2.50
BUFFALO	SD	46017	2.50
BUTTE	SD	46019	2.40
CAMPBELL	SD	46021	2.50
CHARLES MIX	SD	46023	2.50
CLARK	SD	46025	2.60
CLAY	SD	46027	2.60
CODINGTON	SD	46029	2.60
CORSON	SD	46031	2.40
CUSTER	SD	46033	2.40
DAVISON	SD	46035	2.60
DAY	SD	46037	2.60
DEUEL	SD	46039	2.60
DEWEY	SD	46041	2.40
DOUGLAS	SD	46043	2.60
EDMUNDS	SD	46045	2.50
FALL RIVER	SD	46047	2.40
FAULK	SD	46049	2.50
GRANT	SD	46051	2.60
GREGORY	SD	46053	2.50
HAAKON	SD	46055	2.40
HAMLIN	SD	46057	2.60
HAND	SD	46059	2.50
HANSON	SD	46061	2.60
HARDING	SD	46063	2.40
HUGHES	SD	46065	2.50
HUTCHINSON	SD	46067	2.60
HYDE	SD	46069	2.50
JACKSON	SD	46071	2.40
JERAULD	SD	46073	2.60
JONES	SD	46075	2.40
KINGSBURY	SD	46077	2.60
LAKE	SD	46079	2.60
LAWRENCE	SD	46081	2.40
LINCOLN	SD	46083	2.60
LYMAN	SD	46085	2.50
MCCOOK	SD	46087	2.60
MCPHERSON	SD	46089	2.50
MARSHALL	SD	46091	2.60
MEADE	SD	46093	2.40
MELLETTE	SD	46095	2.40
MINER	SD	46097	2.60
MINNEHAHA	SD	46099	2.60
MOODY	SD	46101	2.60
OGDALA LAKOTA	SD	46102	2.40
PENNINGTON	SD	46103	2.40
PERKINS	SD	46105	2.40

County/parish/city	State	FIPS code	Class I differential adjusted for location
POTTER	SD	46107	2.50
ROBERTS	SD	46109	2.60
SANBORN	SD	46111	2.60
SHANNON	SD	46113	0.00
SPINK	SD	46115	2.60
STANLEY	SD	46117	2.40
SULLY	SD	46119	2.50
TODD	SD	46121	2.40
TRIPP	SD	46123	2.50
TURNER	SD	46125	2.60
UNION	SD	46127	2.60
WALWORTH	SD	46129	2.50
YANKTON	SD	46135	2.60
ZIEBACH	SD	46137	2.40
ANDERSON	TN	47001	4.90
BEDFORD	TN	47003	4.90
BENTON	TN	47005	4.60
BLEDSE	TN	47007	4.90
BLOUNT	TN	47009	5.20
BRADLEY	TN	47011	5.20
CAMPBELL	TN	47013	4.90
CANNON	TN	47015	4.90
CARROLL	TN	47017	4.60
CARTER	TN	47019	5.20
CHEATHAM	TN	47021	4.60
CHESTER	TN	47023	4.60
CLAIBORNE	TN	47025	4.90
CLAY	TN	47027	4.60
COCKE	TN	47029	5.20
COFFEE	TN	47031	4.90
CROCKETT	TN	47033	4.30
CUMBERLAND	TN	47035	4.90
DAVIDSON	TN	47037	4.60
DECATUR	TN	47039	4.60
DE KALB	TN	47041	4.90
DICKSON	TN	47043	4.60
DYER	TN	47045	4.30
FAYETTE	TN	47047	4.60
FENTRESS	TN	47049	4.60
FRANKLIN	TN	47051	5.20
GIBSON	TN	47053	4.30
GILES	TN	47055	4.90
GRAINGER	TN	47057	4.90
GREENE	TN	47059	5.20
GRUNDY	TN	47061	4.90
HAMBLE	TN	47063	5.20
HAMILTON	TN	47065	5.20
HANCOCK	TN	47067	4.90
HARDEMAN	TN	47069	4.60
HARDIN	TN	47071	4.90
HAWKINS	TN	47073	5.20
HAYWOOD	TN	47075	4.60
HENDERSON	TN	47077	4.60
HENRY	TN	47079	4.30
HICKMAN	TN	47081	4.60
HOUSTON	TN	47083	4.60
HUMPHREYS	TN	47085	4.60
JACKSON	TN	47087	4.60
JEFFERSON	TN	47089	5.20
JOHNSON	TN	47091	5.20
KNOX	TN	47093	4.90
LAKE	TN	47095	4.30
LAUDERDALE	TN	47097	4.30
LAWRENCE	TN	47099	4.90
LEWIS	TN	47101	4.90
LINCOLN	TN	47103	5.20
LOUDON	TN	47105	5.20
MCMINN	TN	47107	5.20
MCNAIRY	TN	47109	4.90
MACON	TN	47111	4.60
MADISON	TN	47113	4.60

County/parish/city	State	FIPS code	Class I differential adjusted for location
MARION	TN	47115	5.20
MARSHALL	TN	47117	4.90
MAURY	TN	47119	4.90
MEIGS	TN	47121	5.20
MONROE	TN	47123	5.20
MONTGOMERY	TN	47125	4.30
MOORE	TN	47127	4.90
MORGAN	TN	47129	4.90
OBION	TN	47131	4.30
OVERTON	TN	47133	4.60
PERRY	TN	47135	4.60
PICKETT	TN	47137	4.60
POLK	TN	47139	5.40
PUTNAM	TN	47141	4.60
RHEA	TN	47143	4.90
ROANE	TN	47145	4.90
ROBERTSON	TN	47147	4.60
RUTHERFORD	TN	47149	4.60
SCOTT	TN	47151	4.90
SEQUATCHIE	TN	47153	5.20
SEVIER	TN	47155	5.20
SHELBY	TN	47157	4.60
SMITH	TN	47159	4.60
STEWART	TN	47161	4.30
SULLIVAN	TN	47163	5.20
SUMNER	TN	47165	4.60
TIPTON	TN	47167	4.60
TROUSDALE	TN	47169	4.60
UNICOI	TN	47171	5.40
UNION	TN	47173	4.90
VAN BUREN	TN	47175	4.90
WARREN	TN	47177	4.90
WASHINGTON	TN	47179	5.20
WAYNE	TN	47181	4.90
WEAKLEY	TN	47183	4.30
WHITE	TN	47185	4.90
WILLIAMSON	TN	47187	4.60
WILSON	TN	47189	4.60
ANDERSON	TX	48001	4.00
ANDREWS	TX	48003	2.90
ANGELINA	TX	48005	4.60
ARANSAS	TX	48007	4.60
ARCHER	TX	48009	3.30
ARMSTRONG	TX	48011	2.50
ATASCOSA	TX	48013	4.30
AUSTIN	TX	48015	4.30
BAILEY	TX	48017	2.50
BANDERA	TX	48019	4.00
BASTROP	TX	48021	4.30
BAYLOR	TX	48023	2.90
BEE	TX	48025	4.60
BELL	TX	48027	4.00
BEXAR	TX	48029	4.30
BLANCO	TX	48031	4.00
BORDEN	TX	48033	2.90
BOSQUE	TX	48035	3.60
BOWIE	TX	48037	4.00
BRAZORIA	TX	48039	4.80
BRAZOS	TX	48041	4.30
BREWSTER	TX	48043	3.30
BRISCOE	TX	48045	2.50
BROOKS	TX	48047	4.60
BROWN	TX	48049	3.60
BURLESON	TX	48051	4.30
BURNET	TX	48053	4.00
CALDWELL	TX	48055	4.30
CALHOUN	TX	48057	4.60
CALLAHAN	TX	48059	3.30
CAMERON	TX	48061	4.60
CAMP	TX	48063	3.70
CARSON	TX	48065	2.50

County/parish/city	State	FIPS code	Class I differential adjusted for location
CASS	TX	48067	4.00
CASTRO	TX	48069	2.50
CHAMBERS	TX	48071	4.80
CHEROKEE	TX	48073	4.00
CHILDRESS	TX	48075	2.60
CLAY	TX	48077	3.30
COCHRAN	TX	48079	2.50
COKE	TX	48081	3.30
COLEMAN	TX	48083	3.60
COLLIN	TX	48085	3.70
COLLINGSWORTH	TX	48087	2.60
COLORADO	TX	48089	4.30
COMAL	TX	48091	4.00
COMANCHE	TX	48093	3.60
CONCHO	TX	48095	3.60
COOKE	TX	48097	3.30
CORYELL	TX	48099	4.00
COTTLE	TX	48101	2.60
CRANE	TX	48103	2.90
CROCKETT	TX	48105	3.30
CROSBY	TX	48107	2.60
CULBERSON	TX	48109	2.90
DALLAM	TX	48111	2.50
DALLAS	TX	48113	3.70
DAWSON	TX	48115	2.90
DEAF SMITH	TX	48117	2.50
DELTA	TX	48119	3.70
DENTON	TX	48121	3.70
DE WITT	TX	48123	4.30
DICKENS	TX	48125	2.60
DIMMIT	TX	48127	4.00
DONLEY	TX	48129	2.50
DUVAL	TX	48131	4.60
EASTLAND	TX	48133	3.60
ECTOR	TX	48135	2.90
EDWARDS	TX	48137	3.60
ELLIS	TX	48139	3.70
EL PASO	TX	48141	2.70
ERATH	TX	48143	3.60
FALLS	TX	48145	4.00
FANNIN	TX	48147	3.70
FAYETTE	TX	48149	4.30
FISHER	TX	48151	2.90
FLOYD	TX	48153	2.60
FOARD	TX	48155	2.90
FORT BEND	TX	48157	4.60
FRANKLIN	TX	48159	3.70
FREESTONE	TX	48161	4.00
FRIO	TX	48163	4.30
GAINES	TX	48165	2.60
GALVESTON	TX	48167	4.80
GARZA	TX	48169	2.90
GILLESPIE	TX	48171	4.00
GLASSCOCK	TX	48173	3.30
GOLIAD	TX	48175	4.60
GONZALES	TX	48177	4.30
GRAY	TX	48179	2.50
GRAYSON	TX	48181	3.70
GREGG	TX	48183	4.00
GRIMES	TX	48185	4.60
GUADALUPE	TX	48187	4.30
HALE	TX	48189	2.50
HALL	TX	48191	2.50
HAMILTON	TX	48193	3.60
HANSFORD	TX	48195	2.50
HARDEMAN	TX	48197	2.90
HARDIN	TX	48199	4.80
HARRIS	TX	48201	4.80
HARRISON	TX	48203	4.00
HARTLEY	TX	48205	2.50
HASKELL	TX	48207	2.90

County/parish/city	State	FIPS code	Class I differential adjusted for location
HAYS	TX	48209	4.00
HEMPHILL	TX	48211	2.60
HENDERSON	TX	48213	3.70
HIDALGO	TX	48215	4.60
HILL	TX	48217	3.70
HOCKLEY	TX	48219	2.60
HOOD	TX	48221	3.70
HOPKINS	TX	48223	3.70
HOUSTON	TX	48225	4.00
HOWARD	TX	48227	2.90
HUDSPETH	TX	48229	2.70
HUNT	TX	48231	3.70
HUTCHINSON	TX	48233	2.50
IRION	TX	48235	3.30
JACK	TX	48237	3.30
JACKSON	TX	48239	4.60
JASPER	TX	48241	4.80
JEFF DAVIS	TX	48243	2.90
JEFFERSON	TX	48245	4.80
JIM HOGG	TX	48247	4.60
JIM WELLS	TX	48249	4.60
JOHNSON	TX	48251	3.70
JONES	TX	48253	3.30
KARNES	TX	48255	4.30
KAUFMAN	TX	48257	3.70
KENDALL	TX	48259	4.00
KENEDY	TX	48261	4.60
KENT	TX	48263	2.90
KERR	TX	48265	4.00
KIMBLE	TX	48267	3.60
KING	TX	48269	2.90
KINNEY	TX	48271	4.00
KLEBERG	TX	48273	4.60
KNOX	TX	48275	2.90
LAMAR	TX	48277	3.70
LAMB	TX	48279	2.50
LAMPASAS	TX	48281	4.00
LA SALLE	TX	48283	4.30
LAVACA	TX	48285	4.30
LEE	TX	48287	4.30
LEON	TX	48289	4.00
LIBERTY	TX	48291	4.80
LIMESTONE	TX	48293	4.00
LIPSCOMB	TX	48295	2.60
LIVE OAK	TX	48297	4.30
LLANO	TX	48299	4.00
LOVING	TX	48301	2.90
LUBBOCK	TX	48303	2.60
LYNN	TX	48305	2.90
MCCULLOCH	TX	48307	3.60
MCLENNAN	TX	48309	4.00
MCMULLEN	TX	48311	4.30
MADISON	TX	48313	4.00
MARION	TX	48315	4.00
MARTIN	TX	48317	2.90
MASON	TX	48319	3.60
MATAGORDA	TX	48321	4.80
MAVERICK	TX	48323	4.00
MEDINA	TX	48325	4.00
MENARD	TX	48327	3.60
MIDLAND	TX	48329	2.90
MILAM	TX	48331	4.00
MILLS	TX	48333	3.60
MITCHELL	TX	48335	3.30
MONTAGUE	TX	48337	3.30
MONTGOMERY	TX	48339	4.80
MOORE	TX	48341	2.50
MORRIS	TX	48343	3.70
MOTLEY	TX	48345	2.60
NACOGDOCHES	TX	48347	4.00
NAVARRO	TX	48349	3.70

County/parish/city	State	FIPS code	Class I differential adjusted for location
NEWTON	TX	48351	4.80
NOLAN	TX	48353	3.30
NUECES	TX	48355	4.60
OCHILTREE	TX	48357	2.50
OLDHAM	TX	48359	2.50
ORANGE	TX	48361	4.80
PALO PINTO	TX	48363	3.30
PANOLA	TX	48365	4.00
PARKER	TX	48367	3.70
PARMER	TX	48369	2.50
PECOS	TX	48371	3.30
POLK	TX	48373	4.60
POTTER	TX	48375	2.50
PRESIDIO	TX	48377	2.90
RAINS	TX	48379	3.70
RANDALL	TX	48381	2.50
REAGAN	TX	48383	3.30
REAL	TX	48385	4.00
RED RIVER	TX	48387	3.70
REEVES	TX	48389	2.90
REFUGIO	TX	48391	4.60
ROBERTS	TX	48393	2.50
ROBERTSON	TX	48395	4.00
ROCKWALL	TX	48397	3.70
RUNNELS	TX	48399	3.30
RUSK	TX	48401	4.00
SABINE	TX	48403	4.60
SAN AUGUSTINE	TX	48405	4.60
SAN JACINTO	TX	48407	4.60
SAN PATRICIO	TX	48409	4.60
SAN SABA	TX	48411	3.60
SCHLEICHER	TX	48413	3.60
SCURRY	TX	48415	2.90
SHACKELFORD	TX	48417	3.30
SHELBY	TX	48419	4.60
SHERMAN	TX	48421	2.50
SMITH	TX	48423	3.70
SOMERVELL	TX	48425	3.70
STARR	TX	48427	4.60
STEPHENS	TX	48429	3.30
STERLING	TX	48431	3.30
STONEWALL	TX	48433	2.90
SUTTON	TX	48435	3.60
SWISHER	TX	48437	2.50
TARRANT	TX	48439	3.70
TAYLOR	TX	48441	3.30
TERRELL	TX	48443	3.30
TERRY	TX	48445	2.60
THROCKMORTON	TX	48447	3.30
TITUS	TX	48449	3.70
TOM GREEN	TX	48451	3.30
TRAVIS	TX	48453	4.00
TRINITY	TX	48455	4.60
TYLER	TX	48457	4.80
UPSHUR	TX	48459	3.70
UPTON	TX	48461	3.30
UVALDE	TX	48463	4.00
VAL VERDE	TX	48465	3.60
VAN ZANDT	TX	48467	3.70
VICTORIA	TX	48469	4.60
WALKER	TX	48471	4.60
WALLER	TX	48473	4.60
WARD	TX	48475	2.90
WASHINGTON	TX	48477	4.30
WEBB	TX	48479	4.30
WHARTON	TX	48481	4.60
WHEELER	TX	48483	2.60
WICHITA	TX	48485	2.90
WILBARGER	TX	48487	2.90
WILLACY	TX	48489	4.60
WILLIAMSON	TX	48491	4.00

County/parish/city	State	FIPS code	Class I differential adjusted for location
WILSON	TX	48493	4.30
WINKLER	TX	48495	2.90
WISE	TX	48497	3.30
WOOD	TX	48499	3.70
YOAKUM	TX	48501	2.60
YOUNG	TX	48503	3.30
ZAPATA	TX	48505	4.30
ZAVALA	TX	48507	4.00
BEAVER	UT	49001	2.40
BOX ELDER	UT	49003	2.00
CACHE	UT	49005	2.20
CARBON	UT	49007	2.20
DAGGETT	UT	49009	2.30
DAVIS	UT	49011	2.20
DUCHESNE	UT	49013	2.20
EMERY	UT	49015	2.30
GARFIELD	UT	49017	2.30
GRAND	UT	49019	2.30
IRON	UT	49021	2.40
JUAB	UT	49023	2.20
KANE	UT	49025	2.40
MILLARD	UT	49027	2.30
MORGAN	UT	49029	2.20
PIUTE	UT	49031	2.30
RICH	UT	49033	2.20
SALT LAKE	UT	49035	2.20
SAN JUAN	UT	49037	2.30
SANPETE	UT	49039	2.20
SEVIER	UT	49041	2.30
SUMMIT	UT	49043	2.20
TOOELE	UT	49045	2.20
UINTAH	UT	49047	2.30
UTAH	UT	49049	2.20
WASATCH	UT	49051	2.20
WASHINGTON	UT	49053	2.50
WAYNE	UT	49055	2.30
WEBER	UT	49057	2.20
ADDISON	VT	50001	4.30
BENNINGTON	VT	50003	4.50
CALEDONIA	VT	50005	4.30
CHITTENDEN	VT	50007	4.30
ESSEX	VT	50009	4.20
FRANKLIN	VT	50011	4.20
GRAND ISLE	VT	50013	4.20
LAMOILLE	VT	50015	4.30
ORANGE	VT	50017	4.30
ORLEANS	VT	50019	4.20
RUTLAND	VT	50021	4.30
WASHINGTON	VT	50023	4.30
WINDHAM	VT	50025	4.50
WINDSOR	VT	50027	4.50
ACCOMACK	VA	51001	4.80
ALBEMARLE	VA	51003	4.50
ALLEGHANY	VA	51005	4.50
AMELIA	VA	51007	4.80
AMHERST	VA	51009	4.50
APPOMATTOX	VA	51011	4.80
ARLINGTON	VA	51013	4.60
AUGUSTA	VA	51015	4.30
BATH	VA	51017	4.50
BEDFORD	VA	51019	4.80
BLAND	VA	51021	4.80
BOTETOURT	VA	51023	4.80
BRUNSWICK	VA	51025	5.20
BUCHANAN	VA	51027	4.80
BUCKINGHAM	VA	51029	4.80
CAMPBELL	VA	51031	4.80
CAROLINE	VA	51033	4.80
CARROLL	VA	51035	5.20
CHARLES CITY	VA	51036	5.20
CHARLOTTE	VA	51037	4.80

County/parish/city	State	FIPS code	Class I differential adjusted for location
CHESTERFIELD	VA	51041	4.80
CLARKE	VA	51043	4.30
CRAIG	VA	51045	4.80
CULPEPER	VA	51047	4.50
CUMBERLAND	VA	51049	4.80
DICKENSON	VA	51051	4.80
DINWIDDIE	VA	51053	5.20
ESSEX	VA	51057	4.80
FAIRFAX	VA	51059	4.60
FAUQUIER	VA	51061	4.50
FLOYD	VA	51063	5.20
FLUVANNA	VA	51065	4.50
FRANKLIN COUNTY	VA	51067	4.80
FREDERICK	VA	51069	4.30
GILES	VA	51071	4.80
GLOUCESTER	VA	51073	5.20
GOOCHLAND	VA	51075	4.80
GRAYSON	VA	51077	5.20
GREENE	VA	51079	4.50
GREENSVILLE	VA	51081	5.20
HALIFAX	VA	51083	5.20
HANOVER	VA	51085	4.80
HENRICO	VA	51087	4.80
HENRY	VA	51089	5.20
HIGHLAND	VA	51091	4.30
ISLE OF WIGHT	VA	51093	5.20
JAMES CITY	VA	51095	5.20
KING AND QUEEN	VA	51097	4.80
KING GEORGE	VA	51099	4.80
KING WILLIAM	VA	51101	4.80
LANCASTER	VA	51103	5.20
LEE	VA	51105	4.80
LOUDOUN	VA	51107	4.40
LOUISA	VA	51109	4.50
LUNENBURG	VA	51111	5.20
MADISON	VA	51113	4.50
MATHEWS	VA	51115	5.20
MECKLENBURG	VA	51117	5.20
MIDDLESEX	VA	51119	5.20
MONTGOMERY	VA	51121	4.80
NELSON	VA	51125	4.50
NEW KENT	VA	51127	5.20
NORTHAMPTON	VA	51131	4.80
NORTHUMBERLAND	VA	51133	4.80
NOTTOWAY	VA	51135	4.80
ORANGE	VA	51137	4.50
PAGE	VA	51139	4.30
PATRICK	VA	51141	5.20
PITTSYLVANIA	VA	51143	5.20
POWHATAN	VA	51145	4.80
PRINCE EDWARD	VA	51147	4.80
PRINCE GEORGE	VA	51149	5.20
PRINCE WILLIAM	VA	51153	4.50
PULASKI	VA	51155	4.80
RAPPAHANNOCK	VA	51157	4.50
RICHMOND	VA	51159	4.80
ROANOKE	VA	51161	4.80
ROCKBRIDGE	VA	51163	4.50
ROCKINGHAM	VA	51165	4.30
RUSSELL	VA	51167	4.80
SCOTT	VA	51169	4.80
SHENANDOAH	VA	51171	4.30
SMYTH	VA	51173	5.20
SOUTHAMPTON	VA	51175	5.20
SPOTSYLVANIA	VA	51177	4.50
STAFFORD	VA	51179	4.50
SURRY	VA	51181	5.20
SUSSEX	VA	51183	5.20
TAZEWELL	VA	51185	4.80
WARREN	VA	51187	4.30
WASHINGTON	VA	51191	5.20

County/parish/city	State	FIPS code	Class I differential adjusted for location
WESTMORELAND	VA	51193	4.80
WISE	VA	51195	4.80
WYTHE	VA	51197	5.20
YORK	VA	51199	5.20
ALEXANDRIA CITY	VA	51510	4.50
BRISTOL CITY	VA	51520	5.20
BUENA VISTA CITY	VA	51530	4.50
CHARLOTTESVILLE CITY	VA	51540	4.50
CHESAPEAKE CITY	VA	51550	5.20
COLONIAL HEIGHTS CITY	VA	51570	4.80
COVINGTON CITY	VA	51580	4.50
DANVILLE CITY	VA	51590	5.20
EMPORIA CITY	VA	51595	5.20
FAIRFAX CITY	VA	51600	4.50
FALLS CHURCH CITY	VA	51610	4.50
FRANKLIN CITY	VA	51620	5.20
FREDERICKSBURG CITY	VA	51630	4.50
GALAX CITY	VA	51640	5.20
HAMPTON CITY	VA	51650	5.20
HARRISONBURG CITY	VA	51660	4.30
HOPEWELL CITY	VA	51670	5.20
LEXINGTON CITY	VA	51678	4.50
LYNCHBURG CITY	VA	51680	4.80
MANASSAS CITY	VA	51683	4.50
MANASSAS PARK CITY	VA	51685	4.50
MARTINSVILLE CITY	VA	51690	5.20
NEWPORT NEWS CITY	VA	51700	5.20
NORFOLK CITY	VA	51710	5.20
NORTON CITY	VA	51720	4.80
PETERSBURG CITY	VA	51730	5.20
POQUOSON CITY	VA	51735	5.20
PORTSMOUTH CITY	VA	51740	5.20
RADFORD CITY	VA	51750	4.80
RICHMOND CITY	VA	51760	4.80
ROANOKE CITY	VA	51770	4.80
SALEM CITY	VA	51775	4.80
STAUNTON CITY	VA	51790	4.30
SUFFOLK CITY	VA	51800	5.20
VIRGINIA BEACH CITY	VA	51810	5.20
WAYNESBORO CITY	VA	51820	4.30
WILLIAMSBURG CITY	VA	51830	5.20
WINCHESTER CITY	VA	51840	4.30
ADAMS	WA	53001	2.20
ASOTIN	WA	53003	2.20
BENTON	WA	53005	2.20
CHELAN	WA	53007	2.40
CLALLAM	WA	53009	2.40
CLARK	WA	53011	2.70
COLUMBIA	WA	53013	2.20
COWLITZ	WA	53015	2.40
DOUGLAS	WA	53017	2.40
FERRY	WA	53019	2.40
FRANKLIN	WA	53021	2.20
GARFIELD	WA	53023	2.20
GRANT	WA	53025	2.20
GRAYS HARBOR	WA	53027	2.40
ISLAND	WA	53029	2.40
JEFFERSON	WA	53031	2.40
KING	WA	53033	2.70
KITSAP	WA	53035	2.40
KITTITAS	WA	53037	2.40
KLICKITAT	WA	53039	2.20
LEWIS	WA	53041	2.40
LINCOLN	WA	53043	2.40
MASON	WA	53045	2.40
OKANOGAN	WA	53047	2.40
PACIFIC	WA	53049	2.40
PEND OREILLE	WA	53051	2.40
PIERCE	WA	53053	2.40
SAN JUAN	WA	53055	2.40
SKAGIT	WA	53057	2.40

County/parish/city	State	FIPS code	Class I differential adjusted for location
SKAMANIA	WA	53059	2.40
SNOHOMISH	WA	53061	2.40
SPOKANE	WA	53063	2.40
STEVENS	WA	53065	2.40
THURSTON	WA	53067	2.40
WAHKIAKUM	WA	53069	2.40
WALLA WALLA	WA	53071	2.20
WHATCOM	WA	53073	2.40
WHITMAN	WA	53075	2.20
YAKIMA	WA	53077	2.20
BARBOUR	WV	54001	4.30
BERKELEY	WV	54003	4.30
BOONE	WV	54005	4.50
BRAXTON	WV	54007	4.30
BROOKE	WV	54009	4.00
CABELL	WV	54011	4.30
CALHOUN	WV	54013	4.30
CLAY	WV	54015	4.30
DODDRIDGE	WV	54017	4.30
FAYETTE	WV	54019	4.50
GILMER	WV	54021	4.30
GRANT	WV	54023	4.30
GREENBRIER	WV	54025	4.50
HAMPSHIRE	WV	54027	4.30
HANCOCK	WV	54029	4.00
HARDY	WV	54031	4.30
HARRISON	WV	54033	4.30
JACKSON	WV	54035	4.30
JEFFERSON	WV	54037	4.30
KANAWHA	WV	54039	4.30
LEWIS	WV	54041	4.30
LINCOLN	WV	54043	4.50
LOGAN	WV	54045	4.50
MCDOWELL	WV	54047	4.80
MARION	WV	54049	4.00
MARSHALL	WV	54051	4.00
MASON	WV	54053	4.30
MERCER	WV	54055	4.80
MINERAL	WV	54057	4.10
MINGO	WV	54059	4.50
MONONGALIA	WV	54061	4.10
MONROE	WV	54063	4.80
MORGAN	WV	54065	4.30
NICHOLAS	WV	54067	4.50
OHIO	WV	54069	4.00
PENDLETON	WV	54071	4.30
PLEASANTS	WV	54073	4.00
POCAHONTAS	WV	54075	4.50
PRESTON	WV	54077	4.10
PUTNAM	WV	54079	4.30
RALEIGH	WV	54081	4.50
RANDOLPH	WV	54083	4.30
RITCHIE	WV	54085	4.30
ROANE	WV	54087	4.30
SUMMERS	WV	54089	4.80
TAYLOR	WV	54091	4.30
TUCKER	WV	54093	4.30
TYLER	WV	54095	4.00
UPSHUR	WV	54097	4.30
WAYNE	WV	54099	4.50
WEBSTER	WV	54101	4.50
WETZEL	WV	54103	4.00
WIRT	WV	54105	4.30
WOOD	WV	54107	4.00
WYOMING	WV	54109	4.80
ADAMS	WI	55001	2.90
ASHLAND	WI	55003	2.80
BARRON	WI	55005	2.80
BAYFIELD	WI	55007	2.80
BROWN	WI	55009	2.90
BUFFALO	WI	55011	2.80

County/parish/city	State	FIPS code	Class I differential adjusted for location
BURNETT	WI	55013	2.80
CALUMET	WI	55015	2.90
CHIPPEWA	WI	55017	2.80
CLARK	WI	55019	2.80
COLUMBIA	WI	55021	2.90
CRAWFORD	WI	55023	2.90
DANE	WI	55025	2.90
DODGE	WI	55027	2.90
DOOR	WI	55029	2.90
DOUGLAS	WI	55031	2.80
DUNN	WI	55033	2.80
EAU CLAIRE	WI	55035	2.80
FLORENCE	WI	55037	2.80
FOND DU LAC	WI	55039	2.90
FOREST	WI	55041	2.80
GRANT	WI	55043	2.90
GREEN	WI	55045	2.90
GREEN LAKE	WI	55047	2.90
IOWA	WI	55049	2.90
IRON	WI	55051	2.80
JACKSON	WI	55053	2.80
JEFFERSON	WI	55055	2.90
JUNEAU	WI	55057	2.90
KENOSHA	WI	55059	3.10
KEWAUNEE	WI	55061	2.90
LA CROSSE	WI	55063	2.90
LAFAYETTE	WI	55065	2.90
LANGLADE	WI	55067	2.90
LINCOLN	WI	55069	2.80
MANITOWOC	WI	55071	2.90
MARATHON	WI	55073	2.90
MARINETTE	WI	55075	2.90
MARQUETTE	WI	55077	2.90
MENOMINEE	WI	55078	2.90
MILWAUKEE	WI	55079	3.10
MONROE	WI	55081	2.90
OCONTO	WI	55083	2.90
ONEIDA	WI	55085	2.80
OUTAGAMIE	WI	55087	2.90
OZAUKEE	WI	55089	3.10
PEPIN	WI	55091	2.80
PIERCE	WI	55093	2.80
POLK	WI	55095	2.80
PORTAGE	WI	55097	2.90
PRICE	WI	55099	2.80
RACINE	WI	55101	3.10
RICHLAND	WI	55103	2.90
ROCK	WI	55105	2.90
RUSK	WI	55107	2.80
ST. CROIX	WI	55109	2.80
SAUK	WI	55111	2.90
SAWYER	WI	55113	2.80
SHAWANO	WI	55115	2.90
SHEBOYGAN	WI	55117	2.90
TAYLOR	WI	55119	2.80
TREMPEALEAU	WI	55121	2.80
VERNON	WI	55123	2.90
VILAS	WI	55125	2.80
WALWORTH	WI	55127	3.10
WASHBURN	WI	55129	2.80
WASHINGTON	WI	55131	2.90
WAUKESHA	WI	55133	2.90
WAUPACA	WI	55135	2.90
WAUSHARA	WI	55137	2.90
WINNEBAGO	WI	55139	2.90
WOOD	WI	55141	2.90
ALBANY	WY	56001	2.40
BIG HORN	WY	56003	2.40
CAMPBELL	WY	56005	2.40
CARBON	WY	56007	2.40
CONVERSE	WY	56009	2.40

County/parish/city	State	FIPS code	Class I differential adjusted for location
CROOK	WY	56011	2.40
FREMONT	WY	56013	2.40
GOSHEN	WY	56015	2.40
HOT SPRINGS	WY	56017	2.40
JOHNSON	WY	56019	2.40
LARAMIE	WY	56021	2.50
LINCOLN	WY	56023	2.20
NATRONA	WY	56025	2.40
NIOBRARA	WY	56027	2.40
PARK	WY	56029	2.20
PLATTE	WY	56031	2.40
SHERIDAN	WY	56033	2.40
SUBLETTE	WY	56035	2.20
SWEETWATER	WY	56037	2.40
TETON	WY	56039	2.20
UINTA	WY	56041	2.20
WASHAKIE	WY	56043	2.40
WESTON	WY	56045	2.40

■ 5. Amend § 1000.76 by

■ a. Removing the words “and § 1135.11 of this chapter” wherever they appear; and

■ b. Revising and republishing paragraphs (a)(2) through (4) and paragraph (c).

The revisions and republications read as follows:

§ 1000.76 Payments by a handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

(2) For orders with multiple component pricing, compute a Class I differential price by subtracting Class III price from the current month's applicable Class I price. Multiply the pounds remaining after the computation in paragraph (a)(1)(iii) of this section by the amount by which the Class I differential price exceeds the producer price differential, both prices to be applicable at the location of the partially regulated distributing plant except that neither the adjusted Class I differential price nor the adjusted producer price differential shall be less than zero;

(3) For orders with skim milk and butterfat pricing, multiply the remaining pounds by the amount by which the applicable Class I price exceeds the uniform price, both prices to be applicable at the location of the partially regulated distributing plant except that neither the adjusted Class I price nor the adjusted uniform price differential shall be less than the lowest announced class price; and

(4) Unless the payment option described in paragraph (d) of this section is selected, add the amount obtained from multiplying the pounds of labeled reconstituted milk included

in paragraph (a)(1)(iii) of this section by any positive difference between the applicable Class I price at the location of the partially regulated distributing plant (less \$1.00 if the reconstituted milk is labeled as such) and the Class IV price.

* * * * *

(c) The operator of a partially regulated distributing plant that is subject to marketwide pooling of returns under a milk classification and pricing program that is imposed under the authority of a State government shall pay on or before the 25th day after the end of the month (except as provided in § 1000.90) to the market administrator for the producer-settlement fund an amount computed as follows: after completing the computations described in paragraphs (a)(1)(i) and (ii) of this section, determine the value of the remaining pounds of fluid milk products disposed of as route disposition in the marketing area by multiplying the hundredweight of such pounds by the amount, if greater than zero, that remains after subtracting the State program's class prices applicable to such products at the plant's location from the applicable Federal order Class I price at the location of the plant.

* * * * *

PART 1001—MILK IN THE NORTHEAST MARKETING AREA

■ 6. The authority citation for part 1001 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

■ 7. Amend § 1001.60 by:

■ a. Revising the introductory text;

■ b. Redesignating paragraph (i) as paragraph (j); and

■ c. Adding new paragraph (i).

The revision and addition read as follows:

§ 1001.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) of this chapter with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (i) of this section and subtracting from that total amount the value computed in paragraph (j) of this section. Unless otherwise specified, the skim milk, butterfat, and the combined pounds of skim milk and butterfat referred to in this section shall result from the steps set forth in § 1000.44(a), (b), and (c) of this chapter, respectively, and the nonfat components of producer milk in each class shall be based upon the proportion of such components in producer skim milk. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) of this chapter shall be excluded from pricing under this section.

* * * * *

(i) Compute an adjustment for eligible Class I producer milk pursuant to § 1000.43(e) of this chapter by multiplying the Class I skim milk price adjuster computed in § 1000.50(r) of this chapter by the pounds of skim milk eligible in Class I.

* * * * *

**PART 1005—MILK IN THE
APPLACHIAN MARKETING AREA**

■ 8. The authority citation for part 1005 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

■ 9. Amend § 1005.51 by revising paragraph (a) and removing and reserving paragraph (b) to read as follows:

§ 1005.51 Class I differential, adjustments to Class I prices, and Class I price.

(a) The Class I differential shall be the differential established for Mecklenburg County, North Carolina, which is reported in § 1000.52 of this chapter. The Class I price shall be the price computed pursuant to § 1000.50(a) of this chapter for Mecklenburg County, North Carolina.

(b) [Reserved]

■ 10. Amend § 1005.60 by:

- a. Revising the introductory text and paragraph (a);
- b. Removing paragraph (g);
- c. Redesignating paragraph (f) as paragraph (g); and
- d. Adding new paragraph (f).

The revisions and addition read as follows:

§ 1005.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) of this chapter with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (f) of this section and subtracting from that total amount the value computed in paragraph (g) of this section. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) of this chapter shall be excluded from pricing under this section.

(a) Multiply the pounds of skim milk and butterfat in producer milk that were classified in each class pursuant to § 1000.44(c) of this chapter by the applicable skim milk and butterfat prices, and add the resulting amounts;

* * * * *

(f) Compute an adjustment for eligible Class I producer milk pursuant to § 1000.43(e) of this chapter by multiplying the Class I skim milk price adjuster computed in § 1000.50(r) of this chapter by the pounds of skim milk eligible in Class I.

* * * * *

**PART 1006—MILK IN THE FLORIDA
MARKETING AREA**

■ 11. The authority citation for part 1006 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

■ 12. Amend § 1006.51 by revising paragraph (a), removing and reserving paragraph (b), and removing paragraph (c) to read as follows:

§ 1006.51 Class I differential, adjustments to Class I prices, and Class I price.

(a) The Class I differential shall be the differential established for Hillsborough County, Florida, which is reported in § 1000.52 of this chapter. The Class I price shall be the price computed pursuant to § 1000.50(a) of this chapter for Hillsborough County, Florida.

(b) [Reserved]

■ 13. Amend § 1006.60 by:

- a. Revising the introductory text and paragraph (a);
- b. Removing paragraphs (g) through (i);
- c. Redesignating paragraph (f) as paragraph (g); and
- d. Adding new paragraph (f).

The revisions and addition read as follows:

§ 1006.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) of this chapter with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (f) of this section and subtracting from that total amount the value computed in paragraph (g) of this section. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) of this chapter shall be excluded from pricing under this section.

(a) Multiply the pounds of skim milk and butterfat in producer milk that were classified in each class pursuant to § 1000.44(c) of this chapter by the applicable skim milk and butterfat prices, and add the resulting amounts;

* * * * *

(f) Compute an adjustment for eligible Class I producer milk pursuant to § 1000.43(e) of this chapter by multiplying the Class I skim milk price adjuster computed in § 1000.50(r) of this chapter by the pounds of skim milk eligible in Class I.

* * * * *

**PART 1007—MILK IN THE SOUTHEAST
MARKETING AREA**

■ 14. The authority citation for part 1007 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

■ 15. Amend § 1007.51 by revising paragraph (a) and removing and reserving paragraph (b) to read as follows:

§ 1007.51 Class I differential, adjustments to Class I prices, and Class I price.

(a) The Class I differential shall be the differential established for Fulton County, Georgia, which is reported in § 1000.52 of this chapter. The Class I price shall be the price computed pursuant to § 1000.50(a) of this chapter for Fulton County, Georgia.

(b) [Reserved]

■ 16. Amend § 1007.60 by:

- a. Revising the introductory text and paragraph (a);
- b. Removing paragraph (g);
- c. Redesignating paragraph (f) as paragraph (g); and
- d. Adding new paragraph (f).

The revisions and addition read as follows:

§ 1007.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) of this chapter with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (f) of this section and subtracting from that total amount the value computed in paragraph (g) of this section. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) of this chapter shall be excluded from pricing under this section.

(a) Multiply the pounds of skim milk and butterfat in producer milk that were classified in each class pursuant to § 1000.44(c) of this chapter by the applicable skim milk and butterfat prices, and add the resulting amounts;

* * * * *

(f) Compute an adjustment for eligible Class I producer milk pursuant to § 1000.43(e) of this chapter by multiplying the Class I skim milk price adjuster computed in § 1000.50(r) of this chapter by the pounds of skim milk eligible in Class I.

* * * * *

**PART 1030—MILK IN THE UPPER
MIDWEST MARKETING AREA**

■ 17. The authority citation for part 1030 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

■ 18. Amend § 1030.60 by:

- a. Revising the introductory text;
- b. Redesignating paragraphs (j) and (k) as paragraphs (k) and (l); and
- c. Adding new paragraph (j).

The revision and addition read as follows:

§ 1030.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) of this chapter with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (j) of this section and subtracting from that total amount the values computed in paragraphs (k) and (l) of this section. Unless otherwise specified, the skim milk, butterfat, and the combined pounds of skim milk and butterfat referred to in this section shall result from the steps set forth in § 1000.44(a), (b), and (c) of this chapter, respectively, and the nonfat components of producer milk in each class shall be based upon the proportion of such components in producer skim milk. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) of this chapter shall be excluded from pricing under this section.

* * * * *

(j) Compute an adjustment for eligible Class I producer milk pursuant to § 1000.43(e) of this chapter by multiplying the Class I skim milk price adjuster computed in § 1000.50(r) of this chapter by the pounds of skim milk eligible in Class I.

* * * * *

**PART 1032—MILK IN THE CENTRAL
MARKETING AREA**

■ 19. The authority citation for part 1032 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

■ 20. Amend § 1032.60 by:

- a. Revising the introductory text;
- b. Redesignating paragraph (j) as paragraph (k); and
- c. Adding new paragraph (j).

The revision and addition read as follows:

§ 1032.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) of this chapter with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (j) of this section and subtracting from that total amount the value computed in paragraph (k) of this section. Unless otherwise specified, the skim milk, butterfat, and the combined pounds of skim milk and butterfat referred to in this section shall result from the steps set forth in § 1000.44(a), (b), and (c) of this chapter, respectively, and the nonfat components of producer milk in each class shall be based upon the proportion of such components in producer skim milk. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) of this chapter shall be excluded from pricing under this section.

* * * * *

(j) Compute an adjustment for eligible Class I producer milk pursuant to § 1000.43(e) of this chapter by multiplying the Class I skim milk price adjuster computed in § 1000.50(r) of this chapter by the pounds of skim milk eligible in Class I.

* * * * *

**PART 1033—MILK IN THE MIDEAST
MARKETING AREA**

■ 21. The authority citation for part 1033 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

■ 22. Amend § 1033.60 by:

- a. Revising the introductory text;
- b. Redesignating paragraph (j) as paragraph (k); and
- c. Adding new paragraph (j).

The revision and addition read as follows:

§ 1033.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) of this chapter with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (j) of this section and subtracting from that total amount

the value computed in paragraph (k) of this section. Unless otherwise specified, the skim milk, butterfat, and the combined pounds of skim milk and butterfat referred to in this section shall result from the steps set forth in § 1000.44(a), (b), and (c) of this chapter, respectively, and the nonfat components of producer milk in each class shall be based upon the proportion of such components in producer skim milk. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) of this chapter shall be excluded from pricing under this section.

* * * * *

(j) Compute an adjustment for eligible Class I producer milk pursuant to § 1000.43(e) of this chapter by multiplying the Class I skim milk price adjuster computed in § 1000.50(r) of this chapter by the pounds of skim milk eligible in Class I.

* * * * *

**PART 1051—MILK IN THE CALIFORNIA
MARKETING AREA**

■ 23. The authority citation for part 1051 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

■ 24. Amend § 1051.60 by:

- a. Revising the introductory text;
- b. Redesignating paragraph (i) as paragraph (j); and
- c. Adding new paragraph (i).

The revision and addition read as follows:

§ 1051.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) of this chapter with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (i) of this section and subtracting from that total amount the value computed in paragraph (j) of this section. Unless otherwise specified, the skim milk, butterfat, and the combined pounds of skim milk and butterfat referred to in this section shall result from the steps set forth in § 1000.44(a), (b), and (c) of this chapter, respectively, and the nonfat components of producer milk in each class shall be based upon the proportion of such components in producer skim milk. Receipts of nonfluid milk products that are distributed as labeled reconstituted

milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) of this chapter shall be excluded from pricing under this section.

* * * * *

(i) Compute an adjustment for eligible Class I producer milk pursuant to § 1000.43(e) of this chapter by multiplying the Class I skim milk price adjuster computed in § 1000.50(r) of this chapter by the pounds of skim milk eligible in Class I.

* * * * *

PART 1124—MILK IN THE PACIFIC NORTHWEST MARKETING AREA

■ 25. The authority citation for part 1124 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

■ 26. Amend § 1124.60 by:

- a. Revising the introductory text;
- b. Redesignating paragraph (i) as paragraph (j); and
- c. Adding new paragraph (i).

The revision and addition read as follows:

§ 1124.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) of this chapter with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (i) of this section and subtracting from that total amount the value computed in paragraph (j) of this section. Unless otherwise specified, the skim milk, butterfat, and the combined pounds of skim milk and butterfat referred to in this section shall result from the steps set forth in § 1000.44(a), (b), and (c) of this chapter, respectively, and the nonfat components of producer milk in each class shall be based upon the proportion of such components in producer skim milk. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) of this chapter shall be excluded from pricing under this section.

* * * * *

(i) Compute an adjustment for eligible Class I producer milk pursuant to § 1000.43(e) of this chapter by multiplying the Class I skim milk price adjuster computed in § 1000.50(r) of this

chapter by the pounds of skim milk eligible in Class I.

* * * * *

PART 1126—MILK IN THE SOUTHWEST MARKETING AREA

■ 27. The authority citation for part 1126 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

■ 28. Amend § 1126.60 by:

- a. Revising the introductory text;
- b. Redesignating paragraph (j) as paragraph (k); and
- c. Adding new paragraph (j).

The revision and addition read as follows:

§ 1126.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) of this chapter with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (j) of this section and subtracting from that total amount the value computed in paragraph (k) of this section. Unless otherwise specified, the skim milk, butterfat, and the combined pounds of skim milk and butterfat referred to in this section shall result from the steps set forth in § 1000.44(a), (b), and (c) of this chapter, respectively, and the nonfat components of producer milk in each class shall be based upon the proportion of such components in producer skim milk. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) of this chapter shall be excluded from pricing under this section.

* * * * *

(j) Compute an adjustment for eligible Class I producer milk pursuant to § 1000.43(e) of this chapter by multiplying the Class I skim milk price adjuster computed in § 1000.50(r) of this chapter by the pounds of skim milk eligible in Class I.

* * * * *

PART 1131—MILK IN THE ARIZONA MARKETING AREA

■ 29. The authority citation for part 1131 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

■ 30. Amend § 1131.60 by:

- a. Revising the introductory paragraph;

■ b. Redesignating paragraph (f) as paragraph (g); and

■ c. Adding new paragraph (f).

The revision and addition read as follows:

§ 1131.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1000.9(c) of this chapter with respect to milk that was not received at a pool plant by adding the amounts computed in paragraphs (a) through (f) of this section and subtracting from that total amount the value computed in paragraph (g) of this section. Receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another Federal order under § 1000.76(a)(4) or (d) of this chapter shall be excluded from pricing under this section.

* * * * *

(f) Compute an adjustment for eligible Class I producer milk pursuant to § 1000.43(e) of this chapter by multiplying the Class I skim milk price adjuster computed in § 1000.50(r) of this chapter by the pounds of skim milk eligible in Class I.

* * * * *

PART 1170—DAIRY PRODUCT MANDATORY REPORTING

■ 31. The authority citation for part 1170 continues to read as follows:

Authority: 7 U.S.C. 1637–1637b, as amended by Pub. L. 106–532, 114 Stat. 2541; Pub. L. 107–171, 116 Stat. 207; and Pub. L. 111–239, 124 Stat. 2501.

■ 32. Revise and republish § 1170.8(a) to read as follows:

§ 1170.8 Price reporting specifications.

* * * * *

(a) Specifications for Cheddar Cheese Prices:

- (1) Variety: Cheddar cheese.
- (2) Style: 40-pound blocks.
- (3) Age: Not less than 4 days or more than 30 days on date of sale. Exclude cheese that will be aged.
- (4) Grade: Product meets Wisconsin State Brand or USDA Grade A or better standards.
- (5) Color: Colored and within the color range of 6–8 on the National Cheese Institute color chart.
- (6) Packaging: Price should reflect cheese wrapped in a sealed, airtight package in corrugated or solid fiberboard containers with a reinforcing

inner liner or sleeve. Exclude all other packaging costs from the reported price.

(7) Exclude: Intra-company sales, resales of purchased cheese, forward pricing sales (sales in which the selling price was set [not adjusted] 30 or more days before the transaction was completed), cheese produced under faith-based close supervision and marketed at a higher price than the manufacturer's wholesale market price for the basic commodity (for example, kosher cheese produced with a rabbi on site who is actively involved in supervision of the production process), sales under the Dairy Export Incentive Program or other premium-assisted sales (for example, export assistance sales through the Cooperatives Working Together program), and cheese certified as organic by a USDA-accredited certifying agent.

* * * * *

[Note: The following will not appear in the Code of Federal Regulations.]

Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of

practice and procedure effective thereunder (7 CFR part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ ___ to ___,⁶ all inclusive, of the order regulating the handling of milk in the ___⁷ marketing area (7 CFR part ___)⁸ which is annexed hereto; and

II. The following provisions: § ___⁹ Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of ___,¹⁰ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned

hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Secretary in accordance with § 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, the contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature

By (Name) _____

(Title) _____

(Address) _____

(Seal) _____

Attest _____

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2024–27228 Filed 11–29–24; 8:45 am]

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⁶ First and last section of order.

⁷ Name of order.

⁸ Appropriate CFR part number.

⁹ Next consecutive section number.

¹⁰ Appropriate representative period for the order.



FEDERAL REGISTER

Vol. 89

Monday,

No. 231

December 2, 2024

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 80

Administrative Requirements; Pittman-Robertson Wildlife Restoration and
Dingell-Johnson Sport Fish Restoration Acts; Proposed Rule

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 80**

[FWS-HQ-WSFR-2023-0125;
FVWF5110090000-XXX-FF09W11000;
FVWF9410090000-XXX-FF09W11000]

RIN 1018-BB84

Administrative Requirements; Pittman-Robertson Wildlife Restoration and Dingell-Johnson Sport Fish Restoration Acts

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, are proposing to update the regulations pertaining to Federal financial assistance programs and subprograms authorized under the Pittman-Robertson Wildlife Restoration Act and the Dingell-Johnson Sport Fish Restoration Act. We propose these updates to our regulations to ensure they reflect recent legislation; to align with the Office of Management and Budget's administrative rules for Federal financial assistance; to align with other laws, standards, and administrative processes; to respond to comments and feedback on our 2019 rulemaking action; and to provide clarity to help ensure consistency in administering our financial assistance programs and subprograms across the Nation.

DATES: We will accept comments received or postmarked on or before January 31, 2025.

Information collection requirements: If you wish to comment on the information collection requirements in this proposed rule, please note that the Office of Management and Budget (OMB) is required to make a decision concerning the collection of information contained in this proposed rule between 30 and 60 days after the date of publication of this proposed rule in the **Federal Register**. Therefore, comments should be submitted to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, (see "Information collection requirements" below under **ADDRESSES**) by January 31, 2025.

ADDRESSES: You may submit comments, identified by the regulation identifier number 1018-BB84, by any of the following methods:

(1) **Electronically:** Go to the Federal eRulemaking Portal: <https://www.regulations.gov>. In the Search box, enter FWS-HQ-WSFR-2023-0125,

which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment."

(2) **By hard copy:** Submit by U.S. mail to: Public Comments Processing, Attn: FWS-HQ-WSFR-2023-0125, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

We request that you send comments only by the methods described above. We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see Request for Comments, below, for more information).

Information collection requirements: Send your comments on the information collection request by mail to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, by email to Info_Coll@fws.gov; or by mail to 5275 Leesburg Pike, MS: PRB (JAO/3W), Falls Church, VA 22041-3803. Please reference OMB Control Number 1018-0100 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Diana Swan-Pinion, Wildlife and Sport Fish Restoration Program, Policy, and Programs Branch at diana_swan-pinion@fws.gov or (404) 821-6844. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. In compliance with the Providing Accountability Through Transparency Act of 2023, please see docket FWS-HQ-WSFR-2023-0125 on <https://www.regulations.gov> for a document that summarizes this proposed rule.

SUPPLEMENTARY INFORMATION:**Background**

The U.S. Fish and Wildlife Service's (Service) Wildlife and Sport Fish Restoration Program (WSFR) annually apportions to fish and wildlife agencies of States, Territories, and the District of Columbia more than \$1.6 billion for programs and subprograms under the Pittman-Robertson Wildlife Restoration Act (Wildlife Restoration Act, 50 Stat. 917, as amended; 16 U.S.C. 669 *et seq.*) and the Dingell-Johnson Sport Fish

Restoration Act (Sport Fish Restoration Act, 64 Stat. 430, as amended; 16 U.S.C. 777-777m, except 777e-1 and g-1) (Acts). We are proposing to update the regulations in title 50 of the Code of Federal Regulations (CFR) at part 80, which is titled, "Administrative Requirements, Pittman-Robertson Wildlife Restoration and Dingell-Johnson Sport Fish Restoration Acts."

The primary users of these regulations are the fish and wildlife agencies of the 50 States; the Commonwealths of Puerto Rico and the Northern Mariana Islands; the territories of Guam, the U.S. Virgin Islands, and American Samoa; and the District of Columbia (DC). We use "State" or "States" collectively to refer to these entities. The Wildlife Restoration Act does not authorize funding for DC, which receives funds only under the Sport Fish Restoration Act.

These regulations tell States how they may receive annual apportionments from the Federal Aid to Wildlife Restoration Fund (16 U.S.C. 669b) and the Sport Fish Restoration and Boating Trust Fund (26 U.S.C. 9504), how they may use hunting and fishing license revenues, and what requirements States must follow when participating in the programs and subprograms under the Acts. These programs and subprograms provide financial assistance to State fish and wildlife agencies to restore or manage wildlife and sport fish and associated habitats; offer hunter and recreational shooter education and safety programs, development, recruitment, retention, and reactivation; develop and increase recreational boating access; enhance the public's understanding of water resources, aquatic life forms, and sport fishing; and develop responsible attitudes and ethics toward aquatic and related environments.

Assistance Listings for these programs may be found at: <https://sam.gov/content/assistance-listings>. On that website, search for numbers 15.605, 15.611, and 15.626 using the "Search Assistance Listings" function.

We published the last revision of these regulations with a proposed rule in 2017 (82 FR 59564, December 15, 2017) and a final rule in 2019 (84 FR 44772, August 27, 2019; referred to below as "the 2019 final rule"). Our December 15, 2017, proposed rule was intended to be the first step in a phased approach to updating 50 CFR part 80 over a period of a few years, addressing multiple topics of concern, and ultimately leading to publishing a final rule that addressed all issues identified as important to resolve. A team of Federal and State subject matter experts

were engaged in developing the strategy and topics to be addressed. Unfortunately, that process was stalled, and we were unable to complete the phased approach, so we published a final rule in 2019 that did not include all identified topics.

The passage of two new laws in 2019 that amended the Wildlife Restoration Act compels the Service to reflect those changes in this proposed rule. In 2019, the Target Practice and Marksmanship Training Support Act (Pub. L. 116–17, May 10, 2019) amended the Wildlife Restoration Act to provide administrative advantages for States engaged in acquiring land for, expanding, and constructing public target ranges, and the Modernizing the Pittman-Robertson Fund for Tomorrow's Needs Act (Pub. L. 116–94, December 20, 2019) amended the Wildlife Restoration Act to provide additional eligible activities focused on increasing communication and participation in hunting and recreational shooting. This statutory update also provided the Service the opportunity to consider topics that were left unresolved from the phased approach begun with our 2017–2019 rulemaking process, as well as to incorporate principles established through continued collaborative engagement between the Service, States, and partners into the rulemaking process.

On September 30, 2019, the Service issued “Interim Guidance for Applying Public Law 116–17, the Target Practice and Marksmanship Training Support Act, to the Pittman-Robertson Wildlife Restoration Act” (interim guidance; <https://www.fws.gov/guidance/sites/guidance/files/documents/WSFR%20Interim%20Guidance%20Implementing%20PL%20116/17-FINAL.pdf>), and on July 14, 2021, the Service issued “Implementing the Modernizing the Pittman-Robertson Fund for Tomorrow's Needs Act” (https://www.fws.gov/guidance/sites/guidance/files/documents/Implementing_the_Modernizing_the_PittmanRobertson_Act.pdf). Each of these documents has provided WSFR and States with guidance for how to apply the amendments to the Acts to grants, enhance understanding, and strive for consistency, while we developed proposed updates to the regulations. When published and effective, the final rule for this proposed rule will supersede these guidance documents where there are differences;

however, we intend for the guidance documents and any updates to them to continue to provide supplemental information that will assist WSFR and States in administering financial assistance awards. WSFR intends to continue to provide policy and training support on eligible activities under the Acts.

The Service was assisted in this rulemaking by the Joint Federal/State Task Force on Federal Assistance Policy (JTF), an advisory group that was chartered on September 5, 2002, under an agreement between the Service and the Association of Fish and Wildlife Agencies to support the cooperation between the Service and State fish and wildlife agencies in wildlife and sport fish restoration and management projects. The JTF is exempt from the Federal Advisory Committee Act (Pub. L. 92–463, as amended; 5 U.S.C. 1001 *et seq.*) through the Acts. The role of the JTF is to consider operational policies and administrative problems and to recommend solutions. The JTF supported this rulemaking action by nominating State and Federal subject matter experts to serve on a pre-regulatory review team to consider proposed changes and assess them for viability, clarity, applicability, gaps in understanding, and potential controversy, and provide other support as requested. The team began work on this endeavor in September 2021 and had its last meeting in May 2023. During this period, the Service offered two review-and-comment periods to gather input and encourage engagement from Service staff in WSFR, State fish and wildlife agencies, and partners in wildlife and sport fish restoration and associated outdoor recreation. WSFR also provided six open forums to encourage active participation and discussion on topics of interest in the rulemaking process.

In 2013, the Office of Management and Budget (OMB) published regulations at 2 CFR part 200 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards) that updated and amended rules for Federal financial assistance for all Federal agencies (78 FR 78608, December 26, 2013). In this proposed rule to update 50 CFR part 80, we align the terminology we use for administering financial assistance under the Acts to the terms used in 2 CFR part 200. These proposed revisions would provide consistency across Federal

financial assistance regulations and improve understanding of applicable Service requirements.

We propose these updates to our regulations to improve clarity, consistency, readability, and alignment with current administrative practices, and to reflect the currently applicable laws, standards, and practices.

Proposed Amendments to Existing Regulations

Even though we are not proposing revisions or additions to every section in 50 CFR part 80 in this proposed rule, for clarity and readability, we are setting forth the entire part in this proposed rule (see Proposed Regulation Promulgation, below).

The regulations at 2 CFR part 200 have a goal to standardize terms to support standardizing grant management business processes. To support those efforts and to assist grant management practitioners, we propose to amend the following terms to align them more accurately with 2 CFR part 200: *Award* and *subaward* (primarily replacing *grant*), *recipient* and *subrecipient* (replacing *grantee* and *subgrantee*), and *period of performance* (replacing *grant period*). We propose to insert the amended terms throughout 50 CFR part 80. We also propose to incorporate helpful references in 50 CFR part 80 to applicable sections of 2 CFR part 200.

In the information below, we do not discuss in detail editorial changes that we propose to improve readability, clarity, consistency, or continuity. We instead focus on substantive changes to the current regulations.

Proposed amendments and the rationale for changes are described here.

I. Subpart A—General

Section 80.1—What does this part do?

We propose to update § 80.1 to include a new purpose under the Wildlife Restoration Act to facilitate the construction and expansion of public target ranges (per Pub. L. 116–17) and to add reference to activities for hunter recruitment and recreational shooter recruitment (per Pub. L. 116–94).

Section 80.2—What terms do I need to know?

We propose to add the following terms to the definitions section of the regulations for the following reasons:

Proposed new term	Purpose
90/10/5	In describing activities associated with Public Law 116–17 where the Federal cost share is up to 90 percent (and, therefore, the non-Federal cost share is 10 percent or more) and the period of availability of funds is 5 years when specifically engaging in activities for acquiring land for, expanding, or constructing public target ranges, we propose to abbreviate this concept as “90/10/5”.
Acquisition	Supporting activities associated with Public Law 116–17 for acquiring real property for public target ranges, as well as the sections of the regulations pertaining to real property.
Allocate	Supporting the financial action of assigning funds to associated, eligible activities.
Allowable	Clarifying how we address permissibility of activities and costs under 2 CFR part 200 (distinguished from 50 CFR part 80).
Apportioned funds	Enhancing understanding of the grant process and how funds are disbursed to States.
Eligible	Clarifying how we address permissibility of funding activities under 50 CFR part 80 (distinguished from 2 CFR part 200).
Equipment	Responding to a request to include this term as defined at 2 CFR part 200 in the regulations at 50 CFR part 80.
Expanding	Supporting activities associated with Public Law 116–17 for physically expanding access to public target ranges, to mean acquiring land for or constructing public target ranges, or physical improvements to an existing public target range that add to the utility of the range in a manner that ultimately increases range capacity to accommodate more participants.
Facility	Supporting understanding and consistency throughout the rule.
Federal fiscal year	Differentiating the Federal definition from the State equivalent term.
Fiscal year	Adding as defined under Public Law 116–94 for State license years.
Fish restoration and management project	Adding a condensed version from the Sport Fish Restoration Act to provide parity to the definition of <i>Wild-life restoration project</i> (see below).
Hunter recruitment and recreational shooter recruitment	Adding as defined under Public Law 116–94, included in the Act under 16 U.S.C. 669c(c)(4).
Law enforcement	Resolving a longstanding issue that has caused confusion and inconsistencies for what activities may be eligible under the Acts; clarifying these parameters would allow us to broaden the scope of eligible activities that support the Acts but do not fall into the ineligible categories.
Maintenance	Clarifying for those instances where maintenance and operations are not both eligible activities under a funding source.
Operations	Clarifying for those instances where maintenance and operations are not both eligible activities under a funding source, such as under 90/10/5 funding where operational activities are ineligible.
Public	Resolving a longstanding issue as to what constitutes “the public” because using Federal assistance funds for a project and then limiting access to an exclusive group is not permissible.
Public access	Resolving a longstanding issue as to physical access to projects funded under the Acts; supported also by 50 CFR 80.58.
Public relations	Adding because Public Law 116–94 removed public relations as a prohibited activity but 2 CFR part 200 restricts allowability, meaning public relations activities are not always eligible.
Public target range	Adding as defined under Public Law 116–17.
R3	Adding as an abbreviation for “recruiting, retaining, or reactivating” and applicable to both Acts, to support activities under Public Law 116–94.
Traditional Wildlife Restoration program	Adding to mean the activities that are funded under apportionments authorized at 16 U.S.C. 669c(b), which reflects the original program funded under the Wildlife Restoration Act, to support distinctions in funding sources due to passage of Public Law 116–17 and Public Law 116–94.
Wildlife restoration project	Supporting the part of the definition from the Wildlife Restoration Act that is applicable to the Wildlife Restoration Program, and not the sections of the Act amended by Public Law 106–553 to create the Wildlife Conservation and Restoration Program.

In this proposed rule, we propose to remove a term only when we replace it with a term that better aligns with 2 CFR part 200 and current grant management processes. We propose to amend some terms to update to current standards, such as adding a clause to the term “construction” to accommodate projects under Public Law 116–17 for constructing public target ranges. Upon the advice of State representatives, we propose to simplify the list of terms by removing the term “agency” as a separate definition and instead adding “(agency)” after the term “State fish and wildlife agency” to indicate that those terms mean the same thing. We propose to amend the term “angler” to acknowledge applicable Federal law, as one State reviewer commented that sometimes fishing in a State involves

meeting standards of both State and Federal laws. Five of the 50 U.S. States apply for Federal funds using a “comprehensive management system (CMS)” method of operations, which we define at § 80.2. We consulted representatives from those States to inform the proposed updates to this term in this proposed rule. We propose to update the term “personal property” to align better with the definition and use of that term in the Service Manual chapter at 520 FW 6, “Real Property—Overview.” We propose to clarify the term “subaccount” based on recommendations from the pre-regulatory review team. We propose to amend the term “useful life” to apply to a capital asset or equipment in addition to a capital improvement, based on definitions and other regulatory

requirements provided in 2 CFR part 200.

II. Subpart B—State Fish and Wildlife Agency Eligibility

We are not proposing any substantive changes to subpart B.

III. Subpart C—License Revenue

We are not proposing any substantive changes to subpart C.

IV. Subpart D—Certifying License Holders

In our August 27, 2019, final rule (84 FR 44772), we made significant changes to subpart D. Those regulatory changes included a compliance date of September 27, 2021 (2 years from the effective date of the 2019 final rule), for State fish and wildlife agencies to make the needed changes in their laws and

processes to accommodate the new standards to licenses for the purposes of certifying paid license holders during the annual certification period.

Certifying license holders is an important component to both the Wildlife Restoration and the Sport Fish Restoration programs because, under the Acts, annual apportionment to State fish and wildlife agencies is based in part, under the mandatory funding formulae in the Acts, on the number of paid hunting and fishing license holders that the agency certifies.

We propose to make some editorial changes to subpart D to change the title to reflect active voice, place more emphasis on “individual paid license holders,” and improve clarity and consistency in how we present information. At § 80.33, *How does a State fish and wildlife agency decide who to count as paid license holders in the annual certification?*, we propose to address some misunderstandings that have come to our attention as to how different types of licenses allow license holders to be counted in the annual certification. State fish and wildlife agencies develop many varying structures for how they package and sell hunting and fishing licenses in their State.

As an example of the disparities and how we address them, consider these two scenarios. State A and State B both have “fiscal/license years” that are June 1–May 31. This is the “certification period” for both States when reporting individual paid license holders. However, State A and State B follow different processes for issuing licenses:

- State A sells annual licenses that, regardless of when you purchase your license, are valid only during the “fiscal/license year.” For example, if you purchase your license on April 1, it will expire May 31 if you are buying that license for the current license year, or it will not be valid until June 1 if you are buying that license for the next license year.

- State B sells annual licenses that, regardless of when you purchase your license, are valid for a full year starting with the day you purchase the license and ending 1 year later (this type of license is also known as a “365-day license”). For example, if you purchase your license on April 1, it is good from that day (April 1) through the following March 31.

State A can easily determine which individual paid license holders may be counted during the certification period as they all fall into the fiscal/license year. However, State B has individual paid license holders that are holding a valid license in two different fiscal/

license years. It would not be fair if State B certified license holders in two certification periods for licenses that are essentially the same in both States.

To align these scenarios, we propose to clearly state the following:

- An individual paid license holder may be counted only in the certification period in which the license first becomes valid.
- A single-year license may be valid for any period from 1 day up to 2 years.
- A license that is valid for 2 years or more is considered a multiyear license.
- A license holder cannot be counted in more certification periods than a license is valid, *i.e.*, if holding a 5-year license, the holder can be counted only in five certification periods for that license.
- A license holder may be counted only for certification periods that align with the years the license is valid, *i.e.*, if a 5-year license is valid from June 1, 2018, through May 31, 2023, the license holder may not be counted for that license for the certification period that ends between October 1, 2024, and September 30, 2025, or any certification period after that.

The criterion above becomes important when considering multiyear licenses that were sold before the 2019 final rule became effective on September 26, 2019, and a State fish and wildlife agency is recalculating to determine if it may certify the license holder in an upcoming certification period. For example, a 10-year license that was sold in 2016 for \$100 could be counted only once under the regulations in effect at that time. Under the 2019 final rule, the State fish and wildlife agency may apply the current standards in § 80.34 to that license and count the license holder in the certification periods that include 2019 until the license expires in 2025, so that license holder may potentially be counted in seven additional certification periods. The State agency cannot certify that license holder beyond that date, for that license, as it is no longer valid. Using the same example, except for a lifetime license, under the 2019 final rule, the State agency may certify the license holder for up to an additional 49 years, provided the license holder is still alive.

Under this proposal, a State would be allowed to certify a license holder only for the number of years that the license is valid and only in the certification years that correspond to the period that the license is valid.

At § 80.34, *Must a State fish and wildlife agency receive a minimum amount of revenue for each license holder certified?*, we propose to remove the statement that all States must be

following the requirements in § 80.34(b) by September 27, 2021, as that date is now in the past. The subpart includes other references to that date, and we propose revisions to update the regulations appropriately.

We propose to amend § 80.35, *What additional requirements apply to multiyear licenses?*, based on comments we have received since the 2019 final rule that certain language set forth by the 2019 final rule is unclear or confusing. We propose no changes to the basic principles established in § 80.35 by the 2019 final rule; rather we propose revisions similar to those we are proposing for § 80.34 in removing language identifying dates for regulatory compliance that are no longer relevant. We also propose revisions for simplicity and clarity, to encourage consistent understanding and implementation of the regulations.

At § 80.37, which pertains to the question of whether the State fish and wildlife agency can certify a license sold at a discount, we propose to remove the phrase “when combined with another license or privilege,” as the answer to the question does not depend on combining the license with another privilege. It can be discounted under other circumstances. We also propose to amend the heading of § 80.38, which asks whether an entity other than the State fish and wildlife agency may offer a discounted or free license under any circumstances, to instead ask whether a State fish and wildlife agency can certify a license when an entity other than the agency offers a discounted or free license. The emphasis would be placed on the ability to certify the license holder, which ultimately is the concept that we want to establish throughout the regulations in subpart D.

Proposed amendments to the regulations in subpart D were presented to the JTF in December 2021 for review and input. Prior to the 2019 final rule, the Service relied on the advice of the JTF to inform the new standards for certifying license holders with the goal of establishing rules that were fair and could be consistently applied by State fish and wildlife agencies. The JTF again had the opportunity to review proposed subpart D regulations during one of the preliminary review and comment periods on the proposed rule.

V. Subpart E—Eligible Activities

We propose to amend subpart E by editing the regulations for active voice, clarity, and better readability. We propose to strategically amend the regulations in subpart E more than those in any other subpart in 50 CFR part 80 to accommodate activities newly

eligible under the 2019 amendments to the Wildlife Restoration Act. The WSFR pre-rulemaking policy process and preliminary guidance developed to address the amendments to the Act greatly informed the proposed changes to this subpart.

We describe here several areas of focus that greatly expand eligible activities set forth in subpart E, how we are proposing to reformat the regulations in this subpart, the analyses we engaged in to determine how to improve the current regulations, and how we support certain concepts throughout this proposed rule.

Background Information on the Wildlife Restoration Act

To better understand amendments to the Wildlife Restoration Act for programs and subprograms, additional eligible activities, and how all eligible activities under the Act intersect with funding sources under the Act and the Service's administration of awards, we provide some background on the Wildlife Restoration Act.

The Federal Aid in Wildlife Restoration Act (Sept. 2, 1937, ch. 899, section 1, 50 Stat. 917) set forth a program that apportioned funds to State fish and wildlife agencies for eligible activities related to acquiring land, improving habitat, and conducting research associated with wildlife restoration and management. Funding was available from revenue accrued during the Federal fiscal year (FFY) on taxes imposed on firearms, shells, and cartridges under the Revenue Act of 1932 (47 Stat. 169) and deposited into "the Federal aid to wildlife restoration fund," which we now refer to as the Wildlife Restoration Trust Fund.

Each of the Act's programs and subprograms has specific eligible activities, and costs must be assigned to separate fiscal subaccounts to support accurate administration of the funds. The Service tracks apportionments and available funding using the Department of the Interior's Financial and Business Management System (FBMS), which supports business management processes related to financial management, grants and cooperative agreements, real and personal property management, and several other functions. FBMS employs the use of subaccounts, which allows the Service to use a "first-in, first-out" method of accounting.

The Service also uses subaccounts to administer the specific use requirements for program and subprogram funding sources under the Act. States that have funding that has not been obligated to an award within the period of

availability may encounter the possibility of having to return apportioned funds to the Service (see table 1 to § 80.92 under Proposed Regulation Promulgation, below, for information on how the Service disburses returned funds). The Service uses a "safety margin" system to track apportioned funds, obligated funds, and periods of availability and will alert a State agency if the agency is approaching a situation where they may need to return funds. (*Note:* the formulas for awarding funds and cost share requirements for insular areas, the Commonwealth of Puerto Rico, and the District of Columbia vary from the formula applied to the 50 States.)

Since enactment of the Wildlife Restoration Act, several amendments have revised the original eligibilities that impact changes addressed in this proposed rule:

- The addition of maintenance of wildlife restoration projects as eligible (Pub. L. 79–533, July 24, 1946).
- Law enforcement and public relations excluded as eligible activities (Pub. L. 84–375, August 12, 1955).
- The addition of the Basic Hunter Education and Safety subprogram to the Act (Pub. L. 91–503, October 23, 1970).
- The addition of the Enhanced Hunter Education and Safety program to the Act (Pub. L. 106–408, November 1, 2000; also known as "the Improvement Act").
- The addition of an administrative funding advantage to encourage and assist States in acquiring land for, expanding, and constructing public target ranges, under the Target Practice and Marksmanship Training Support Act (Pub. L. 116–17, May 10, 2019), which we refer to as "90/10/5."
- The addition of new eligible activities for hunter recruitment and recreational shooter recruitment (which we refer to as "R3") under the Modernizing the Pittman-Robertson Fund for Tomorrow's Needs Act (Pub. L. 116–94, December 20, 2019), which also removed the exclusion of public relations activities that was added to the Act in 1955.

Section 80.50—What activities are eligible for funding under the Wildlife Restoration Act?

Updated Terms and Arrangement

As noted above, we propose to begin using the term "Traditional Wildlife Restoration program" to refer to the original program that is funded under 16 U.S.C. 669c(b) and "90/10/5" to refer to activities for acquiring land for, expanding, or constructing public target ranges that qualify for the

administrative advantage of a 90 percent Federal/10 percent non-Federal cost share, with a period of availability to obligate funds of 5 years.

We propose to reorganize the regulations at § 80.50(b) under the general categories of Basic Hunter Education and Safety subprogram and Hunter Recruitment and Recreational Shooter Recruitment, and separate eligible activities for the Basic Hunter Education and Safety subprogram into § 80.50(b)(1) and eligible activities for recruiting, retaining, or reactivating hunters and recreational shooters (R3) into a new § 80.50(b)(2). This proposed revision would allow us to recognize the common funding source, while providing the distinctions between eligible activities under each. We also propose to remove regulations that describe activities that are eligible under all programs under the Acts from current § 80.50 and add them to proposed § 80.52.

Traditional Wildlife Restoration Program

We propose that eligible research may include social sciences, to assist States in improving communication and benefits to the public they serve. We also propose that a State may use funds under a Traditional Wildlife Restoration program award for maintaining and operating projects or equipment under the ownership or management control of the State fish and wildlife agency and that support eligible activities under the Wildlife Restoration Act. This proposed change is intended to support the ability for State agencies to use Traditional Wildlife Restoration program funds for eligible maintenance and operations on projects or activities on Traditional Wildlife Restoration-managed land that may have been funded in accordance with regulations in another subpart or from an external source. As an example, a wildlife management area has a public target range. Maintenance activities such as mowing the lawn or operations such as providing lighting to the facility would be eligible activities using Traditional Wildlife Restoration program funds, as they are eligible Traditional Wildlife Restoration program activities, without the need to allocate costs to other funding sources. However, activities such as constructing a public target range or providing staff to run and operate the public target range would not be eligible Traditional Wildlife Restoration program activities and must be charged to an eligible funding source.

We also propose to add to § 80.50 that a State agency may use funds under a Traditional Wildlife Restoration

program award for maintaining and operating projects or equipment that a third party owns or manages provided a third-party binding agreement is in place that ensures the project continues to serve the intended purposes under the award. This third-party binding agreement may be in the form of a subaward.

Communication and Public Relations

With the passage of Public Law 116–94, the prohibition for funding public relations activities was removed from the Wildlife Restoration Act, making public relations potentially an eligible activity. The regulations at 2 CFR part 200 specifically define public relations and provide principles establishing when these costs are and are not allowable. We have considered that perhaps the overlap of public relations with other communication terms (such as “outreach,” “marketing,” and “advertising”) would cause confusion and inconsistencies in determining which associated activities may be funded under the Acts. Using preliminary guidance that we already have developed (“Implementing the Modernizing the Pittman-Robertson Fund for Tomorrow’s Needs Act,” July 14, 2021), in this proposed rule we focus on public relations and other activities that would be considered eligible for communicating with the public.

We propose to define the term “public relations” by referencing 2 CFR part 200; therefore, “public relations” would mean activities that are dedicated to maintaining the image of the State fish and wildlife agency or subrecipient or to maintaining or promoting understanding and favorable relations with the community or public at large or any segment of the public. As “public relations” activities are described in 2 CFR part 200, costs for the activities are unallowable unless meeting the objectives of, or necessary for the performance of, a Federal award, or when conducting general liaison on matters of public concern. To clarify, if the form of communication solely benefits the State or the State agency, then the costs are unallowable, but if the form of communication supports the objectives or performance of the Federal award then costs would likely be allowable. We propose to include at § 80.50(a)(8) examples of eligible communication types that support a State’s ability to have an informed and engaged public. We would describe at proposed § 80.50(a)(9) what communication activities require prior approval.

Some of the eligible communication activities we describe in this proposed rule are prompted by our engagement in the newly introduced activities associated with R3, but we do not limit the opportunity to expand on eligible communication activities to strictly R3. We propose amendments throughout the regulations that clarify and allow for expanded communication activities that support other eligible activities.

Law Enforcement and Eligible Activities

We propose to begin foundationally at § 80.2, as described above, by defining the term “law enforcement” to mean enforcing laws, orders, and regulations. We also would describe at proposed § 80.55 how activities for both law enforcement and the process of making State laws are ineligible for funding. Using these two standards of ineligible activities under the Acts allows us to take an approach with this proposed rulemaking to clarify and more distinctly define those activities that are eligible, as the prohibition of activities connected to law enforcement has been interpreted over the years to extend beyond these restrictions. Based on this approach, we propose to include the following activities in the regulation as eligible:

- Research, data collection, surveys, meeting with boards, and other preliminary activities that State agency staff do to collect information, make assessments, develop internal recommendations, and inform legislators, who then use the information when engaging in the ineligible activity associated with a formal legislative process for making public policy. These eligible activities are also supported under both Acts. When defining “wildlife restoration project” and “fish restoration and management project,” the Acts include, respectively, “research into problems of wildlife management as may be necessary to efficient administration affecting wildlife resources” (16 U.S.C. 669a(11)) and “acquisition of such facts as are necessary to guide and direct the regulation of fishing by law” (16 U.S.C. 777a(1)(B)).

- Activities that are otherwise eligible being conducted by law enforcement personnel. Examples are activities such as participating in hunter education and safety courses, supporting public access at boat ramps, or conducting outreach to educate the public or for R3 purposes. If an activity is eligible, the staff involved with conducting the activity, even if law enforcement, may be included as an eligible part of an award. Of course, if law enforcement staff are involved in an eligible activity, and

something occurs that activates them to conduct law enforcement activities, the State or subrecipient would have to prorate costs accordingly and charge only eligible activities to the award or subaward.

- Interpreting, translating, printing, or disseminating published State hunting regulations to inform and educate the public about their responsibilities to comply with laws, orders, and regulations. Once the laws are published in the official legal registry (State Register or other), the lawmaking process is complete. However, the State agency should then make this information readily available to members of the public in a manner they can understand. Such efforts to simplify the rules in a different format, translate the law into other languages, include information on the laws in hunter or angler guides, and other associated projects would be eligible.

Technology

Considering that State agencies may provide many forms of innovation in communication with the public, such as phone applications (apps), social media, websites, software products, and whatever is on the horizon, we propose to add the flexibility for States to employ these methods and tools when associated with an eligible activity.

R3 Flexibility

We understand that the ability to use funds under these Acts for R3 activities will provide State fish and wildlife agencies opportunities to be somewhat creative in finding various ways to approach different audiences, thereby helping the agencies achieve the R3 success they are seeking. We want to provide flexibility in the regulations for States to take advantage of those opportunities as much as possible, while still meeting the requirements for being necessary and reasonable and supporting objectives in an award. We, therefore, propose to list eligible activities that support R3 for items such as hiring shooting trainers and hunting guides, paying for optimizing State websites, acquiring supplies that help enhance the experience and skills of participants, and various types of education to include mentoring, field demonstrations, and training simulators. Many of the activities for R3 under Wildlife Restoration can be applied similarly to R3 under Sport Fish Restoration. We propose to leave sufficient flexibility to allow a State agency to have an award approved for activities that the agency can clearly demonstrate are targeted toward eligible R3 objectives.

Section 80.51—What activities are eligible for funding under the Sport Fish Restoration Act?

We propose to amend eligible activities in § 80.51 to align with those in the proposed revised § 80.50, as appropriate, including expansion of eligible activities for communication.

Recreational Boating Access Subprogram

We propose to add some activities to provide more context, based on the Service Manual chapter at 517 FW 7. Based on recommendations from States, we would clarify that projects may be for motorized or nonmotorized vessels and users.

State Outreach and Communications Subprogram

We propose to add the word “State” to this subprogram. The Act provides for a National Outreach and Communications Program, which is a competitive program administered out of the Service’s Headquarters Office. The Act also provides for a State Outreach and Communications program (an R3 program), which is to be an extension of the National program focused on State priorities. Each State may use up to 15 percent of its Sport Fish Restoration program apportioned funds (16 U.S.C. 777c) for the costs of the combined Aquatic Resources Education and State Outreach and Communications subprograms. We propose to add a provision for “Interpreting, translating, printing, or disseminating published State fishing regulations to inform and educate the public about their responsibilities to comply with laws, orders, and regulations” to the regulations to provide parity with eligible activities under proposed revised § 80.50.

Section 80.52—What activities are eligible for funding under all programs and subprograms under the Acts?

We propose to add this new section to the regulations as we identified multiple activities currently discussed in §§ 80.50 and 80.51 and in this proposed rule that are eligible to all programs and subprograms. Below we describe two new proposed provisions to accommodate activities newly eligible under the 2019 amendments to the Wildlife Restoration Act.

State Electronic Data Systems

License sales are an important component of the congressionally mandated funding formula the Service uses for awarding annual apportionments to State agencies. Originally a manual process, tracking of

license sales became automated as technology improved and State agencies began using automated point of sale or electronic licensing systems for collecting payments for hunting and fishing licenses and accounting for license sales. As the primary purpose for these electronic systems was management of hunting and fishing license revenue for the State fish and wildlife agency, using grant funds to support the system was considered ineligible for funding as activities conducted for the primary purpose of producing income (see 50 CFR 80.54(c)), and all associated costs, are ineligible. As technology has further improved and agency activities expanded over the years, traditional licensing systems evolved to accommodate a variety of needs and purposes and have been combined with other public-facing electronic systems designed to collect and share data and information as a public interface. A Director’s Memorandum issued on July 11, 1996 (Automated Sportsman’s Data Systems (ASDS)—Formerly Point of Sale), describes the Service’s awareness of the changing technology and the potential eligibility of some costs associated with the expanding system. More than 25 years later, systems have become a tool for a variety of actions related to the conservation of fish and wildlife resources and associated administration of a State agency. Some electronic systems may be combined within a State to accommodate multiple purposes or be used in conjunction with other State agencies. States are using technology to increase efficiency and generate cost savings, so it is possible that the electronic system that sells hunting and fishing licenses may include components for collecting data and funds, distributing information, or administering activities for other purposes such as driver’s licenses, vehicle registrations, park entry permits, and other sources of revenue for States.

In June 2021, WSFR published guidance that describes how States may apply costs of an electronic system that support eligible activities to a Wildlife Restoration or Sport Fish Restoration award. As we have had 2 years to implement and receive feedback on this guidance and have received no negative responses from States, we propose to add such costs to the list of eligible activities in the regulations. The processes in the guidance would still have to be followed for costs to be eligible.

Oversight Activities

We propose to add provisions to the regulations that clarify as eligible those

activities pertaining to oversight, such as monitoring, evaluating, and reporting. We would include as eligible the costs associated with monitoring and compliance activities when they lead to the discovery of an area of noncompliance with an award, a potential diversion of funds under the Acts, or a situation where property acquired under the Acts is infringed upon—improprieties that could result in an action in the legal system. This proposed regulatory change would continue to build on the flexibilities for activities that do not fall into the category of law enforcement or State lawmaking. The State agency would still be unable to use award funds for conducting law enforcement activities, such as issuing a citation, but the agency could use award funds for obtaining evidence, testifying in court, meeting with attorneys, and other activities to protect resource and property interests under an award. Here is an example: While a State is monitoring real property holdings that were acquired under an award, the State finds that an adjacent landowner has put a shed on a State-owned property. Eligible activities would include the work that non-law enforcement staff do to collect information and evidence (*i.e.*, take photographs, check lot lines in the files, etc.), notify managers and officials, write letters to the other party informing them of the situation and offering an opportunity to correct, consult with attorneys to assess the situation and potential alternatives, and, if needed, testify and provide evidence in a court of law.

Section 80.53—May an activity be eligible for funding if it is not explicitly eligible in this part?

We propose to add in § 80.53 that an activity must be allowable under 2 CFR part 200 to be eligible if the activity is not explicitly described as eligible in the regulations in part 80.

Section 80.55—What activities are ineligible for funding?

We propose to expand on the prohibition for law enforcement to include the definition of “law enforcement” but also the making of laws. We also propose to remove “public relations” as ineligible under the Acts in response to Public Law 116–94.

State Lawmaking as Ineligible

We propose to clearly describe as an ineligible activity participation in the State lawmaking process using Federal funds under an award. This provision is primarily because State agencies need to

retain their State law authority to make policy decisions, and once these activities are included in a grant and paid for with Federal financial assistance funds, they are “federalized,” creating a Federal nexus to what is inherently a State responsibility. When a federally funded project includes the making of State laws, a Federal compliance review is automatically triggered. Even if the project is determined to be categorically excluded from some Federal compliance requirements, the Federal nexus on a State’s responsibility and authority to promulgate laws is inappropriate and is deemed ineligible. Therefore, this proposed rule would clarify and more distinctly define what law-related activities are eligible and ineligible under the Acts.

Public Access Denied

We also propose to add that when public access is required under an award and is not provided, the project becomes ineligible for funding. This provision does not include temporary closings or closings because of reasons established at proposed § 80.58 but refers to blatant exclusion or denial of public access when that access is required under an award.

Section 80.57—How does a proposed project qualify as substantial in character and design?

We propose to add to § 80.57 planned approaches, appropriate procedures, and accepted principles that would relate to R3, access, and communication to accommodate additional eligible activities described in this proposed rule.

Section 80.58—What are public access requirements for activities in an approved award under the Wildlife Restoration or Sport Fish Restoration programs?

The parameters for public access have been a longstanding issue for the Service and States, and we propose to set some basic principles in the regulations to assist with understanding and encourage consistent application. We propose to start with stating that there are certain eligible activities under an award for which the primary purpose is to provide public access. A prime example of such an activity is public target ranges, which are prominent in both Public Law 116–17, which focuses on offering advantages to States to encourage further development of such facilities, and Public Law 116–94, which seeks to provide public target ranges and other support to recruit, retain, or reactivate members of the

public in hunting and recreational shooting activities. We have encountered situations where potential subrecipients were actively seeking to partner with States in using funds under the Wildlife Restoration Act for range projects but did not want the range open to the public. Often, we encounter situations where the desire is to limit access to members only, and membership costs are very high, or memberships are not offered to all. This includes projects under both Acts.

From the public side, we also have encountered situations where certain groups with specific interests want to access property acquired under an award for various purposes that are not consistent with the purposes of the award under which they were acquired. For example, a real property acquisition for the purposes of conserving a sensitive species in recovery may not be compatible with all-terrain vehicle use or horseback riding on that property. Proposed § 80.58 would give the State agency authority, within the purposes of the Acts, to set parameters for public access. We understand that many States have standards for public access already institutionalized in their laws and practices. Proposed § 80.58 would also describe how a State agency may work under a third-party binding agreement (which may be accomplished as a subaward) to partner with non-State entities on projects that must provide public access.

We purposely do not discuss in the proposed regulations any set formulas for determining the amount of public access to provide when the project with a third party is not available for public access 100 percent of the time. In May 2017, the Service published Best Practices for Third-Party Agreements guidance (best practices guidance), which we updated in September 2019. In the best practices guidance, we describe that the determination as to the adequacy of public access will be accomplished on a case-by-case basis and will be considered as follows:

The WSFR-prescribed method used to determine the amount of public access is:

(1) A reasonable number of regularly scheduled and posted hours of availability must be available to the public that reflects, at minimum, the amount of the Federal and State investment;

(2) Hours of operation may take into consideration safety and security issues, but must not impose impediments such as mandatory membership or excessive fees beyond those needed to offset maintenance and management costs;

(3) If there is potential for closing a site for targeted, non-public use, the recipient must define a process whereby the third party must notify the public of any changes in availability and must compensate the recipient when it reduces the minimum public access defined in the agreement (the preferred method is for the third party to offer additional public access at an alternate time that compensates for the interruption); and

(4) If there are gates, locks, or other controls to access, the third party must clearly indicate at the control point how the public may gain access to the facility.

VI. Subpart F—Allocation of Funds by an Agency

With the passage of Public Law 116–17 and Public Law 116–94, many more interrelationships are available for developing projects and engaging in eligible activities that could potentially include using funds from a different funding source under the Wildlife Restoration Act. Because these statutory changes prompted a more holistic approach in subpart F, we propose to expand current § 80.60 and add three new sections as follows:

- Proposed § 80.60—What is the relationship between the Traditional Wildlife Restoration Program, the Basic Hunter Education and Safety subprogram (Basic Hunter Education), and the Enhanced Hunter Education and Safety program (Enhanced Hunter Education) for acquiring land for, expanding, or constructing public target ranges?

- Proposed § 80.61—What sources of funding in the Wildlife Restoration Act may a State fish and wildlife agency use to support public target range projects, and may funds from multiple sources be used in a single award?

- Proposed § 80.62—What are eligible and ineligible 90/10/5 activities?

- Proposed § 80.63—What exception is provided for Enhanced Hunter Education and Safety funds in relation to Basic Hunter Education and Safety funds?

We propose in these sections, based on the “Interim Guidance for Applying Public Law 116–17, the Target Practice and Marksmanship Training Support Act, to the Pittman-Robertson Wildlife Restoration Act” (interim guidance), how a State may apply the 90 percent Federal/10 percent non-Federal cost share and period of availability of up to 5 years to eligible public target range projects. The proposed sections also describe what amount of funds, if any, a State may allocate to public target range projects and the process a State

agency must take when applying apportioned Traditional Wildlife Restoration program funds to those projects. The current regulations at § 80.60 focus on the differences between the Basic Hunter Education and Safety subprogram and the Enhanced Hunter Education and Safety program. We propose to address the relationship between the two programs and one subprogram that may include public target range activities using the 90/10/5 approach as allowable under the amendments from Public Law 116–17.

Proposed § 80.61 would engage with all the options that a State may use when funding public target range projects. We would identify, in a table to proposed § 80.61, seven different potential approaches to use under the regulations.

Proposed § 80.62 would describe eligible and ineligible 90/10/5 activities. The proposed revisions would include a topic that we need to address as, following a legal review of Public Law 116–17, it became clear that the intent of the law is to increase physical access to more or expanded public target ranges. In the interim guidance and this proposed rule, we make it clear that “expanding” means, for the purposes of projects for acquiring land for, expanding, or constructing public target ranges (90/10/5), physical improvements to an existing public target range that add to the utility of the range in a manner that ultimately increases range capacity to accommodate more participants. Physical improvements do not necessarily have to increase the size of the facility but must result in an increase in physical usability that will accommodate more participants. This legal interpretation led us to include in this proposed rule definitions for the terms “maintenance” and “operations.”

In the grant programs under the Acts, we tend to combine operations and maintenance under single awards, and this approach is acceptable for most of the eligible activities under the Acts. However, for 90/10/5 awards, an activity defined as “operations” is not an eligible activity. An activity defined as “maintenance” may be, depending on whether it integrally supports a construction or expansion project. For example, if a project includes activities to expand a 6-stall range to a 12-stall range, but the roof and structure of the existing 6 lanes need repair and maintenance at the same time to allow for successful construction, it may be necessary and reasonable to support the expansion project and ensure that all 12 lanes will be accessible to the public. Other examples may include when a

safety feature of a public target range needs maintenance, and closure of the facility will occur if the need is not resolved. When combined with other activities for expanding the range, this maintenance activity may be included as necessary and reasonable. A State fish and wildlife agency would have to clearly justify how the maintenance activity supports the 90/10/5 objectives and is not just a stand-alone maintenance activity that does nothing to increase range capacity for more participants.

We include in this proposed rule that public target ranges may be on property where title is held by a third party provided the State agency holds a lease or other binding agreement that ensures the terms and conditions of the award will be met. Mobile public target ranges would also be eligible. Although personnel and administrative costs for managing and operating a public target range once the project is completed would be ineligible, personnel and administrative costs associated with activities that directly support development of public target ranges, such as acquiring land and construction, would be eligible. Examples include those activities associated with planning for projects, which may include identifying potential parcels of land, investigating and obtaining permits, conducting real property appraisals, engineering, coordinating projects on a State level, and administering specific projects. Costs that are also eligible when combined with an expansion or construction project are the associated amenities that are necessary and reasonable to ensure the public can fully access and utilize the public target range, such as public restrooms, storage facilities, safety amenities, signs, roads and parking lots, and infrastructure for utilities. We also propose to include as eligible the possibility to justify a project using the 90/10/5 approach when the range has deteriorated to a condition where it is no longer operable or accessible. We do not expect this situation to happen often, and anyone considering this option would have to consult the regional WSFR office.

We would list the following activities as ineligible: operations, maintenance unless necessary for completing a construction or expansion project, long-term monitoring, and any other activities that are not directly related to the goals of 90/10/5 for providing new or increased physical capacity for public target ranges.

Proposed § 80.63 would describe the exception that is in the Wildlife Restoration Act (16 U.S.C. 669 *et seq.*) for use of Enhanced Hunter Education

and Safety funds. The amendments to the Act from Public Law 116–94 complicate administration in some respects. The funding source for both the Basic Hunter Education and Safety subprogram and the newly added hunter recruitment and recreational shooter recruitment (which we refer to as “R3”) activities is described in the Act at 16 U.S.C. 669c(c)(1)–(3). When applied to the Basic Hunter Education and Safety subprogram, the eligible activities are described in the Act at 16 U.S.C. 669g(b). The new eligible activities for R3 are included in the Act under 16 U.S.C. 669c(c)(4). The Act also includes an exception for the Enhanced Hunter Education and Safety program that, if a State uses all its Basic Hunter Education and Safety subprogram funds for purposes under 16 U.S.C. 669g(b) during the FFY, the State may then use its Enhanced Hunter Education and Safety program funds for any purpose under the Act. When applying the amendments for R3 activities in the Act, if a State uses any of its funds under 16 U.S.C. 669c(c) for R3 activities, it voids the exception, and the State must use all its Enhanced Hunter Education and Safety program funds for Enhanced Hunter Education and Safety program purposes. We propose to revise § 80.63 to explain and clarify the exception and associated restrictions when using those funds for R3 activities.

Section 80.64—What requirements apply to funds for the Recreational Boating Access subprogram?

We propose to update § 80.64 to clarify that a State need not set aside funds out of each annual apportionment for this subprogram, provided that the standard is accomplished within the designated 5-year period. We propose to update the 5-year periods starting with 2023.

Section 80.66—Must a State fish and wildlife agency allocate costs in multipurpose projects and facilities? And section 80.67—How does a State fish and wildlife agency allocate costs to an award in multipurpose projects and facilities?

We propose to amend §§ 80.66 and 80.67 slightly to accommodate for various funding sources within the Acts and to support that a State agency may describe ineligible activities in a proposal that supports eligible activities provided that the proposal clearly shows that no costs for ineligible activities are part of the award. The Service has had a few instances in which auditors have identified any discussion of ineligible activities in a proposal as making the award ineligible.

This determination is inaccurate. In many multipurpose projects, eligible and ineligible activities work together for the success of the overall project, and describing the ineligible activities makes it clearer to the grant reviewer how the entire project is supported. Therefore, this is an acceptable approach that supports the information required at § 80.82(b).

Section 80.69—What requirements apply to allocation of funds between marine and freshwater fisheries projects?

We propose to amend § 80.69 to remove the term “obligated” and replace it with the term “allocated” to better align with current administrative practices.

VII. Subpart G—Applying for an Award

We propose to amend the title of subpart G to reflect active voice and to replace the term “grant” with “award” to align with 2 CFR part 200.

The Service has had several changes to systems and processes for States applying for an award and for Service staff administering awards. In response to these changed circumstances, we propose to revise subpart G to become more generic in some places, not referencing specific systems and processes and referring applicants to the notice of funding opportunity for specific information. As many actions that used to require hardcopy submissions and signatures are now accomplished electronically, we also propose changes to reflect modern procedures. Effective January 1, 2020, *SAM.gov* (<https://sam.gov/content/home>) became the central repository for common certifications and representations required of Federal grants recipients. Effective October 28, 2022, the Service no longer requires applicants to submit the “Assurances for Non-Construction Programs (SF-424B)” form or the “Assurances for Construction Programs (SF-424D)” form with their applications. Therefore, we propose to remove this requirement from the regulations.

Section 80.83—What is the Federal share of allowable costs? And section 80.84—How does the Service establish the non-Federal share of allowable costs?

On October 22, 2022, the U.S. Department of the Interior issued a notification (DOI–PGM–PAN Reference No: 2023–0022) that the Office of the Solicitor has determined Public Law 96–205, title VI, section 601, as amended, in conjunction with 48 U.S.C.

1469a(d), requires Department of the Interior offices and bureaus to waive the cost sharing requirement for grants to the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, commonly called “insular areas.” Based on this determination, we propose to amend these sections of the regulations to show that the Service will not require those insular areas to provide cost share to awards under these Acts. The insular areas may provide voluntary cost share, but it is not required. The Commonwealth of Puerto Rico and the District of Columbia must still provide a minimum 25 percent cost share.

We also propose to amend these sections to reflect that for those activities that meet the criteria for acquiring land for, expanding, or constructing public target ranges, the Federal share may be up to 90 percent of costs under an award, except for insular areas where it is 100 percent.

Section 80.85—What requirements apply to cost share or match?

We propose to revise § 80.85 to refer only to the requirements for cost share as described at 2 CFR 200.306. We would maintain the text that describes at what level of accounting to apply cost share.

VIII. Subpart H—General Award Administration

Section 80.92—How long are funds available for a Federal obligation?

We propose to supplement § 80.92 by providing a table that describes all programs and subprograms under the Acts and shows the name of the program or subprogram, the period of availability for obligation (how many FFYs), and the disbursement of funds at the end of the period of availability for obligation. This table would clearly show all sources of funding and what happens to the funding should it not be obligated within the period of availability.

Section 80.94—May a State fish and wildlife agency incur costs before the beginning of the period of performance?

We propose to add a clause at the end of paragraph (c) of § 80.94 that would state that the agency can receive reimbursement for pre-award costs only after the beginning of the period of performance and, for activities requiring compliance, only after the compliance is satisfied. This proposed revision would emphasize that if a State agency receives approval for pre-award costs that require compliance, the compliance

must be completed to the satisfaction of the Service before reimbursement will be made. For activities that do not require compliance, reimbursement may be accomplished as soon as practicable.

Section 80.97—What is barter, and may a State fish and wildlife agency use barter of goods or services to carry out a grant-funded project? And section 80.98—How must a State fish and wildlife agency include barter in an award and report barter transactions?

The final rule published on August 1, 2011 (76 FR 46150), introduced in the regulations how a State agency may use the barter of goods and services to carry out a grant-funded project and how barter must be reported. This revision was in response to audit findings reported by the Office of the Inspector General in several States and recommendations that the Service provide clear guidance. In January 2020, the JTF began a process where, annually, WSFR sends out a request for State agencies to submit topics of national concern in the programs under the Acts for our consideration and possible policy action. In 2021, we received a concern that barter transactions in a State had again been identified as an audit finding. This situation prompted WSFR to reexamine the topic and determine how States were managing barter requirements. The JTF supported WSFR staff working with the Federal Assistance Coordinators Working Subcommittee, a group of State representatives and subject matter experts chartered under the Association of Fish and Wildlife Agencies, to assist in reaching out to States and to provide advice on regulatory changes.

Barter is an accounting activity that is addressed under the Generally Accepted Accounting Principles (GAAP) and the associated standards for State and local governments set by the Governmental Accounting Standards Board (GASB). We determined that the current GASB standard that includes barter transactions was published after §§ 80.97 and 80.98 were set forth in the proposed rule (75 FR 32877, June 10, 2010) for the August 1, 2011, rule (76 FR 46150), and we were unaware of the change until consulting with our accounting experts when reassessing the topic in 2021. Therefore, we propose to amend those sections of the regulations to reflect current standards. The proposed revised sections would assign the responsibility to each individual State for developing and maintaining processes that follow GAAP/GASB standards for how to manage barter transactions within that State fish and wildlife agency. This proposed revision

is consistent with 2 CFR part 200, which requires States to establish and follow their own processes under existing laws.

The definition for “barter transactions” would remain the same—that it is an accounting term and means a nonmonetary exchange (reciprocal transfer) transaction. The requirement to report barter transactions in the Federal financial report also would remain. The barter exchange needs to be accounted for according to the GAAP standard. The GAAP standard for States is dictated by the GASB Statement No. 62. In general, accounting for nonmonetary transactions should be based on the fair values of the assets (or services) involved, which is the same basis as that used in monetary transactions. Therefore, barter could result in an even exchange when the fair values of the assets exchanged are the same or result in a gain or a loss when one part of the exchange has a higher value than the other. A gain could be program income and a loss a project expense.

In the current regulations, the Service describes cooperative farming and grazing, a very typical activity with State agencies that is considered an even-exchange barter transaction. In this proposed rule, we propose to remove cooperative farming and grazing from § 80.98 not because it is no longer considered as an even-exchange barter transfer but because, under the current GASB standard, each State, and not the Service, is responsible for establishing processes for making those determinations for their State and then following the resulting processes. Therefore, any State desiring to include cooperative farming and grazing as an even-barter exchange must include it in the State’s processes. A State could potentially add more parameters within GAAP/GASB standards that could benefit the agency’s approaches and objectives. WSFR has been providing technical assistance to States through the Federal Assistance Coordinators Working Subcommittee to assist them in identifying any existing State policies on barter transactions and establishing or refining barter policies for the State fish and wildlife agency to use. By establishing State fish and wildlife agency policies on barter transactions that meet the standards established under GASB, and then following those policies, State agencies may avoid future audit findings related to barter.

One concern related to barter transactions that was brought to our attention is when a State agency wants to incentivize certain activities to support its program objectives and offers something of value to private entities in exchange for a desired action.

We do not address incentives in this rulemaking but did address them in a policy advisory (Advisory 2020–016, October 15, 2020 (<https://fawiki.fws.gov/pages/viewpage.action?pageId=117669889>)) when the question was presented to WSFR. We describe an “incentive” as something that motivates or encourages someone to do a desired behavior or action, that is, it stimulates a reaction or response. An incentive is not a barter transaction unless it meets the criteria for barter. A State agency offering incentives to prompt a desired reaction or response may take many forms, many of which are not barter transactions. When the incentive is more transactional and includes a nonmonetary exchange on both ends, it is a barter transaction and must follow the State processes and the regulations at 50 CFR part 80.

IX. Subpart I—Program Income

Section 80.120—What is program income?

We propose to update § 80.120 to better align with 2 CFR part 200. To this section, we propose to add barter transactions as a form of program income when the value of goods or services received exceeds the value of goods or services the agency provided.

X. Subpart J—Real Property

We propose to revise the heading of § 80.134 and make one substantive change to subpart J. We would add a new paragraph (e) under § 80.134 stating that real property acquired with license revenue (see § 80.20(b)) must be controlled by the State fish and wildlife agency and used only for administration of the agency (see § 80.10(c)). Paragraphs (a) through (d) of § 80.134 address how State agencies must use real property acquired under an award. The proposed addition of new paragraph (e) to this section would close the loop by referring to § 80.20(b), which includes real or personal property acquired with license revenue as “hunting and fishing license revenue” that must be protected, and then back to § 80.10(c), which requires that hunting and fishing license revenue be controlled by the State fish and wildlife agency and used only for the administration of that agency. We would impose no new requirements by adding this new paragraph (e); rather, this proposed addition would align the requirements in a meaningful way in the real property subpart.

XI. Subpart K—Revisions and Appeals

We are not proposing any substantive changes to subpart K.

XII. Subpart L—Information Collection

We are proposing to update subpart L to the current standardized paragraph for information collection.

Statutory Authority

The authorities for this action are 16 U.S.C. 669 *et seq.*, and 777–777m, except 777e–1 and g–1.

Request for Comments

You may submit comments and materials on this proposed rule by any one of the methods listed in **ADDRESSES**. We will not accept comments sent by email or fax or to an address not listed in **ADDRESSES**. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in **DATES**.

We will post your entire comment on <https://www.regulations.gov>. Before including personal identifying information in your comment, you should be aware that we may make your entire comment—including your personal identifying information—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. We will post all hardcopy comments on <https://www.regulations.gov>.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866, 13563, and 14094)

Executive Order (E.O.) 12866, as reaffirmed by E.O. 13563 and E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this proposed rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for

public participation and an open exchange of ideas.

Executive Order 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law.

We have developed this proposed rule in a manner consistent with these requirements.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency publishes a proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

We have examined this proposed rule's potential effects on small entities as required by the RFA. We have determined that this proposed rule would not have a significant economic effect on a substantial number of small entities and does not require a regulatory flexibility analysis because only eligible State, Territorial, and the District of Columbia fish and wildlife agencies may receive funding under the Acts and regulations. Therefore, small entities (small businesses, small organizations, and small governmental jurisdictions) would not be affected by this proposed rule.

In summary, we have considered whether this proposed rule would result in a significant economic impact on a substantial number of small entities. We certify that, if made final, this proposed rule will not have a significant economic effect on a substantial number of small entities as defined under the RFA, as amended. An initial regulatory

flexibility analysis is not required. Accordingly, a small entity compliance guide is not required.

Unfunded Mandates Reform Act

This proposed rule would not impose an unfunded mandate on State, local, or Tribal governments, or the private sector of more than \$100 million per year. The proposed rule would not have a significant or unique effect on State, local, or Tribal governments or the private sector.

(a) As discussed above under *Regulatory Flexibility Act*, this proposed rule would not have a significant economic effect on a substantial number of small entities.

(b) The regulations do not require a small government agency plan or any other requirement for expending local funds.

(c) The programs governed by the current regulations and enhanced by the proposed amendments in this document potentially assist small governments financially when they occasionally and voluntarily participate as subrecipients of an eligible agency.

(d) The proposed rule clarifies and improves upon the current regulations allowing State, local, and Tribal governments, and the private sector, to receive the benefits of financial assistance funding in a more flexible, efficient, and effective manner.

(e) Any costs incurred by a State, local, or Tribal government or the private sector are voluntary. There are no mandated costs associated with the proposed rule other than a required cost share, in some cases. No cost share is required under this proposed rule for insular areas.

(f) The benefits of grant funding outweigh the costs. Of the 50 States and 6 other jurisdictions that voluntarily are eligible to apply for grants in these programs each year, all participate. This is clear evidence that the benefits of this grant funding outweigh the costs.

(g) This proposed rule would not produce a Federal mandate of \$100 million or greater in any year, *i.e.*, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (E.O. 12630)

This proposed rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630. This proposed rule has no provision for taking private property. Any real property acquisitions

with private landowners are strictly voluntary and only with willing sellers. A takings implication assessment is not required.

Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. It would not interfere with the States' ability to manage themselves or their funds. We work closely with the States administering these programs. They helped us identify those sections of the current regulations needing further consideration and new issues that prompted us to develop a regulatory response. A federalism summary impact statement is not required.

Civil Justice Reform (E.O. 12988)

This proposed rule complies with the requirements of Executive Order 12988. Specifically, this proposed rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (E.O. 13175, Department Policy, and U.S. Fish and Wildlife Service Native American Policy)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this proposed rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it would have no substantial direct effects on federally recognized Indian Tribes and that consultation under the Department's Tribal consultation policy is not required. This proposed rule would inform States, Territories, and the District of Columbia as the eligible recipients under the Acts how to apply for funding, what activities are eligible for funding, and other administrative requirements. Eligible entities may partner with Indian Tribes on projects, but Indian Tribes are not eligible to receive funds directly.

Paperwork Reduction Act (44 U.S.C. 3501 et seq.)

This proposed rule contains existing and new information collections. All information collections require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The OMB has reviewed and approved the information collection requirements associated with the administration of financial assistance through grants and cooperative agreement awards to States, local governments, Indian Tribes, institutions of higher education, nonprofit organizations, foreign organizations, foreign public entities, for-profit entities, and individuals and has assigned OMB Control Number 1018-0100, Administrative Procedures for U.S. Fish and Wildlife Service Financial Assistance Programs (expires 02/28/2025).

In accordance with the PRA and its implementing regulations at 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on our proposal to revise OMB Control Number 1018-0100. This input will help us assess the impact of our information collection requirements and minimize the public's reporting burden. It will also help the public understand our information collection requirements and provide the requested data in the desired format.

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

- (1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;
- (2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and
- (4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of response.

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

The proposed revisions to existing and new reporting and/or recordkeeping requirements identified below require approval by OMB:

(1) *(NEW) Notice of Annual Apportionment Nonacceptance (50 CFR 80.12)*—If a State fish and wildlife agency does not want to receive the annual apportionment of funds, it must notify the Service in writing within 60 days after receiving a preliminary certificate of apportionment.

(2) *(NEW) State Agency Hunting and Sport Fishing License Certification Revision (50 CFR 80.39)*—A State fish and wildlife agency must submit revised certified data on license holders within 90 days after it becomes aware of errors in its certified data. The State may become ineligible to participate in the benefits of the relevant Act if the State becomes aware of errors in its certified data and does not resubmit accurate certified data within 90 days.

(3) *(NEW) Voluntary Display of Program Symbols (50 CFR 80.100)*—A State fish and wildlife agency does not have to display one of the symbols in § 80.99 on a project completed under the Acts. However, the Service encourages agencies to display the appropriate symbol as follows:

- a. An agency may display the appropriate symbol(s) on:
 1. Areas such as wildlife-management areas, shooting ranges, and sportfishing and boating-access facilities that were acquired, developed, operated, or maintained with funds authorized by the Acts; and
 2. Printed or web-based material or other visual representations of project accomplishments.

b. An agency may establish a requirement for similar standards for displaying the appropriate symbol or symbols, in the places described in paragraph (a) of this section, that is passed through to subrecipients. An agency may require a subrecipient to display the appropriate symbol or symbols in the places described in paragraph (a) of this section.

c. The Director or Regional Director may authorize an agency to use the symbols in a manner other than as described in paragraph (a) of this section.

d. The Director or Regional Director may authorize other persons, organizations, agencies, or governments to use the symbols for purposes related to the Acts by entering into a written agreement with the user. An applicant must state how it intends to use the symbol(s), to what it will attach the symbol(s), and the relationship to the specific Act.

e. The user of the symbol(s) must indemnify and defend the United States and hold it harmless from any claims, suits, losses, and damages from:

1. Any allegedly unauthorized use of any patent, process, idea, method, or device by the user in connection with its use of the symbol(s), or any other alleged action of the user; and

2. Any claims, suits, losses, and damages arising from alleged defects in the articles or services associated with the symbol(s).

f. The appearance of the symbol(s) on projects or products indicates that the manufacturer of the product pays excise taxes in support of the respective Act(s) and that the project was funded under the respective Act(s) (26 U.S.C. 4161, 4162, 4181, 4182, 9503, and 9504). The Service and the Department of the Interior make no representation or endorsement whatsoever by the display of the symbol(s) as to the quality, utility, suitability, or safety of any product, service, or project associated with the symbol(s).

g. No one may use any of the symbols in any other manner unless the Director or Regional Director authorizes it. Unauthorized use of the symbol(s) is a violation of 18 U.S.C. 701 and subjects the violator to possible fines and imprisonment.

(4) *(NEW) Required Display of CVA Program Symbol, Slogan, and Information (50 CFR 85.43 and 85.47)*—Facilities must display appropriate information signs at pumpout and portable toilet dump stations. Those signs should indicate fees, restrictions, hours of operation, operating instructions, a contact name, and 1-800-ASK-FISH telephone number for boaters to get additional information or to report an inoperable facility. As the source of funding for Clean Vessel Act facilities, the Sport Fish Restoration program should get credit through use of the Sport Fish Restoration logo. Grant recipients may use the crediting logo identified in 50 CFR 80.99 to identify projects funded by the Clean Vessel Act.

(5) (*REVISION*) Adjust previously approved burden estimates as follows:

- Reduce burden estimates due to the archival of the following programs: 15.641 Wildlife Without Borders—Mexico, 15.633 Landowner Incentive, and 15.656 Recovery Act Funds. We propose to reduce burden estimates based on the number of awards under these programs that were pending closeout reports as of our previous clearance.

- Increase burden estimates associated with new 15.069 Zoonotic Disease Initiative program. This new program was funded and then defunded since our last renewal. We propose to increase burden estimates for only post-award requirements (amendments and reporting) for the 21 awards issued by the program before funding recission.

- Increase burden estimates for increased financial assistance funding and activities resulting from Infrastructure Investment and Jobs Act (BIL) appropriations supplementing 14 Service financial assistance programs.

- Add the new 15.685 National Fish Passage and 15.686 National Fish Habitat Partnership programs, but we have not proposed a corresponding increase in burden estimates. These longstanding programs were previously managed and reported as subprograms under our 15.608 Fish and Wildlife Management Assistance program.

We also propose to renew the existing reporting and/or recordkeeping requirements identified below:

(1) *Application Package*—We use the information provided in applications to:

- (1) Determine eligibility under the authorizing legislation and applicable program regulations;
- (2) determine allowability of major cost items under the Cost Principles at 2 CFR part 200;
- (3) select those projects that will provide the highest return on the Federal investment; and
- (4) assist in compliance with laws, as applicable, such as the National Environmental Policy Act, the National Historic Preservation Act, and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. The full application package (submitted by the applicant) generally includes the following:

- Required Federal financial assistance application forms (SF-424 suite of forms, as applicable to specified project).

- Project Narrative—generally includes items such as:

- Statement of need,
- Project goals and objectives,
- Methods used and timetable,
- Description of key personnel qualifications,

- Description of stakeholders or other relevant organizations/individuals involved and level of involvement,
- Project monitoring and evaluation plan, and/or
- Other pertinent project-specific information.

- Pertinent project budget-related information—generally includes items such as:

- Budget justification,
- Detail on costs requiring prior approval,
- Indirect cost statement,
- Federally funded equipment list, and/or
- Certifications and disclosures.

(2) *Amendments*—Recipients must provide written explanation and submit prior approval requests for budget or project plan revisions, due date extensions for required reports, or other changes to approved award terms and conditions. The information provided by the recipient is used by the Service to determine the eligibility and allowability of activities and to comply with the requirements of 2 CFR part 200.

(3) *Reporting Requirements*—Reporting requirements associated with financial assistance awards generally include the following types of reports:

- Federal Financial Reports (using the required SF-425),
- Performance Reports, and
- Real Property Status Reports, when applicable (using the required SF-429 forms series).

(4) *Recordkeeping Requirements*—In accordance with 2 CFR 200.334, financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award must be retained for a period of 3 years after the date of submission of the final expenditure report or, for Federal awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, respectively, as reported to the Federal awarding agency or pass-through entity (in the case of a subrecipient) (unless an exemption as described in 2 CFR 200.334 applies that requires retention of records longer than 3 years).

(5) *Real Property Reporting/Recordkeeping Requirements*—Service recipients purchasing real property under their award in which the Federal Government retains an interest must report on the status and request approval to dispose of those per 2 CFR part 200 and 2 CFR part 1402 using the SF-429-A, Real Property Status Report (General Reporting) and the SF-429-C,

Real Property Status Report (Disposition or Encumbrance Request), as appropriate. For real property acquisition awards in which the Service will retain an interest, we require recipients to submit certain information, including:

- Transactions, such as dates, method of transfer, title holder, and seller;
- Identifiers, such as State and Federal Record ID, parcel number, and property name;
- Values, such as appraised value, purchase price, and other cost information, and acres or acre feet;
- Encumbrances;
- Partners;
- Copies of any options, purchase agreements, mineral assessment reports, and draft conservation easements; and
- Documentation to demonstrate compliance with 2 CFR part 1402.

Title of Collection: Administrative Procedures for U.S. Fish and Wildlife Service Financial Assistance Programs.

OMB Control Number: 1018-0100.

Form Number: None.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Individuals/households, private sector, and State/local/Tribal governments.

Total Estimated Number of Annual Respondents: 15,199.

Total Estimated Number of Annual Responses: 17,170.

Estimated Completion Time per Response: Varies from 15 minutes to 100 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 403,086.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion, quarterly, or annually, depending on activity.

Total Estimated Annual Nonhour Burden Cost: None.

Send your written comments and suggestions on this information collection by the date indicated in **DATES** to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS: PRB/PERMA (JAO), 5275 Leesburg Pike, Falls Church, VA 22041-3803 (mail); or by email to Info_Coll@fws.gov. Please reference OMB Control Number 1018-0100 in the subject line of your comments.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

This proposed rule is not anticipated to constitute a major Federal action significantly affecting the quality of the human environment. The Service has preliminarily determined that categorical exclusion 43 CFR 46.210(i)

applies as the proposed regulation is of an administrative nature and no extraordinary circumstances in 43 CFR 46.215 apply. Therefore, preparation of an environmental assessment or environmental impact statement associated with this proposed rulemaking action is not required. Once eligible applicants have available funding, they would submit project proposals for review and consideration and an assessment under the National Environmental Policy Act and appropriate compliance would be completed prior to awarding a grant.

Effects on Energy Supply (E.O. 13211)

This proposed rule is not a significant energy action under the definition in Executive Order 13211. This proposed rule is not a significant regulatory action under Executive Order 12866 or any successor order, and it would have no effect on energy supply, distribution, or use. A statement of energy effects is not required.

Clarity of This Regulation

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

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use common, everyday words and clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

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

List of Subjects in 50 CFR Part 80

Fish, Fishing, Grant programs—natural resources, Grant programs—recreation, Grants administration, Hunting, Licensing and Registration, Natural resources, Rates and fares, Real property acquisition, Recreation and recreation areas, Reporting and recordkeeping requirements, Signs and symbols, Wildlife.

Proposed Regulation Promulgation

■ For the reasons discussed in the preamble, the U.S. Fish and Wildlife Service proposes to revise 50 CFR part 80 to read as follows:

PART 80—ADMINISTRATIVE REQUIREMENTS, PITTMAN-ROBERTSON WILDLIFE RESTORATION AND DINGELL-JOHNSON SPORT FISH RESTORATION ACTS

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- 80.54 Are costs of State central services eligible for funding?
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- 80.60 What is the relationship between the Traditional Wildlife Restoration Program, the Basic Hunter Education and Safety subprogram, and the Enhanced Hunter Education and Safety program for acquiring land for, expanding, or constructing public target ranges?
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- 80.62 What are eligible and ineligible 90/10/5 activities?
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- 80.150 How does a State fish and wildlife agency revise an award?
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Subpart L—Information Collection

- 80.160 What are the information collection requirements of this part?

Authority: 16 U.S.C. 669 *et seq.*, except for provisions specific to the Wildlife Conservation and Restoration program, and 777–777m, except 777e–1 and g–1.

Subpart A—General

§ 80.1 What does this part do?

This part of the Code of Federal Regulations tells States how they may:

(a) Use revenues derived from State hunting and fishing licenses in compliance with the Acts.

(b) Receive annual apportionments from the Federal Aid to Wildlife Restoration Fund (16 U.S.C. 669(b)), if authorized, and the Sport Fish Restoration and Boating Trust Fund (26 U.S.C. 9504).

(c) Receive Federal financial assistance awards for eligible activities under the Traditional Wildlife Restoration program, the Basic Hunter Education and Safety subprogram, and the Enhanced Hunter Education and Safety program, including those authorized for hunter recruitment and recreational shooter recruitment under 16 U.S.C. 669c.

(d) Receive Federal financial assistance awards for eligible activities under the Sport Fish Restoration program, the Recreational Boating Access subprogram, the Aquatic Resources Education subprogram, and the State Outreach and Communications subprogram.

(e) Comply with the requirements of the Acts.

§ 80.2 What terms do I need to know?

The terms in this section pertain only to the regulations in this part.

90/10/5 means activities authorized under Public Law 116–17 for acquiring land for, expanding, or constructing public target ranges that apply a 90 percent Federal/10 percent non-Federal cost share and a 5-year period of availability for obligation.

Acquisition of real property means taking ownership or control of a designated area of land or an interest in land by purchase, assignment, reversion, gift, eminent domain, or any other method consistent with State or Federal law. The purpose of the acquisition must be for an eligible activity to meet the objective of an award.

Acts means the Pittman-Robertson Wildlife Restoration Act of September 2, 1937 (Wildlife Restoration Act), as amended (16 U.S.C. 669 *et seq.*, except for provisions specific to the Wildlife Conservation and Restoration program), and the Dingell-Johnson Sport Fish Restoration Act of August 9, 1950 (Sport Fish Restoration Act), as amended (16 U.S.C. 777–777m, except 777e–1 and g–1).

Allocate means the process by which States work with the Service to assign apportioned funds to a specific subaccount based on the eligible uses. Once allocated, the funding becomes available for obligation to Federal awards for eligible program activities.

Allowable refers to those costs that meet the general criteria to be charged to a Federal financial assistance award and comply with the basic considerations at 2 CFR 200.402 through 200.411, as well as the general principles for selected items of cost at 2 CFR 200.420 through 200.476.

Angler means a person who fishes for recreational purposes as permitted by State and/or Federal law.

Apportioned funds are those that are made available to a State based on formulas in the Acts. Traditional Wildlife Restoration program funds are apportioned using the formula at 16 U.S.C. 669c(b); Basic Hunter Education and Safety subprogram funds are apportioned using the formula at 16 U.S.C. 669c(c); Enhanced Hunter Education and Safety program funds are apportioned using the formula at 16 U.S.C. 669c(c) and according to the criteria at 16 U.S.C. 669h–1(a); and Sport Fish Restoration program funds are apportioned using the formula at 16 U.S.C. 777c(c).

Asset means all tangible and intangible real and personal property of monetary value. This includes “capital assets” as defined at 2 CFR 200.1,

“equipment” as defined at 2 CFR 200.1, and real property of any value.

Award or grant has the same meaning as “Federal award” as defined at 2 CFR 200.1. The regulations in this part use the terms “award” or “grant” for both a grant and a cooperative agreement for convenience of reference, and the use does not affect the legal distinction between the two instruments. An award includes all “project costs” as defined at 2 CFR 200.1. We use the term “grant” when making references to programs (i.e., a grant program).

Capital improvement or capital expenditure for improvement means:

(1) A structure that costs at least \$25,000 to build, acquire, or install; or the alteration or repair of a structure or the replacement of a structural component, if it increases the structure’s useful life by at least 10 years or its market value by at least \$25,000.

(2) A State fish and wildlife agency may use its own definition of “capital improvement” if the agency’s definition includes all capital improvements as defined here.

Comprehensive management system (CMS) is a State fish and wildlife agency’s method of operations that links programs, financial systems, human resources, goals, products, and services. When using a CMS method of operations, a State fish and wildlife agency assesses the current, projected, and desired status of fish and wildlife; develops a strategic plan and carries it out through an operational planning process; and evaluates results. The planning period is at least 5 years using a minimum 15-year projection of the desires and needs of the State’s citizens. A CMS award funds all or part of a State’s CMS. For those States that employ a CMS method of operations, where we refer to a “project statement” in the regulations in this part, a CMS State might refer to activities as part of its “operational plan.”

Construction means the act of building or significantly renovating, altering, or repairing a structure. Acquiring, clearing, and reshaping land and demolishing structures are types or phases of construction. Examples of structures are buildings, roads, parking lots, utility lines, fences, piers, wells, pump stations, ditches, dams, dikes, water-control structures, fish-hatchery raceways, and shooting ranges. For the purposes of 90/10/5 projects (acquiring land for, expanding, or constructing public target ranges), *constructing* means building a public target range (see §§ 80.60 and 80.62, 16 U.S.C. 669g(b)(2) and 669h–1(b)(2)).

Cost sharing has the same meaning as at 2 CFR 200.1. Cost sharing must meet

the requirements at 2 CFR 200.306(b)(1) through (7) and §§ 80.83 through 80.85.

Director has the same meaning as at 50 CFR 1.4 and, for the purposes of this part, means:

(1) The person whom the Secretary delegated to administer the Acts nationally; or

(2) A deputy or another person authorized temporarily to administer the Acts nationally.

Diversion means any use of revenue from hunting and fishing licenses for a purpose other than administration of the State fish and wildlife agency.

Eligible refers to activities or actions for a Federal financial assistance program that are authorized by Congress through a statute or by Federal agency regulations to accomplish a public purpose under that program.

Equipment has the same meaning as at 2 CFR 200.1.

Expanding means, for the purposes of projects for acquiring land for, expanding, or constructing public target ranges (90/10/5), physical improvements to an existing public target range that add to the utility of the range in a manner that ultimately increases range capacity to accommodate more participants. Physical improvements do not necessarily have to increase the size of the facility but must result in an increase in physical usability that will accommodate more participants.

Facility means the physical infrastructure and appurtenances necessary to support purposes under the Acts. The physical infrastructure includes land.

Federal fiscal year (FFY) means the annual period the Federal Government uses for budgets and accounting, beginning October 1 and ending September 30.

Fee interest means the right to possession, use, and enjoyment of a parcel of land or water for an indefinite period. A fee interest, as used in this part, may be the:

(1) Fee simple or full-fee interest, which includes all possible interests or rights that a person or legal entity can hold in a parcel of real property (land or water); or

(2) Fee with exceptions to title or less-than-full-fee interest, which excludes one or more real property interests that would otherwise be part of the fee simple.

Fiscal year, for the purposes of determining the number of paid hunting- or fishing-license holders in a State, means the State-determined (State fiscal year or license year) period that it identifies to certify license holders.

Fish restoration and management project means the restoration and management of any species of fish that has material value in connection with sport or recreation (see *Sport fish*) in the marine and/or fresh waters of the United States.

Hunter recruitment and recreational shooter recruitment means any activity or project to recruit or retain and, for the purposes of the regulations in this part, reactivate hunters and recreational shooters including by:

(1) Outreach and communications as a means—

(i) To improve communications with hunters, recreational shooters, and the public with respect to hunting and recreational shooting opportunities;

(ii) To reduce barriers to participation in these activities;

(iii) To advance the adoption of sound hunting and recreational shooting practices;

(iv) To promote conservation and the responsible use of the wildlife resources of the United States; and

(v) To further safety in hunting and recreational shooting.

(2) Providing education, mentoring, and field demonstrations;

(3) Enhancing access for hunting and recreational shooting, including through range construction; and

(4) Providing education to the public about the role of hunting and recreational shooting in funding wildlife conservation.

Law enforcement means enforcing laws, orders, and regulations.

Lease means an agreement in which the owner of a fee interest transfers to a lessee the right of exclusive possession and use of an area of land or water for a fixed period, which may be renewable. The lessor cannot readily revoke the lease at their discretion. The lessee pays rent periodically or as a single payment. The lessor must be able to regain possession of the lessee’s interest (leasehold interest) at the end of the lease term. An agreement that does not correspond to this definition is not a lease even if it is labeled as one.

Maintenance means keeping a facility or equipment in a condition to serve the intended purpose. It includes recurring, cyclical, or occasional actions to keep a facility or equipment fully functional that are less than the threshold for a capital improvement or capital expenditure for improvement. It does not include operations. Examples of maintenance activities include but are not limited to:

(1) Routine upkeep for physical and mechanical parts of a facility; and

(2) Replacing components of a facility or a piece of equipment that are

expected to need replacement during its useful life.

Obligation has two meanings depending on the context:

(1) When a recipient of Federal financial assistance commits funds by incurring costs for purposes of the award, the definition for “financial obligations” at 2 CFR 200.1 applies.

(2) When the Service sets aside funds in an award for disbursement immediately or at a later date in the formula-based programs under the Acts, the definition at § 80.91 applies.

Operations means supporting the availability of a facility and its components for current public or other intended use. Operations include necessary activities that occur frequently (daily, weekly, monthly). The term does not include maintenance. Operations may be divided into the categories of physical or administrative. Examples include but are not limited to:

(1) Physical activities such as trash removal, portable toilet services, and utility costs; and

(2) Administrative operations such as personnel costs to manage and keep a facility open.

Period of performance has the same meaning as at 2 CFR 200.1.

Personal property means anything tangible or intangible that is not real property.

(1) Tangible personal property includes:

(i) Objects, such as equipment and supplies, that are movable without substantive damage to the land or any structure to which they may be attached and not considered an inherent part of the land;

(ii) Soil, rock, gravel, minerals, gas, oil, or water after excavation or extraction from the surface or subsurface;

(iii) Commodities derived from trees or other vegetation after harvest or separation from the land; and

(iv) Annual crops before or after harvest.

(2) Intangible personal property has the same meaning as at 2 CFR 200.1 and includes:

(i) Intellectual property, such as patents or copyrights;

(ii) Securities, such as bonds and interest-bearing accounts; and

(iii) Licenses, which are personal privileges (not a real property interest) granted by consent of a landowner, lessee, or tenant to use an area of land or water that would otherwise be trespass or another violation of law, with at least one of the following attributes:

(A) Are revocable at the discretion of the entity consenting to the license;

(B) Terminate when the area of land or water passes to another owner, the lease or tenancy ends, or the landowner, lessee, or tenant dies; or

(C) Do not transfer a right of exclusive use and possession of an area of land or water.

Project means one or more related undertakings in a project-by-project award that are necessary to fulfill a need or needs, as defined by a State fish and wildlife agency, consistent with the purposes of the appropriate Act. For convenience of reference in this part, the meaning of “project” includes an agency’s fish and wildlife program under a CMS award.

Project-by-project award means an award of money based on a detailed statement of a project, or projects, and other supporting documentation.

Public means of, relating to, or affecting all people in general.

Public access means the public has opportunity, permission, and/or ability to enter, approach, pass to, from, and within, and appropriately use a place/facility for an authorized purpose (see § 80.58 for further requirements).

Public target range, including mobile public target ranges and privately owned target ranges during those times when open for public use, means a specific location that—

(1) Is identified by a governmental agency for recreational shooting;

(2) Is open to the public;

(3) May be supervised; and

(4) May accommodate archery or rifle, pistol, or shotgun shooting.

Public relations means those activities dedicated to maintaining the image of the non-Federal entity (recipient or subrecipient) or maintaining or promoting understanding and favorable relations with the community, public at large, or any segment of the public. This term could include communicating with the public about specific activities or accomplishments resulting from approved projects or communication and liaison necessary to keep the public informed on matters of public concern such as notices of funding opportunities. (See also “advertising and public relations” in 2 CFR part 200).

R3 means to recruit, retain, and/or reactivate members of the public to actively participate in the outdoor recreational activities of hunting, angling, boating, and recreational shooting. State fish and wildlife agencies and other involved partners may define R3 more broadly, but agencies must use funds under the Acts only for activities that are eligible under the regulations in this part.

Real property means one, several, or all interests, benefits, and rights inherent in the ownership of a parcel of land or water. Examples of real property include fees, conservation easements, access easements, utility easements, and mineral rights. A leasehold interest is also real property except in those States where the State attorney general provides an official opinion that determines a lease is personal property under State law.

(1) A parcel includes (unless limited by its legal description) the space above and below it and anything physically affixed to it by a natural process or human action. Examples include standing timber, other vegetation (except annual crops), buildings, roads, fences, and other structures.

(2) A parcel may also have rights attached to it by a legally prescribed procedure. Examples include water rights or an access easement that allows the parcel’s owner to travel across an adjacent parcel.

(3) The legal classification of an interest, benefit, or right depends on its attributes rather than the name assigned to it. For example, a grazing permit is often incorrectly labeled a lease, which can be real property, but most grazing permits are actually licenses, which are not real property.

Recipient for the purposes of the regulations in this part means the entities eligible to receive apportionments under the Acts (see § 80.10).

Regional Director has the same meaning as at 50 CFR 1.7. This person’s responsibility does not extend to any administrative units that the Service’s Washington Office supervises directly in that geographic region.

Secretary has the same meaning as at 50 CFR 1.8.

Service has the same meaning as at 50 CFR 1.3.

Sport fish means aquatic, gill-breathing, vertebrate animals with paired fins, having material value for recreation in the marine and fresh waters of the United States.

State means any State of the United States, the Commonwealth of Puerto Rico, and the insular areas of the Commonwealth of the Northern Mariana Islands, the Territory of Guam, the Territory of the U.S. Virgin Islands, and the Territory of American Samoa.

(1) “State” also includes the District of Columbia for purposes of the Sport Fish Restoration Act, the Sport Fish Restoration program, and its subprograms. “State” does not include the District of Columbia for purposes of the Wildlife Restoration Act and the programs and subprogram under the Act

because the Wildlife Restoration Act does not authorize funding for the District.

(2) References to “the 50 States” apply only to the 50 States of the United States and do not include the Commonwealths of Puerto Rico and the Northern Mariana Islands, the District of Columbia, or the Territories of Guam, the U.S. Virgin Islands, and American Samoa.

State fish and wildlife agency (or *agency*) means the administrative unit designated by State law or regulation to carry out State laws for management of fish and wildlife resources. If an agency has other jurisdictional responsibilities, the agency is considered the State fish and wildlife agency only when exercising responsibilities specific to management of the State’s fish and wildlife resources.

Subaccount (and *account*) means the fiscal management designation used in the Service’s financial system to identify funds by program and subprogram allocation (see § 80.61 for a description of subaccounts and the financial system). Different subaccounts also distinguish between benefits to marine or freshwater fisheries in the programs and subprograms authorized by the Sport Fish Restoration Act.

Subaward has the same meaning as at 2 CFR 200.1. A subaward may serve as a third-party binding agreement where required.

Subrecipient has the same meaning as at 2 CFR 200.1.

Traditional Wildlife Restoration program, for the purposes of the regulations in this part and associated policies, means the activities that are funded under apportionments authorized at 16 U.S.C. 669c(b), which reflects the original program funded under the Wildlife Restoration Act of 1937 (see eligible activities at § 80.50(a)). We use this term for clarity when administering awards, as many eligible activities are specific to funding sources within the Act.

Useful life means the period during which a federally funded capital improvement, capital asset, or equipment is capable of fulfilling its intended purpose with adequate routine maintenance.

Wildlife means the indigenous or naturalized species of birds or mammals that are either:

- (1) Wild and free-ranging;
- (2) Held in a captive-breeding program established to reintroduce individuals of a depleted indigenous species into previously occupied range; or
- (3) Under the jurisdiction of a State fish and wildlife agency.

Wildlife restoration project means the selection, restoration, rehabilitation, and improvement of areas of land or water adaptable as feeding, resting, or breeding places for wildlife, including acquisition of such areas or estates or interests therein as are suitable or capable of being made suitable therefor, and the construction thereon or therein of such works as may be necessary to make them available for such purposes and also including such research into problems of wildlife management as may be necessary to efficient administration affecting wildlife resources, and such preliminary or incidental costs and expenses as may be incurred in and about those projects.

Subpart B—State Fish and Wildlife Agency Eligibility

§ 80.10 Who is eligible to receive the benefits of the Acts?

States acting through their fish and wildlife agencies are eligible for benefits of the Acts only if they pass and maintain legislation that:

- (a) Assents to the provisions of the Acts;
- (b) Ensures the conservation of fish and wildlife; and
- (c) Requires that revenue from hunting and fishing licenses be:

- (1) Controlled only by the State fish and wildlife agency; and
- (2) Used only for administration of the State fish and wildlife agency, which includes only the functions required to manage the agency and the fish- and wildlife-related resources for which the agency has authority under State law.

§ 80.11 How does a State become ineligible to receive the benefits of the Acts?

A State becomes ineligible to receive the benefits of the Acts if the State:

- (a) Fails materially to comply with any law, regulation, or terms and conditions of the Federal award as it relates to acceptance and use of funds under the Acts;
- (b) Does not have legislation required at § 80.10 or passes legislation contrary to the Acts; or
- (c) Diverts hunting and fishing license revenue from:
 - (1) The control of the State fish and wildlife agency; or
 - (2) Purposes other than the agency’s administration.

§ 80.12 Must a State fish and wildlife agency confirm that it wants to receive an annual apportionment of funds?

No. However, if a State fish and wildlife agency does not want to receive the annual apportionment of funds, it must notify the Service in writing

within 60 days after receiving a preliminary certificate of apportionment.

Subpart C—License Revenue

§ 80.20 What does revenue from hunting and fishing licenses include?

Hunting and fishing license revenue includes:

(a) All proceeds from State-issued general or special hunting and fishing licenses, permits, stamps, tags, access and use fees, and other State charges to hunt or fish for recreational purposes. Revenue from licenses sold by vendors is net income to the State after deducting reasonable sales fees or similar amounts retained by vendors.

(b) Real or personal property acquired with license revenue.

(c) Income from the sale, lease, or rental of, granting rights to, or a fee for access to real or personal property acquired or constructed with license revenue.

(d) Income from the sale, lease, or rental of, granting rights to, or a fee for access to a recreational opportunity, product, or commodity derived from real or personal property acquired, managed, maintained, or produced by using license revenue.

(e) Interest, dividends, or other income earned on license revenue.

(f) Reimbursements for expenditures originally paid with license revenue.

(g) Payments received for services funded by license revenue.

§ 80.21 What if a State diverts license revenue from the control of its fish and wildlife agency?

The Director may declare a State to be in diversion if it violates the requirements of § 80.10 by diverting license revenue from the control of its fish and wildlife agency to purposes other than the agency’s administration. The State is then ineligible to receive benefits under the relevant Act from the date the Director signs the declaration until the date the State resolves the diversion. Only the Director may declare a State to be in diversion, and only the Director may rescind the declaration.

§ 80.22 What must a State do to resolve a declaration of diversion?

The State must complete the actions in paragraphs (a) through (e) of this section to resolve a declaration of diversion. The State must use a source of funds other than license revenue to fund the replacement of license revenue.

(a) If necessary, the State must enact adequate legislative prohibitions to prevent diversions of license revenue.

(b) The State fish and wildlife agency must replace all diverted funds derived from license revenue and the interest lost up to the date of repayment. The agency must update financial records for the receipt of the diverted funds and interest accordingly.

(c) The agency must receive either the revenue earned from diverted property during the period of diversion or the current market rental rate of any diverted property, whichever is greater.

(d) The agency must take one of the following actions to resolve a diversion of real, personal, or intellectual property:

(1) Regain management control of the property, which must be in about the same condition as before diversion;

(2) Receive replacement property that meets the criteria in paragraph (e) of this section; or

(3) Receive an amount at least equal to the current market value of the diverted property only if the Director agrees that the actions described in paragraphs (d)(1) and (2) of this section are impractical.

(e) To be acceptable under paragraph (d)(2) of this section:

(1) Replacement property must have both:

(i) Market value that at least equals the current market value of the diverted property; and

(ii) Fish or wildlife benefits that at least equal those of the property diverted.

(2) The Director must agree that the replacement property meets the requirements of paragraph (e)(1) of this section.

§ 80.23 Does a declaration of diversion affect a previous Federal obligation of funds?

No. Federal funds obligated before the date that the Director declares a diversion remain available for expenditure without regard to the intervening period of the State's ineligibility. See § 80.91 for when a Federal obligation occurs.

Subpart D—Certifying License Holders

§ 80.30 Why must a State fish and wildlife agency certify the number of paid license holders?

A State fish and wildlife agency must certify the number of individuals having paid licenses to hunt and paid licenses to fish because the Service uses these data in statutory formulas to apportion funds in the Wildlife Restoration and Sport Fish Restoration programs among the States.

§ 80.31 How does a State fish and wildlife agency certify the number of paid license holders?

(a) A State fish and wildlife agency certifies the number of paid license holders by responding to the Director's annual request for the following information:

(1) The number of individual paid hunting license holders in the State during the State-specified certification period (certification period); and

(2) The number of individual paid fishing license holders in the State during the certification period.

(b) The State fish and wildlife agency director or their designee:

(1) Must certify the information described at paragraph (a) of this section in the format that the Director specifies;

(2) Must provide documentation to support the accuracy of this information at the Director's request;

(3) Is responsible for eliminating multiple counting of the same individuals in the information that they certify and may use statistical sampling, automated record consolidation, or other techniques approved by the Director for this purpose.

(c) If a State fish and wildlife agency director uses statistical sampling to eliminate multiple counting of the same individuals, they must ensure that the sampling is complete by the earlier of the following:

(1) Five years after the last statistical sample; or

(2) Before completing the first certification following any change in the licensing system that could affect the number of license holders.

§ 80.32 What is the certification period?

A certification period must:

(a) Be 12 consecutive months;

(b) Correspond to the State's fiscal year or license year;

(c) Be consistent from year to year unless the Director approves a change; and

(d) End at least 1 year and no more than 2 years before the beginning of the FFY in which the apportioned funds first become available for expenditure.

§ 80.33 How does a State fish and wildlife agency decide who to count as paid license holders in the annual certification?

(a) A State fish and wildlife agency must count only those individuals who have a license issued:

(1) In the license holder's name; or

(2) With a unique identifier that is traceable to the license holder, who must be verifiable in State records.

(b) An agency must count an individual in the annual certification:

(1) Only once, and in the certification period in which the license first

becomes valid, when holding a single-year license. A single-year license is valid for any length of time from 1 day to less than 2 years. If valid 2 years or more, a license is considered a multiyear license and may be valid for a specific number of years that is 2 or more, or for the lifetime of the individual (see § 80.35(d)).

(2) Only for the number of years the license is valid and starting in the certification period in which the license first becomes valid, unless that year has already been certified in the case of multiyear licenses. An individual holding a multiyear license may be counted for only the number of years the license is valid and only during the applicable certification periods.

(3) Only for the number of years allowed under § 80.35, when holding a lifetime license.

(c) An individual is counted as a valid license holder when meeting requirements at § 80.34, even if the individual is not required to have a paid license.

(d) An individual having more than one valid hunting license is counted only once each certification period as a hunter. An individual having more than one valid fishing license is counted only once each certification period as an angler. An individual having both a valid hunting license and a valid fishing license, or a valid combination hunting/fishing license, may be counted once each certification period as a hunter and once each certification period as an angler. The license holder may have voluntarily obtained the license(s) or was required to obtain the license(s) to receive a different privilege.

(e) An individual who has a license that allows the license holder only to trap animals or only to engage in commercial fishing or other commercial activities must not be counted.

§ 80.34 Must a State fish and wildlife agency receive a minimum amount of revenue for each year a license holder is certified?

(a) Yes. A State fish and wildlife agency must receive a minimum amount of gross revenue for each year a license holder is certified.

(b) For the State fish and wildlife agency to certify a license holder, the agency must establish that it receives the following minimum gross revenue:

(1) \$2 for each year the license is certified, for either the privilege to hunt or the privilege to fish; or

(2) \$4 for each year the license is certified for a combination license that gives privileges to both hunt and fish.

§ 80.35 What additional options and requirements apply to multiyear licenses?

In addition to the requirements at § 80.34, the following provisions apply to multiyear licenses:

(a) An agency may spend the proceeds derived from a multiyear license fee as soon as the agency receives payment.

(b) A multiyear license may be valid for either a specific or indeterminate number of years, but it must be valid for at least 2 years.

(c) The agency may count a license holder for the number of certification periods for which all the following requirements are met:

(1) The license holder meets all other requirements of this subpart;

(2) The license is currently valid;

(3) The agency received the minimum required revenue for each certification period during the duration of the license, in the case of a multiyear license with a specified ending date;

(4) The license holder remains alive (see paragraph (d) of this section), in the

case of a lifetime license or other license with no specified ending date; and

(5) If the license is valid for less than the number of years that it meets the minimum required revenue, or the license exceeds the life expectancy of the holder, the agency may count the license holder only for the number of years during which all certification requirements are met. For example, an agency may count for 12 certification periods a license holder who purchased a single-privilege, multiyear license that sells for \$25 and is valid for at least 12 years.

(d) The agency must use and document a reasonable technique for deciding how many multiyear-license holders remain alive in the certification period. Some examples of reasonable techniques are specific identification of license holders, statistical sampling, life-expectancy tables, and mortality tables. The agency may instead use 80

years of age as a default for life expectancy.

(e) For currently valid multiyear licenses sold prior to September 26, 2019 (the effective date of the rule promulgated at 84 FR 44772, August 27, 2019), an agency may apply the provisions of § 80.34 to those multiyear licenses under the following situations:

(1) All the requirements in paragraph (c) of this section are met.

(2) The agency may count a multiyear license holder only once in any certification period (see § 80.33) when the license holder purchased another license with the same privilege within an allowable future certification period.

(3) An agency must count the license holder only for the appropriate number of current or future certification periods. The provisions of § 80.34 are not retroactive to past certification periods.

(4) For an illustration of the applications provided in this paragraph (e), see table 1 to paragraph (e):

TABLE 1 TO PARAGRAPH (e)—SCENARIOS FOR COUNTING LICENSE HOLDERS UNDER THE REQUIREMENTS FOR GROSS REVENUE AT § 80.34

[For use in counting valid multiyear licenses sold prior to September 26, 2019]

Scenario 1	Scenario 2
An agency sold a single-privilege multiyear license, valid for 10 years, for \$100 in 2014 (term of license 2014–2023)	
The agency spent the money and was able to count the license during only one certification period based on the regulations promulgated in 2014.	The agency invested the funds into an annuity that produced enough income to allow the license holder to be counted in all certification periods since the date of the license sale.
Applying the standard at § 80.34(b)(1) to the original license cost results in a potential for 50 certification periods (\$100/\$2 per year = 50).	Applying the standard at § 80.34(b)(1) to the original license cost results in a potential for 50 certification periods (\$100/\$2 per year = 50).
After subtracting the 1 certification period that was already counted, 49 potential certification periods remain.	After subtracting the 6 (2014–2019) certification periods already counted, 44 potential certification periods remain.
Because the license is valid for only 10 years, and through 2023, under scenario 1 the agency could count the license holder only from 2019 through the end of the term of the license (2023) or an additional five certification periods.	Because the license is valid for only 10 years, under scenario 2 the agency could count the license holder in an additional four (2020–2023) certification periods.

§ 80.36 May a State fish and wildlife agency count license holders in the annual certification if the agency receives funds from the State or other entity to cover the holders' license fees?

If a State fish and wildlife agency receives funds from the State or other entity to cover fees for some license holders, the agency may count those license holders in the annual certification only under the following conditions:

(a) The State funds to cover license fees must come from a source other than hunting- and fishing-license revenue.

(b) The State must identify funds to cover license fees separately from other funds provided to the agency.

(c) The State fish and wildlife agency must receive at least the average amount of State-provided discretionary funds that it received for the administration of

the State's fish and wildlife agency during the State's 5 previous fiscal years.

(1) State-provided discretionary funds are those from the State's general fund that the State may increase or decrease if it chooses to do so.

(2) Some State-provided funds are from special taxes, trust funds, gifts, bequests, or other sources specifically dedicated to the support of the State fish and wildlife agency. These funds typically fluctuate annually due to interest rates, sales, or other factors. They are not discretionary funds for purposes of this part as long as the State does not take any action to reduce the amount available to its fish and wildlife agency.

(d) The State fish and wildlife agency must receive and account for the State or other entity funds as license revenue.

(e) The State fish and wildlife agency must issue licenses in the license holder's name or by using a unique identifier that is traceable to the license holder, who is verifiable in State records.

(f) The license fees must meet all other requirements in this part.

§ 80.37 May the State fish and wildlife agency certify a license sold at a discount?

Yes. A State fish and wildlife agency may certify a license that is sold at a discount if the agency meets the rules for minimum gross revenue at § 80.34.

§ 80.38 May a State fish and wildlife agency certify a license when an entity other than the agency offers a discount on a license or offers a free license?

A State fish and wildlife agency may certify a license when an entity other than the agency offers a license that costs less than the regulated price only if:

- (a) The license is issued to the individual according to the requirements at § 80.33;
- (b) The amount received by the agency meets all other requirements in this subpart; and
- (c) The license meets any other conditions required by the agency.

§ 80.39 What must a State fish and wildlife agency do if it becomes aware of errors in its certified license data?

A State fish and wildlife agency must submit revised certified data on license holders within 90 days after it becomes aware of errors in its certified data. The State may become ineligible to participate in the benefits of the relevant Act if the State becomes aware of errors in its certified data and does not resubmit accurate certified data within 90 days.

§ 80.40 May the Service recalculate an apportionment if a State fish and wildlife agency submits revised data?

The Service may recalculate an apportionment of funds based on revised certified license data under the following conditions:

- (a) If the Service receives revised certified data for a pending apportionment before the Director approves the final apportionment, the Service may recalculate the pending apportionment.
- (b) If the Service receives revised certified data for an apportionment after the Director has approved the final version of that apportionment, the Service may recalculate the apportionment only if it would not reduce funds to other State fish and wildlife agencies.

§ 80.41 May the Director correct a Service error in apportioning funds?

Yes. The Director may correct any error that the Service makes in apportioning funds.

Subpart E—Eligible Activities

§ 80.50 What activities are eligible for funding under the Wildlife Restoration Act?

The following activities are eligible for funding in these programs and subprograms under the Wildlife Restoration Act:

- (a) *Traditional Wildlife Restoration program.* The following wildlife

restoration projects and other associated activities are eligible for funding under apportionments authorized at 16 U.S.C. 669c(b).

- (1) Restoring and managing wildlife for the benefit of the public.
- (2) Conducting research on the problems of managing wildlife and its habitat if necessary to administer wildlife resources efficiently. This research may include social science activities.
- (3) Obtaining data to guide and direct the regulation of hunting.
- (4) Acquiring real property suitable or capable of being made suitable for:
 - (i) Wildlife habitat or management;
 - (ii) Providing public access for hunting or other wildlife-oriented recreation; or
 - (iii) Supporting other eligible activities described under this paragraph (a).
- (5) Wildlife restoration projects for restoring, rehabilitating, improving, managing, or maintaining areas of lands or waters as wildlife habitat.
- (6) Building structures or acquiring equipment, goods, and services for:
 - (i) Restoring, rehabilitating, or improving lands or waters as wildlife habitat;
 - (ii) Supporting wildlife management;
 - (iii) Providing public access for hunting or other wildlife-oriented recreation; or
 - (iv) Supporting other eligible activities described under this paragraph (a).
- (7) Acquiring land for, expanding, or constructing public target ranges following the requirements of § 80.60 when combining up to 10 percent of annually apportioned Traditional Wildlife Restoration funds (16 U.S.C. 669c(b)) with Enhanced Hunter Education and Safety funds (16 U.S.C. 669h–1). When Traditional Wildlife Restoration funds are committed to the Wildlife Restoration for Public Target Ranges 90/10/5 subaccount, they are no longer eligible for Traditional Wildlife Restoration activities.
- (8) Communicating with the public (see § 80.52(h)), including:
 - (i) Outreach and sharing information on award activities, accomplishments, performance, or other communication related to meeting the objectives of an award;
 - (ii) Providing the public with information on Wildlife Management Areas; public access for hunting or other wildlife-associated recreation; notices on safety, rule changes, and topics of interest to the public related to wildlife management; and other opportunities available to the public as a result of a Traditional Wildlife Restoration award;

- (iii) Liaising with the media or other venues to provide public information related to the objectives of an award; or
- (iv) Other forms of communication that support a State's wildlife restoration and management objectives in an award.

(9) Public relations, advertising as a form of outreach, and marketing that are associated with achieving eligible objectives require prior approval of the Service. These activities are allowable only when included in the approach of an approved award to accomplish eligible activities and meet award objectives. Communication that solely benefits the agency is unallowable public relations and is not eligible for funding under the Act.

(b) Basic Hunter Education and Safety subprogram and Hunter Recruitment and Recreational Shooter Recruitment.

(1) The following activities are eligible under the Basic Hunter Education and Safety subprogram for activities authorized at 16 U.S.C. 669g(b):

- (i) Teaching the skills, knowledge, and attitudes necessary to be a responsible hunter.
- (ii) Developing and improving access to public target ranges by:

(A) Acquiring real property suitable or capable of being made suitable for public target ranges, including through licenses or third-party binding agreements that provide assurances for public access (see § 80.58).

(B) Constructing, upgrading, or restoring public target ranges to a useful condition.

(C) Operating or maintaining public target ranges.

(D) Acquiring land for, expanding, or constructing public target ranges as 90/10/5 projects following §§ 80.60 and 80.62.

(E) Constructing, operating, or maintaining educational facilities to support Hunter Education.

(2) The following activities are eligible when directly supporting recruiting, retaining, or reactivating hunters or recreational shooters (R3), as authorized at 16 U.S.C. 669c(c)(4).

(i) Communicating with hunters, recreational shooters, and the public about hunting and recreational shooting and associated opportunities by:

(A) Promoting conservation and the responsible use of the wildlife resources of the United States as part of an effort to recruit, retain, or reactivate hunters or recreational shooters.

(B) Promoting a State's R3 program, special events, and opportunities.

(C) Providing outreach on public target range availability, access, and locations.

(D) Marketing, publications, press releases, and media relations for content directly related to R3 activities.

(ii) Interpreting, translating, printing, or disseminating published State hunting regulations to inform and educate the public about their responsibilities to comply with laws, orders, and regulations.

(iii) Using a State fish and wildlife agency's website, cell phone or software products, online support systems, or other appropriate communication tools to engage the public in activities supporting a State's R3 efforts (see § 80.55(c) for exclusions related to income-producing activities).

(iv) Supporting the scope and impact of a State's R3 program by:

(A) Reducing barriers to hunting and recreational shooting opportunities;

(B) Furthering safety in hunting and recreational shooting;

(C) Providing education, mentoring, field demonstrations, and other similar opportunities to recruit, retain, or reactivate hunters or recreational shooters;

(D) Constructing, operating, or maintaining educational facilities to the extent they support R3 activities;

(E) Supporting programs for hunting or recreational shooting that have been developed or are delivered by other entities; and

(F) Offering activities that support R3 for youth and beginner hunters or recreational shooters, such as R3 camps and mentoring programs.

(v) Constructing, operating, or maintaining public target ranges, including mobile public target ranges.

(vi) Educating the public about the role of hunting and recreational shooting in funding wildlife conservation.

(vii) Supplying services that support R3 activities, such as hunt guides, trainers for shooting, and celebrity endorsements.

(viii) Acquiring supplies that enhance the experience and skills for hunters and recreational shooters.

(ix) Engaging in other allowable activities that directly support recruiting, retaining, or reactivating hunters or recreational shooters.

(c) *Enhanced Hunter Education and Safety program.* The following activities are eligible under Enhanced Hunter Education and Safety for activities authorized at 16 U.S.C. 669h–1:

(1) Enhancing programs for hunter education, hunter development, and firearm and archery safety. Hunter-development programs introduce individuals to and recruit them to take part in hunting, bow hunting, target shooting, or archery.

(2) Enhancing interstate coordination and developing hunter-education and public target range programs.

(3) Enhancing programs for education, safety, or development of firearm and bow hunters and recreational shooters.

(4) Enhancing development, construction, upgrades, rehabilitation, and improved safety features at public target ranges.

(5) Acquiring real property suitable or capable of being made suitable for public target ranges.

(6) Enhancing operation and maintenance of public target ranges.

(7) Enhancing access for hunting and recreational shooting opportunities.

(8) Acquiring land for, expanding, or constructing public target ranges following the regulations at § 80.60.

(9) Enhancing the hunter and recreational shooter R3 activities listed at paragraph (b)(2) of this section.

§ 80.51 What activities are eligible for funding under the Sport Fish Restoration Act?

The following activities are eligible for funding in these programs and subprograms under the Sport Fish Restoration Act:

(a) *Sport Fish Restoration program.*

The following fish restoration and management projects and other associated activities are eligible for funding under apportionments authorized at 16 U.S.C. 777c(c)(1).

(1) Restoring and managing sport fish for the benefit of the public.

(2) Conducting research on the problems of managing fish and their habitat and the problems of fish culture if necessary to administer sport fish resources efficiently. This research may include social science activities.

(3) Obtaining data to guide and direct the regulation of fishing. These data may be on:

(i) Size and geographic range of sport fish populations;

(ii) Changes in sport fish populations due to fishing, other human activities, or natural causes; and

(iii) Effects of any measures or regulations applied.

(4) Developing and adopting plans to restock sport fish and forage fish in the natural areas or districts covered by the plans and obtain data to develop, carry out, and test the effectiveness of the plans.

(5) Stocking fish for recreational purposes.

(6) Acquiring real property suitable or capable of being made suitable for:

(i) Sport fish habitat, as a buffer to protect that habitat, or sport fish management;

(ii) Providing public access for sport fishing; or

(iii) Supporting other eligible activities described under this paragraph (a).

(7) Implementing fish restoration and management projects to restore, rehabilitate, improve, manage, or maintain:

(i) Aquatic areas adaptable for sport fish habitat; or

(ii) Land adaptable as a buffer to protect sport fish habitat.

(8) Building structures or acquiring equipment, goods, and services for:

(i) Restoring, rehabilitating, or improving aquatic habitat for sport fish or land as a buffer to protect aquatic habitat for sport fish;

(ii) Supporting sport fish management;

(iii) Providing public access for sport fishing; or

(iv) Supporting other eligible activities described under this paragraph (a).

(9) Constructing, renovating, operating, or maintaining pumpout and dump stations. A pumpout station is a facility that pumps or receives sewage from a type III marine sanitation device that the U.S. Coast Guard requires on some vessels. A dump station, also referred to as a "waste reception facility," is specifically designed to receive waste from portable toilets on vessels.

(10) Communicating with the public (see § 80.52(h)) to include:

(i) Conducting outreach and sharing information on award activities, accomplishments, performance, or other communication related to meeting the objectives of an award;

(ii) Providing the public with information on sport fish management areas; public access for fishing or other sport fish-associated recreation; notices on safety, rule changes, and topics of interest to the public related to sport fish management; and other opportunities available to the public as a result of a Sport Fish Restoration award;

(iii) Liaising with the media or other venues to provide public information related to the objectives of an award; or

(iv) Engaging in other forms of communication that support a State's sport fish restoration and management objectives in an award.

(11) Conducting public relations, advertising as a form of outreach, and marketing that are associated with achieving eligible objectives require prior approval of the Service. These activities are allowable only when included in the approach of an approved award to accomplish eligible activities and meet award objectives. Communication that solely benefits the

agency is unallowable public relations and is not eligible for funding under the Act.

(b) *Sport Fish Restoration—Recreational Boating Access subprogram.* (1) Conducting projects and activities that may include those for motorized or nonmotorized vessels and users.

(2) Acquiring real property, including water rights, suitable or capable of being made suitable for:

(i) Building, renovating, or improving facilities to create or enhance public access to the waters of the United States;

(ii) Improving the suitability of these waters for recreational boating; or (iii) Providing benefits for recreational boating.

(3) Constructing a broad range of recreational boating access facilities that also may provide services or amenities to recreational boaters. “Facilities” includes auxiliary structures necessary to ensure safe use of recreational boating access facilities.

(4) Conducting surveys to determine the adequacy, number, location, and quality of facilities providing access to recreational waters for all sizes of recreational boats.

(5) Developing new, or redeveloping or expanding existing, boating access sites.

(c) *Sport Fish Restoration—Aquatic Resource Education subprogram.* Enhancing the public’s understanding of water resources, aquatic life forms, and sport fishing, and developing responsible attitudes and ethics toward the aquatic environment.

(d) *Sport Fish Restoration—State Outreach and Communications subprogram.* (1) Improving communications with anglers, boaters, and the public on sport fishing and boating opportunities.

(2) Interpreting, translating, printing, or disseminating published State fishing regulations to inform and educate the public about their responsibilities to comply with laws, orders, and regulations.

(3) Increasing participation in sport fishing and boating through R3 programs and activities.

(4) Advancing the adoption of sound fishing and boating practices including safety.

(5) Promoting conservation and responsible use of the aquatic resources of the United States.

§ 80.52 What activities are eligible for funding under all programs and subprograms under the Acts?

The following activities, when supporting other eligible activities under a program or subprogram and

costs are allocated to the appropriate funding source, are eligible for funding:

(a) Conducting planning and compliance activities such as engineering, designing, surveying, obtaining permits or appraisals, and conducting environmental and archeological assessments.

(b) Engaging in oversight activities related to an award, such as:

(1) Monitoring, evaluating, and reporting;

(2) Investigating noncompliance or diversions; and

(3) Protecting property rights for real property that is carrying out the purposes of the Acts.

(c) Maintaining and operating facilities and equipment under the ownership or management control of the State fish and wildlife agency, or under a third-party binding agreement, that support eligible activities under the Wildlife Restoration Act or Sport Fish Restoration Act.

(d) Covering costs associated with State electronic data systems (SEDS), when appropriately allocated and approved by the Service. A SEDS is an electronic system used by a State fish and wildlife agency to sell licenses or support other financial transactions, collect and manage data, and communicate information. The functions and abilities of a SEDS may vary depending on the State fish and wildlife agency needs and organization.

(e) Administering awards (see also § 80.54) and coordinating awards in associated programs and subprograms.

(f) Providing technical assistance.

(g) Making payments in lieu of taxes on real property under the control of the State fish and wildlife agency when the payment is:

(1) Required by State or local law; and

(2) Required for all State lands, including those acquired with Federal funds and those acquired with non-Federal funds.

(h) Communicating with the public on eligible activities in an award, when allowable under 2 CFR part 200, subpart E. This communication may include using various forms of media and technology and does not require prior approval (see also §§ 80.50(a)(8) and 80.51(a)(10)).

(i) Advertising (see 2 CFR 200.421) to hire personnel for eligible activities, for procuring goods or services for an eligible activity, or to inform the public or a target audience about events or opportunities that support purposes of the Acts.

§ 80.53 May an activity be eligible for funding if it is not explicitly eligible according to the regulations in this part?

Yes. An activity may be eligible for funding even if the regulations in this part do not explicitly designate it as an eligible activity if:

(a) The State fish and wildlife agency justifies in the project statement how the activity will help carry out the purposes of the program or subprogram under the Wildlife Restoration Act or the Sport Fish Restoration Act;

(b) The activities are allowable under 2 CFR part 200; and

(c) The Regional Director concurs with the justification.

§ 80.54 Are costs of State central services eligible for funding?

Yes. Administrative costs in the form of overhead or indirect costs for State central services outside of the State fish and wildlife agency are eligible for funding under the Acts and must follow an approved cost-allocation plan. These expenses must not exceed 3 percent of the funds apportioned annually to the State under the Acts.

§ 80.55 What activities are ineligible for funding?

The following activities are ineligible for funding under the Acts, except when necessary to carry out project purposes approved by the Regional Director:

(a) Law enforcement activities (see definition at § 80.2).

(b) The formal administrative process for establishing State fish and wildlife agency regulations. This process:

(1) Begins when boards, commissions, or other policymakers receive information and recommendations from State fish and wildlife agencies and use this input to develop and implement public policy.

(2) Involves official filing and publication of regulations, including State administrative procedures to officially adopt rules and laws to meet authoritative requirements.

(3) Includes printing and distributing the official code of regulations, or State equivalent, except as provided for under §§ 80.50(b)(2)(ii) and 80.51(d)(2) (which pertains to the agency’s interpretive guides and regulatory resources for the public) for the purposes of R3.

(c) License sales and other activities conducted for the primary purpose of producing income. These activities include processes and procedures directly related to the sale of items listed at § 80.20(a).

(d) Activities, projects, or programs that promote or encourage opposition to the regulated taking of fish, hunting, or the trapping of wildlife.

(e) Activities or projects that do not provide public access when access is a purpose of the funding or an objective of the award (see § 80.58).

§ 80.56 May a State fish and wildlife agency receive an award to carry out part of a larger project?

Yes. A State fish and wildlife agency may receive an award to carry out part of a larger project that uses funds unrelated to the award. The part of the larger project funded by the award must:

- (a) Result in an identifiable outcome consistent with the purposes of the grant program;
- (b) Be substantial in character and design (see § 80.57);
- (c) Meet the requirements of §§ 80.130 through 80.137 for any real property acquired under the award and any capital improvements completed under the award; and
- (d) Meet all other requirements of the grant program.

§ 80.57 How does a proposed project qualify as substantial in character and design?

A proposed project qualifies as substantial in character and design if it:

- (a) Describes a need consistent with the Acts;
- (b) States a purpose and sets objectives, both of which are based on the need;
- (c) Uses a planned approach, appropriate procedures, and accepted principles of fish and wildlife conservation and management, research, construction, wildlife- and fish-associated-recreation participation and access, communication, education, or other eligible purposes; and
- (d) Is cost effective.

§ 80.58 What are public access requirements for activities in an approved award under the Wildlife Restoration or Sport Fish Restoration programs?

(a) Public access is required for some eligible activities (see §§ 80.50 and 80.51) when supporting the purpose of an award.

(b) The State fish and wildlife agency has the authority, within the purposes of the Acts, to establish parameters for public access and may limit or restrict public access when the management of natural resources and public access are not compatible. Additionally, the agency may limit or restrict public access when the funded project or facility is closed for business or temporarily closed due to an emergency, repairs, construction, or as a safety precaution.

(c) When public access is required for projects and facilities that are under the

ownership or management control of a third party, the State fish and wildlife agency, following its own State laws and processes, must ensure a legally binding instrument setting forth the terms and conditions, such as a subaward or third-party agreement, is in place as follows:

(1) The instrument must be sufficient to ensure public access is provided as expected by the agency and described in the approved award from the Service.

(2) The third-party binding agreement must include or reference agency approval for reasonable fees, any rules and requirements for use, circumstances for temporary closure or reduction to public access, duration of the agreement and any useful life expectations, and procedures for any modifications to the agreement.

(3) The Service does not have authority to approve or reject a State's third-party binding agreement but will include a special award term and condition to require minimum standards and that third-party binding agreements be maintained in agency award files and provided to the Service, upon request, for all awards where funds under the Acts are being used for renovating, constructing, operating, or maintaining property that a third party owns or controls.

Subpart F—Allocation of Funds by an Agency

§ 80.60 What is the relationship between the Traditional Wildlife Restoration Program, the Basic Hunter Education and Safety subprogram, and the Enhanced Hunter Education and Safety program for acquiring land for, expanding, or constructing public target ranges?

(a) The Target Practice and Marksmanship Training Support Act (Pub. L. 116–17, March 10, 2019) amended the Wildlife Restoration Act (16 U.S.C. 669 *et seq.*) to include activities for acquiring land for, expanding, or constructing public target ranges but does not authorize any new sources of funding. The law became effective for States beginning October 1, 2019.

(b) When a State fish and wildlife agency allocates funds to activities for acquiring land for, expanding, or constructing public target ranges under this law, it may apply a 90 percent Federal/10 percent non-Federal cost share and funds are available for obligation up to 5 years, beginning October 1 of the year the funds first become available. We abbreviate this funding method as “90/10/5.”

(c) An agency may allocate annually apportioned funds for 90/10/5 activities

from the Traditional Wildlife Restoration program (not to exceed 10 percent), Basic Hunter Education and Safety subprogram (any amount from 0 up to 100 percent), and/or Enhanced Hunter Education and Safety program (any amount from 0 up to 100 percent) to projects for acquiring land for, expanding, or constructing public target ranges. There is no requirement for States to allocate any amount of funds to 90/10/5 activities.

(d) When using up to 10 percent of annually apportioned Traditional Wildlife Restoration program funds for 90/10/5 activities, the funds must be allocated to the designated subaccount and must be used only for eligible 90/10/5 purposes. Some amount of available Enhanced Hunter Education and Safety program funds, at least \$1, must be combined with the Traditional Wildlife Restoration program funds allocated to 90/10/5 activities.

(e) An agency must allocate funds to a 90/10/5 subaccount within the FFY that funds are first apportioned. Funds allocated to a 90/10/5 subaccount during a prior FFY must remain in that 90/10/5 subaccount for obligation during the period of availability and until expended.

(f) Acquiring land for, expanding, or constructing public target ranges may also be accomplished, in total or when combined with 90/10/5 funds, using funds under the Basic Hunter Education and Safety subprogram, the Enhanced Hunter Education and Safety program, or both, but the agency must apply cost share and period of availability according to table 1 to § 80.61.

§ 80.61 What sources of funding in the Wildlife Restoration Act may a State fish and wildlife agency use to support public target range projects, and may funds from multiple sources be used in a single award?

Table 1 to § 80.61 describes the sources of funding available for public target range projects and identifies their subaccount number. The Service uses subaccounts in the Department of the Interior's financial management system, the Financial and Business Management System or FBMS, to administer the specific use requirements for program and subprogram funding sources under the Acts. A State fish and wildlife agency may combine funds from multiple sources within the Act for eligible public target range activities. Your Regional Wildlife and Sport Fish Restoration Program Office can provide technical assistance on best practices for allocating costs to multiple eligible funding sources.

TABLE 1 TO § 80.61

[BHE = Basic Hunter Education and Safety subprogram; EHE = Enhanced Hunter Education and Safety program; TWR = Traditional Wildlife Restoration program]

Program/subprogram	Funding source; method	Period available for obligation	Cost share	Conditions	Eligible activities described in this part at:
Options for Funding Public Target Ranges					
Traditional Wildlife Restoration program (Subaccount 5222).	16 U.S.C. 669c(b); apportioned.	2 years	75 percent Federal/ 25 percent non-Federal.	May use apportioned funds for maintenance activities at public target ranges owned or under the management control of the agency; may allocate to 90/10/5 projects as described for sub-account 5252.	§ 80.50(a).
Traditional Wildlife Restoration program for Public Target Ranges (90/10/5) (Sub-account 5252).	16 U.S.C. 669c(b); allocated by an agency from TWR funds.	5 years	90 percent Federal/ 10 percent non-Federal.	May allocate up to 10 percent of TWR funds during the year apportioned to be combined with at least \$1 of EHE funds for acquiring land for, expanding, or constructing public target ranges.	§§ 80.50(a)(7) and 80.60.
Basic Hunter Education and Safety program for activities described at 16 U.S.C. 669g(b) (Subaccount 5221).	16 U.S.C. 669c(c); apportioned.	2 years	75 percent Federal/ 25 percent non-Federal.	May allocate up to 100 percent of apportioned funds for acquiring land for, constructing, operation of, and maintenance for public target ranges; does not have to be part of a hunter education program.	§ 80.50(b)(1).
Activities for hunter recruitment and recreational shooter recruitment as described at 16 U.S.C. 669c(c)(4) (Subaccount 5221).	16 U.S.C. 669c(c); assigned by an agency from BHE funds.	2 years	75 percent Federal/ 25 percent non-Federal.	May be used for constructing public target ranges or other eligible public target range activities that directly support R3.	§ 80.50(b)(2).
Basic Hunter Education and Safety subprogram for Public Target Ranges (90/10/5) (Subaccount 5251).	16 U.S.C. 669c(c); allocated by an agency from BHE funds.	5 years	90 percent Federal/ 10 percent non-Federal.	May allocate up to 100 percent of apportioned funds for acquiring land for, expanding, or constructing a public target range.	§§ 80.50(b)(1)(ii)(E) and 80.60.
Enhanced Hunter Education and Safety program (Sub-account 5231).	16 U.S.C. 669h–1; apportioned.	1 year	75 percent Federal/ 25 percent non-Federal.	May allocate up to 100 percent of apportioned funds for acquiring land for, constructing, developing, or improving safety features at public target ranges.	§ 80.50(c).
Enhanced Hunter Education and Safety program for Public Target Ranges (90/10/5) (Subaccount 5241).	16 U.S.C. 669h–1; allocated by an agency from EHE funds.	5 years	90 percent Federal/ 10 percent non-Federal.	May allocate up to 100 percent of apportioned funds for acquiring land for, expanding, or constructing a public target range.	§§ 80.50(c)(9) and 80.60.

§ 80.62 What are eligible and ineligible 90/10/5 activities?

(a) The following are eligible 90/10/5 activities:

(1) Acquiring real property suitable or capable of being made suitable for constructing or expanding public target ranges (see subpart J of this part).

(2) Acquiring title to real property with an existing target range when the acquisition will increase public access or includes construction or expansion activities on the existing target range.

(3) Constructing a public target range on land owned or under management

control of the State fish and wildlife agency. Construction may occur on land when title is held by a third party provided the agency holds a lease or other third-party binding agreement under State law that ensures the terms and conditions of the award will be met.

(4) Constructing or acquiring a mobile public target range.

(5) Expanding the physical footprint or configuration of an existing public target range in a manner that increases range capacity to accommodate more participants, provides additional range activities or functions, or physically

modifies to accommodate all participants, regardless of ability. Examples include adding more lanes at a range, adding structures that provide access that is compliant with the Americans With Disabilities Act (42 U.S.C. 12101 *et seq.*), and expanding the facility to provide new opportunities that did not exist before, such as adding an archery range to a former firearm-only facility.

(6) Coordinating 90/10/5 awards that directly support acquiring land for, constructing, or expanding public target ranges through necessary activities that

address planning, compliance, appraisals, engineering, and administering a project.

(7) Auxiliary activities and amenities that support the primary project and are necessary to the public's ability to fully utilize the public target range. Examples include public restrooms, storage facilities, protective bunkers and barriers, signs and markers, roads and parking areas, and utilities.

(8) Improvements may be approved if they are needed to prevent a public target range facility from becoming inoperable or suffering from significant diminished capacity. Consult with your Regional Wildlife and Sport Fish Restoration Program Office.

(9) Constructing or expanding public target range projects on federally owned land.

(b) The following are ineligible 90/10/5 activities:

(1) Operations at a public target range.

(2) Maintenance at a public target range, unless necessary for completing a project for constructing or expanding a public target range.

(3) Construction that is not to build a new or expand an existing public target range. This includes auxiliary activities and amenities not associated with an approved new or expansion project.

(4) Long-term monitoring of a public target range facility.

(5) Activities that do not provide or support new or increased physical capacity for public target ranges.

§ 80.63 What exception is provided for Enhanced Hunter Education and Safety program funds in relation to Basic Hunter Education and Safety program funds?

(a) If Basic Hunter Education and Safety program funds are fully obligated for activities listed at § 80.50(b)(1) (see 16 U.S.C. 669g(b)), the State fish and wildlife agency may use Enhanced Hunter Education and Safety program funds for Enhanced Hunter Education and Safety program eligible activities or may allocate any portion of that FFY's Enhanced Hunter Education and Safety program funds to any eligible activity under the Wildlife Restoration Act.

(b) If Basic Hunter Education and Safety program funds are used for R3 activities listed at § 80.50(b)(2), the exception set forth at paragraph (a) of this section does not apply and Enhanced Hunter Education and Safety program funds must be used for Enhanced Hunter Education and Safety program activities.

§ 80.64 What requirements apply to funds for the Recreational Boating Access subprogram?

The requirements of this section apply to allocating and obligating funds

for the Recreational Boating Access subprogram.

(a) A State fish and wildlife agency must allocate funds from annual apportionments under the Sport Fish Restoration Act for use in the subprogram.

(b) Over each 5-year period, the total allocation for the subprogram in each of the Service's geographic regions must average at least 15 percent of the Sport Fish Restoration funds apportioned to the States in that Region. If this requirement is met, an individual State fish and wildlife agency may allocate more or less than 15 percent of its annual apportionment.

(c) The Regional Director calculates regional allocation averages for separate 5-year periods that coincide with FFYs 2023–2027, 2028–2032, 2033–2037, and each subsequent 5-year period.

(d) If the total regional allocation for a 5-year period is less than 15 percent, the State agencies may, in a memorandum of understanding, agree among themselves which of them will make the additional allocations to eliminate the regional shortfall.

(e) The regulations in this paragraph (e) apply if State fish and wildlife agencies in a Service region do not agree on which of them will make additional allocations to bring the average regional allocation to at least 15 percent over a 5-year period. If the agencies do not agree:

(1) The Regional Director may require States in the region to make changes needed to achieve the minimum 15-percent regional average before the end of the fifth year; and

(2) The Regional Director must not require a State to increase or decrease its allocation if the State has allocated at least 15 percent over the 5-year period.

(f) A Federal obligation of these allocated funds must occur by the end of the fourth consecutive FFY after the FFY in which the funds first became available for allocation.

(g) If the agency's application to use these funds has not led to a Federal obligation by that time, these allocated funds become available for reapportionment among the State fish and wildlife agencies for the following FFY.

§ 80.65 What limitations apply to spending on the Aquatic Resource Education and the State Outreach and Communications subprograms?

The limitations in this section apply to State fish and wildlife agency spending on the Aquatic Resource Education and State Outreach and Communications subprograms.

(a) Each State's fish and wildlife agency may spend a maximum of 15

percent of the annual amount apportioned to the State from the Sport Fish Restoration and Boating Trust Fund for activities in both subprograms. The 15-percent maximum applies to both subprograms as if they were one.

(b) The 15-percent maximum for the subprograms does not apply to the Commonwealths of Puerto Rico and the Northern Mariana Islands, the District of Columbia, and the Territories of Guam, the U.S. Virgin Islands, and American Samoa. These jurisdictions may spend more than 15 percent of their annual apportionments for both subprograms with the approval of the Regional Director.

§ 80.66 Must a State fish and wildlife agency allocate costs in multipurpose projects and facilities?

(a) Yes. A State fish and wildlife agency must allocate costs in multipurpose projects and facilities. A grant-funded project or facility is multipurpose if it carries out the purposes of:

(1) A single grant program under the Acts; and

(2) Another grant program, subprogram, a different funding source under the Acts, a grant program not under the Acts, or an activity unrelated to awards.

(b) An agency may describe activities in the project statement that are ineligible under the Act and must clearly show that the ineligible activities are not being funded under the award.

§ 80.67 How does a State fish and wildlife agency allocate costs to an award in multipurpose projects and facilities?

A State fish and wildlife agency must allocate costs in multipurpose projects based on eligible activities authorized, sources of funding, and the uses or benefits for each purpose that will result from the completed project or facility. The agency must describe the method used to allocate costs in multipurpose projects or facilities in the project statement included in the award application.

§ 80.68 Must a State fish and wildlife agency allocate funds between marine and freshwater fisheries projects?

Yes. Each coastal State's fish and wildlife agency must equitably allocate the funds apportioned under the Sport Fish Restoration Act between projects with benefits for marine fisheries and projects with benefits for freshwater fisheries.

(a) The subprograms authorized by the Sport Fish Restoration Act do not have to allocate funding in the same manner if the State fish and wildlife agency allocates Sport Fish Restoration

funds equitably between marine and freshwater fisheries.

(b) The coastal States for purposes of this allocation are:

(1) Alabama, Alaska, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Carolina, Texas, Virginia, and Washington;

(2) The Commonwealths of Puerto Rico and the Northern Mariana Islands; and

(3) The Territories of Guam, the U.S. Virgin Islands, and American Samoa.

§ 80.69 What requirements apply to allocation of funds between marine and freshwater fisheries projects?

The requirements of this section apply to allocation of funds between marine and freshwater fisheries projects.

(a) When a State fish and wildlife agency allocates funds, it must meet the following requirements:

(1) The ratio of total funds allocated for marine fisheries projects to total funds allocated for marine and freshwater fisheries projects combined must equal the ratio of resident marine anglers to the total number of resident anglers in the State; and

(2) The ratio of total funds allocated for freshwater fisheries projects to total funds allocated for marine and freshwater fisheries projects combined must equal the ratio of resident freshwater anglers to the total number of resident anglers in the State.

(b) A resident angler is one who fishes for recreational purposes in the same State where that person maintains legal residence.

(c) Agencies must determine the relative distribution of resident anglers in the State between those who fish in marine environments and those who fish in freshwater environments. Agencies must use the National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, or another statistically reliable survey or technique approved by the Regional Director, for this purpose.

(d) If an agency uses statistical sampling to determine the relative distribution of resident anglers in the State between those who fish in marine environments and those who fish in freshwater environments, the sampling must be complete by the earlier of the following:

(1) Five years after the last statistical sample; or

(2) Before completing the first certification following any change in the licensing system that could affect the number of sportfishing license holders.

(e) The amounts allocated from each year's apportionment do not necessarily have to result in an equitable allocation for each year. However, the amounts allocated over a variable period, not to exceed 3 years, must result in an equitable allocation between marine and freshwater fisheries projects.

(f) Agencies that fail to allocate funds equitably between marine and freshwater fisheries projects may become ineligible to use Sport Fish Restoration program funds. These agencies must remain ineligible until corrective action is taken and the funds have been allocated equitably.

§ 80.70 May a State fish and wildlife agency finance an activity from more than one annual apportionment?

A State fish and wildlife agency may use funds from more than one annual apportionment to finance projects, such as construction or acquisition of lands or interests in lands, including water rights. An agency may use funds in this manner, according to a plan approved by the Regional Director and subject to the availability of funds, in either of the following ways:

(a) Finance the entire cost of the acquisition or construction from a non-Federal funding source. The Service will reimburse funds to the agency in succeeding apportionment years.

(b) Negotiate an installment purchase or contract in which the agency pays periodic and specified amounts to the seller or contractor according to a plan that schedules either reimbursements or advances of funds immediately before need.

§ 80.71 What requirements apply to financing an activity from more than one annual apportionment?

The following conditions apply to financing an activity from more than one annual apportionment:

(a) A State fish and wildlife agency must agree to complete the project even if Federal funds are not available. If an agency does not complete the project, the agency must recover any expended Federal funds that did not result in commensurate wildlife or sport-fishery benefits. The agency must then reallocate the recovered funds to approved projects in the same program.

(b) The project statement included with the application must have a complete schedule of payments to finish the project.

(c) Interest and other financing costs may be allowable subject to the restrictions in the applicable Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200).

Subpart G—Applying for an Award

§ 80.80 How does a State fish and wildlife agency apply for an award?

(a) A State fish and wildlife agency applies for an award by following the directions in the annual funding announcement available on the electronic Federal financial assistance grants management system.

(b) The director of the State agency or their designee must authorize submission of all requests for Federal financial assistance under the Acts.

(c) If the State supports the process under Executive Order 12372, Intergovernmental Review of Federal Programs, the agency must follow its processes for sending copies of all standard forms and supporting information to the State Clearinghouse or Single Point of Contact.

§ 80.81 What must a State fish and wildlife agency submit when applying for a comprehensive-management-system award?

A State fish and wildlife agency must submit the following documents when applying for a comprehensive-management-system award:

(a) The standard form for an application for Federal assistance in a mandatory grant program.

(b) A statement of cost estimates by subaccount. Agencies may obtain the subaccount numbers from the Regional Wildlife and Sport Fish Restoration Program Office.

(c) Supporting documentation explaining how the proposed work complies with the Acts, the regulations in this part, and other applicable laws and regulations.

(d) A statement of the agency's intent to carry out and fund part or all of its comprehensive management system through an award.

(e) A description of the agency's comprehensive management system including inventory, strategic plan, operational plan, and evaluation. "Inventory" refers to the process or processes that an agency uses to:

(1) Determine actual, projected, and desired resource and asset status; and
(2) Identify management problems, issues, needs, and opportunities.

(f) A description of the State fish and wildlife agency program covered by the comprehensive management system.

(g) Contact information for the State fish and wildlife agency employee who is directly responsible for the integrity and operation of the comprehensive management system.

(h) A description of how the public can take part in decision making for the comprehensive management system.

§ 80.82 What must a State fish and wildlife agency submit when applying for a project-by-project award?

A State fish and wildlife agency must submit the following documents when applying for a project-by-project award:

(a) The standard form for an application for Federal assistance in a mandatory grant program.

(b) A project statement that describes each proposed project and provides the following information:

(1) *Need*. Explain why the project is necessary and how it fulfills the purposes of the relevant Act.

(2) *Purpose*. State the purpose and base it on the need. The purpose states the desired outcome of the proposed project in general or abstract terms.

(3) *Objectives*. State the objectives and base them on an identified need(s). The objectives state the desired outcome of the proposed project in terms that are specific and quantified.

(4) *Results*. Describe the results or benefits expected.

(5) *Approach*. Describe the methods used to achieve the stated objectives.

(6) *Useful life*. Propose a useful life for each capital improvement and reference the method used to determine the useful life of a capital improvement with a value greater than \$100,000.

(7) *Geographic location*. Describe the geographic location(s) where activities will occur. Maps or other geographic aids are encouraged and may be attached. Include geographic coordinates in decimal degrees, if relevant and available.

(8) *Principal investigator for research projects*. Record the principal investigator's name, work address, and work telephone number.

(9) *Program income*. (i) Estimate the amount of program income that the project is likely to generate.

(ii) Indicate the method or combination of methods (deduction, addition, or cost sharing) of applying program income to Federal and non-Federal outlays.

(iii) Request the Regional Director's approval for the additive or cost-sharing method. Describe how the agency proposes to use the program income and the expected results. Describe the essential need when using program income as cost sharing.

(iv) Indicate whether the agency wants to treat income that it earns after the period of performance as either license revenue or additional funding for purposes consistent with the award terms and conditions or program regulations.

(v) Indicate whether the agency wants to treat income that the subrecipient earns after the period of performance as

license revenue, additional funding for the purposes consistent with the award or subprogram, or income subject only to the terms of the subaward agreement.

(10) *Budget narrative*. (i) Provide costs by project and subaccount with additional information sufficient to show that the project is cost effective. Agencies may obtain the subaccount numbers from the Regional Wildlife and Sport Fish Restoration Program Office.

(ii) Describe any item that requires the Service's approval and estimate its cost. Examples are pre-award costs, capital improvements or expenditures, real property acquisitions, or equipment purchases.

(iii) Include a schedule of payments to finish the project if an agency proposes to use funds from two or more annual apportionments.

(11) *Multipurpose projects*. Describe the method for allocating costs in multipurpose projects and facilities as described in §§ 80.66 and 80.67.

(12) *Relationship with other awards*. Describe any relationship between this project and other work funded by Federal awards that is planned, anticipated, or under way.

(13) *Timeline*. Describe significant milestones in completing the project and any accomplishments to date.

(14) *General*. Provide information in the project statement that:

(i) Shows that the proposed activities are eligible for funding and substantial in character and design; and

(ii) Enables the Service to comply with the applicable requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 and 4331–4347), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), the National Historic Preservation Act (16 U.S.C. 470s), and other laws, regulations, and policies.

§ 80.83 What is the Federal share of allowable costs?

(a) Except as provided at paragraphs (e) and (f) of this section, the Regional Director must provide at least 10 percent and no more than 75 percent of the allowable costs of a grant-funded project to the fish and wildlife agencies of the 50 States. The Regional Director generally approves any Federal share from 10 to 75 percent as proposed by 1 of the 50 States if the:

(1) Funds are available; and

(2) Application is complete and consistent with laws, regulations, and policies.

(b) The Regional Director may provide funds to the District of Columbia to pay 75 to 100 percent of the allowable costs of a grant-funded project in a program or subprogram authorized by the Sport

Fish Restoration Act. The decision on the specific Federal share between 75 and 100 percent will be based on what the Regional Director decides is fair, just, and equitable. The Regional Director may reduce the Federal share to less than 75 percent of allowable project costs only if the District of Columbia provides voluntary committed cost sharing to pay the remaining allowable costs. However, the Regional Director must not reduce the Federal share below 10 percent unless the procedure set forth at paragraph (e) of this section is followed.

(c) The Regional Director may provide funds to pay 75 to 100 percent of the allowable costs of a grant-funded project to the fish and wildlife agency of the Commonwealth of Puerto Rico. The decision on the specific Federal share between 75 and 100 percent will be based on what the Regional Director decides is fair, just, and equitable. The Regional Director may reduce the Federal share to less than 75 percent of allowable project costs only if the Commonwealth voluntarily provides cost sharing to pay the remaining allowable costs. However, the Regional Director must not reduce the Federal share below 10 percent unless the procedure set forth at paragraph (e) of this section is followed.

(d) The Regional Director must provide funds to pay 100 percent of the allowable costs of a grant-funded project to a fish and wildlife agency of the Commonwealth of the Northern Mariana Islands and the Territories of Guam, the U.S. Virgin Islands, and American Samoa. The Service is required to waive all cost sharing requirements for these insular areas.

(e) The Regional Director may waive the 10-percent minimum Federal share of allowable costs if the State, District of Columbia, Commonwealth, or territory requests a waiver and provides compelling reasons to justify why it is necessary for the Federal Government to fund less than 10 percent of the allowable costs of a project.

(f) The Regional Director must provide no more than 90 percent of the allowable costs of a project to a State, the Commonwealth of Puerto Rico, or the District of Columbia for the purposes of acquiring land for, expanding, or constructing a public target range when the agency identifies a project that meets the criteria for 90/10/5 activities.

§ 80.84 How does the Service establish the non-Federal share of allowable costs?

(a) To establish the non-Federal share of a grant-funded project for the 50 States, the Regional Director approves

an application for Federal assistance in which the State fish and wildlife agency proposes the specific non-Federal share by estimating the Federal and cost-sharing dollars, consistent with § 80.83(a), (e), and (f).

(b) To establish the non-Federal share of a grant-funded project for the District of Columbia and the Commonwealth of Puerto Rico, the Regional Director:

(1) Decides which percentage is fair, just, and equitable for the Federal share consistent with § 80.83(b) and (c);

(2) Subtracts the Federal share percentage from 100 percent to determine the percentage of non-Federal share; and

(3) Applies the percentage of non-Federal share to the allowable costs of a grant-funded project to determine the cost sharing requirement.

(c) For the Commonwealth of the Northern Mariana Islands and the Territories of Guam, the U.S. Virgin Islands, and American Samoa (insular areas), the Service must waive all non-Federal cost sharing requirements (see 48 U.S.C. 1469a).

§ 80.85 What requirements apply to cost sharing?

(a) The requirements that apply to cost sharing are at 2 CFR 200.306.

(b) The State fish and wildlife agency must fulfill cost sharing requirements at the:

(1) Award level if the award has funds from a single subaccount; or

(2) Subaccount level if the award has funds from more than one subaccount.

Subpart H—General Award Administration

§ 80.90 What are the recipient's responsibilities?

A State fish and wildlife agency as a recipient is responsible for all the actions required by this section:

(a) Complying with all applicable Federal, State, and local laws and regulations.

(b) Supervising and administering the award to ensure that the work follows the terms and conditions of the award, including:

(1) Properly and effectively using funds;

(2) Maintaining accurate records;

(3) Submitting complete and accurate Federal financial reports and performance reports, using the Federal electronic system(s) designated by the Service, by the due dates in the terms and conditions of the award; and

(4) Regularly inspecting and monitoring work in progress.

(c) Selecting and supervising personnel to ensure that:

(1) Adequate and competent personnel are available to complete the grant-funded work on schedule; and

(2) Project personnel meet time schedules, accomplish the proposed work, meet objectives, and submit the required reports.

(d) Settling all procurement-related contractual and administrative issues.

(e) Giving reasonable access to work sites and records to employees and contractual auditors of the Service, the Department of the Interior, and the Comptroller General of the United States.

(1) Access is for the purpose of:

(i) Monitoring progress, conducting audits, or other reviews of grant-funded projects; and

(ii) Monitoring the use of license revenue.

(2) Regulations on the uniform administrative requirements for awards issued by the Department of the Interior describe the records that are subject to these access requirements (see 2 CFR part 1402).

(3) The closeout of an award does not affect the recipient's responsibilities described in this section.

(f) Controlling all assets acquired under the award to ensure that they serve the purpose for which acquired throughout their useful life.

§ 80.91 What is a Federal obligation of funds, and how does it occur?

An obligation of funds is a legal liability to disburse funds immediately or later based on a series of actions. All these actions must occur to obligate funds for the formula-based grant programs authorized by the Acts:

(a) The Service sends to a State fish and wildlife agency an annual certificate of apportionment, which tells the agency how much funding is available according to formulas in the Acts.

(b) The agency sends the Regional Director an application for Federal assistance to use the funds available to the agency under the Acts and commits to provide the required cost sharing to carry out projects that are substantial in character and design.

(c) The Regional Director notifies the agency that the application for Federal assistance is approved and states the terms and conditions of the award.

(d) The agency accepts the terms and conditions of the award in one of the following ways:

(1) Starts work on the grant-funded project by placing an order, entering into a contract, entering into a subaward, receiving goods or services, or otherwise incurring allowable costs during the period of performance that will require payment immediately or in the future;

(2) Draws down funds for an allowable activity under the award; or

(3) Accepts the award via electronic means.

§ 80.92 How long are funds available for a Federal obligation?

Funds are available for a Federal obligation starting October 1 of the FFY in which they are apportioned and for the number of years indicated in table 1 to § 80.92. Funds not obligated within the required period of availability will revert to the Service and be disbursed as described in the table.

TABLE 1 TO § 80.92

Program/subprogram	Period of availability for obligation	Disbursement of unobligated funds at the end of the period of availability for obligation
WILDLIFE RESTORATION ACT		
Enhanced Hunter Education and Safety program.	1 FFY	Reapportioned the following year only to States that have fully obligated the current year's Basic Hunter Education and Safety program funds to activities at 16 U.S.C. 669g(b) (see §§ 80.50(b) and 80.63).
Traditional Wildlife Restoration program	2 FFYs	Made available to the Secretary for carrying out the provisions of the Migratory Bird Conservation Act (16 U.S.C. 715 <i>et seq.</i>); hereafter referred to as "migratory bird conservation" (see 16 U.S.C. 669b(a)(1)).
Basic Hunter Education and Safety subprogram.	2 FFYs	Migratory bird conservation.

TABLE 1 TO § 80.92—Continued

Program/subprogram	Period of availability for obligation	Disbursement of unobligated funds at the end of the period of availability for obligation
Basic Hunter Education and Safety subprogram for R3 activities at 16 U.S.C. 669c(c)(4).	2 FFYs	Migratory bird conservation.
Traditional Wildlife Restoration program for public target ranges (90/10/5).	5 FFYs	Migratory bird conservation.
Basic Hunter Education and Safety subprogram for public target ranges (90/10/5).	5 FFYs	Migratory bird conservation.
Enhanced Hunter Education and Safety program for public target ranges (90/10/5).	5 FFYs	Reapportioned the following year only to States that have fully obligated the current year's Basic Hunter Education and Safety funds to activities at 16 U.S.C. 669g(b) (see §§ 80.50(b) and 80.63).

SPORT FISH RESTORATION ACT

Sport Fish Restoration program	2 FFYs	Available for expenditure by the Secretary of the Interior to supplement the Sport Fish Restoration apportionment, as provided for in 16 U.S.C. 777c(c), the following year.
Aquatic Resource Education program	2 FFYs	Same as apportioned Sport Fish Restoration funds.
State Outreach and Communications program	2 FFYs	Same as apportioned Sport Fish Restoration funds.
Recreational Boating Access subprogram	5 FFYs	Same as apportioned Sport Fish Restoration funds.

§ 80.93 When may a State fish and wildlife agency incur costs under an award?

A State fish and wildlife agency may incur costs under an award from the effective date of the period of performance to the end of the period of performance except for pre-award costs that meet the conditions in § 80.94.

§ 80.94 May a State fish and wildlife agency incur costs before the beginning of the period of performance?

(a) A State fish and wildlife agency may incur costs of a proposed project before the beginning of the period of performance (*i.e.*, pre-award costs). However, the agency has no assurance that it will receive reimbursement until the Regional Director approves an award that incorporates a project statement demonstrating that the pre-award costs conform to all the conditions set forth in paragraph (b) of this section.

(b) Pre-award costs must meet the following requirements:

(1) The costs are necessary and reasonable for accomplishing the award objectives.

(2) The Regional Director would have approved the costs if the State fish and wildlife agency incurred them during the period of performance.

(3) The agency incurs these costs in anticipation of the award and in conformity with the negotiation of the award with the Regional Director.

(4) The activities associated with the pre-award costs comply with all laws, regulations, and policies applicable to a grant-funded project.

(5) The agency must:

(i) Obtain the Regional Director's concurrence that the Service will be able to comply with the applicable laws,

regulations, and policies before the agency starts work on the ground; and

(ii) Provide the Service all the necessary information with enough lead time for the Service to comply with the applicable laws, regulations, and policies.

(6) The agency must not complete the project before the beginning of the period of performance unless the Regional Director concurs that doing so is necessary to take advantage of temporary circumstances favorable to the project or to meet legal deadlines. An agency completes a project when it incurs all costs and finishes all work necessary to achieve the project objectives.

(c) The agency can receive reimbursement for pre-award costs only after the beginning of the period of performance, and, for activities requiring compliance, only after the compliance is satisfied.

§ 80.95 How does a State fish and wildlife agency receive Federal award funds?

(a) A State fish and wildlife agency may receive Federal award funds through either:

(1) A request for reimbursement; or

(2) A request for an advance of funds if the agency maintains or demonstrates that it will maintain procedures to minimize time between transfer of funds and disbursement by the agency or its subrecipient.

(b) An agency must use the following procedures to receive a reimbursement or an advance of funds:

(1) Request funds through an electronic payment system designated by the Regional Director; or

(2) Request funds on a standard form for that purpose only if the agency is

unable to use the electronic payment system.

(c) The Regional Director will reimburse or advance funds only to the office or official designated by the agency and authorized by State law to receive public funds for the State.

(d) All payments are subject to final determination of allowability based on audit or a Service review. The State fish and wildlife agency must repay any overpayment as directed by the Regional Director.

(e) The Regional Director may withhold payments pending receipt of all required reports or documentation for the project.

§ 80.96 May a State fish and wildlife agency use Federal funds without using cost sharing?

(a) The State fish and wildlife agency must not draw down any Federal funds for a grant-funded project under the Acts in greater proportion to the use of cost sharing than total Federal funds bear to total cost sharing unless:

(1) The recipient draws down Federal award funds to pay for construction, including land acquisition;

(2) A third-party in-kind contribution of cost sharing is not yet available for delivery to the recipient or subrecipient; or

(3) The project is not at the point where it can accommodate a third-party in-kind contribution.

(b) If an agency draws down Federal funds in greater proportion to the use of cost sharing than total Federal funds bear to total cost sharing under the conditions described at paragraphs (a)(1) through (3) of this section, the agency must:

- (1) Obtain the Regional Director's prior approval; and
- (2) Satisfy the project's cost sharing requirement before submitting the final Federal financial report.

§ 80.97 What is barter, and may a State fish and wildlife agency use barter of goods or services to carry out a grant-funded project?

(a) Barter is a nonmonetary exchange of goods or services with another entity (reciprocal transfer). If goods or services are given or received without expectation of a reciprocal transfer, the activity is not barter and is an expense of or donation to the agency.

(b) A State fish and wildlife agency may use barter to carry out a grant-funded project when following approved State policies and procedures that comply with the generally accepted accounting practices as defined by the Governmental Accounting Standards Board. The State processes, as applied by the agency, may identify types of barter (*e.g.*, cooperative farming or grazing) for which the agency will consider the barter transaction to be an even exchange.

§ 80.98 How must a State fish and wildlife agency include barter in an award and report barter transactions?

- (a) A State fish and wildlife agency must identify when barter exchanges are anticipated in the project when applying for, or carrying out, an award. All activities included in a barter transaction are subject to Federal compliance requirements under an award.
- (b) An agency must follow its State processes for authorizing, valuing, and documenting barter transactions, and report barter transactions under an award in the Federal financial report according to table 1 to § 80.98:

TABLE 1 TO § 80.98

If, following the State processes for barter transactions . . .		Then the agency must . . .
(1) The barter transaction is determined to be an even exchange of goods or services.		Disclose in the remarks section that the barter transaction(s) occurred, and the barter transaction(s) resulted in no gain or loss to the agency.
	(2) The fair value of the goods or services provided by the State fish and wildlife agency exceeds the fair value of the goods and services received.	Disclose in the remarks section that the barter transaction(s) occurred and report the difference in fair value as award expenses in the Federal financial report.
	(3) The fair value of the goods or services received exceeds the fair value of the goods and services the State fish and wildlife agency provided.	Disclose in the remarks section that the barter transaction(s) occurred and report the difference in fair value as program income in the Federal financial report.

§ 80.99 Are symbols available to identify projects?

Yes. The following distinctive symbols are available to identify projects funded by the Acts and products on which taxes and duties have been collected to support the Acts:

- (a) The symbol of the Wildlife Restoration Act follows:



- (b) The symbol of the Sport Fish Restoration Act follows:



- (c) The symbol of the Acts when used in combination follows:



§ 80.100 Must a State fish and wildlife agency display one of the symbols set forth in this part on a completed project?

No. A State fish and wildlife agency is not required to display one of the symbols in § 80.99 on a project completed under the Acts.

- (a) However, the Service encourages agencies to display the appropriate symbol on projects funded by the Acts. Appropriate use and requirements for symbols are as follows:

- (1) An agency may display the appropriate symbol(s) on:

(i) Areas such as wildlife-management areas, shooting ranges, and sportfishing and boating-access facilities that were acquired, developed, operated, or maintained with funds authorized by the Acts; and

(ii) Printed or web-based material or other visual representations of project accomplishments.

(2) An agency may establish a requirement for similar standards for displaying the appropriate symbol or symbols, in the places described in paragraph (a) of this section, that is passed through to subrecipients.

(3) An agency may use the symbols in a manner other than as described in paragraph (a) of this section if authorized by the Director or a Regional Director.

(b) The Director or Regional Director may authorize other persons, organizations, agencies, or governments

to use the symbols for purposes related to the Acts.

- (c) Restrictions and requirements on use of symbols for either agencies or other entities are as follows:

(1) Users of the symbol(s) indemnify and defend the United States and hold it harmless from any claims, suits, losses, and damages from:

(i) Any allegedly unauthorized use of any patent, process, idea, method, or device by the user in connection with its use of the symbol(s), or any other alleged action of the user; and

(ii) Any claims, suits, losses, and damages arising from alleged defects in the articles or services associated with the symbol(s).

(2) The appearance of the symbol(s) on projects or products indicates that the manufacturer of the product pays excise taxes in support of the respective Act(s) and that the project was funded under the respective Act(s) (26 U.S.C. 4161, 4162, 4181, 4182, 9503, and 9504). The Service and the Department of the Interior make no representation or endorsement whatsoever by the display of the symbol(s) as to the quality, utility, suitability, or safety of any product, service, or project associated with the symbol(s).

(3) No one may use any of the symbols in any other manner unless authorized by the Director or Regional Director. Unauthorized use of the symbol(s) is a violation of 18 U.S.C. 701

and subjects the violator to possible fines and imprisonment.

Subpart I—Program Income

§ 80.120 What is program income?

(a) Program income is gross income earned by the recipient or subrecipient that is directly generated by an award activity or earned as a result of the Federal award during the period of performance (see 2 CFR 200.1 and 200.307).

(b) Program income includes revenue from:

(1) Services performed under an award.

(2) Use or rental of real or personal property acquired, constructed, or managed with award funds.

(3) Payments by concessioners or contractors under an arrangement with the agency or subrecipient to provide a service in support of award objectives on real property acquired, constructed, or managed with award funds.

(4) Sale of items produced under an award.

(5) Fees collected by the agency for delivering or providing hunter education, aquatic education, or other courses.

(6) Royalties and license fees for copyrighted material, patents, and inventions developed as a result of an award.

(7) Sale of a product of mining, drilling, forestry, or agriculture during the period of performance that supports the:

(i) Mining, drilling, forestry, or agriculture; or

(ii) Acquisition of the land on which these activities occurred.

(8) Barter transactions when the value of goods or services received exceeds the value of goods or services the agency provided.

(c) Program income does not include any of the following:

(1) Interest on award funds, rebates, credits, discounts, or refunds.

(2) Sales receipts retained by concessioners or contractors under an arrangement with the agency to provide a service in support of award objectives on real property acquired, constructed, or managed with award funds.

(3) Cash received by the agency or by volunteer instructors to cover incidental costs of hunter education, aquatic education, or other classes. Incidental costs are small amounts and typically not essential to the training delivery. Materials purchased at cost by the student, separate from course fees, are incidental costs.

(4) Proceeds from the sale of real property, equipment, or supplies.

§ 80.121 May a State fish and wildlife agency earn program income?

A State fish and wildlife agency may earn program income from activities incidental to the award purposes if producing income is not a primary purpose. The agency must account for program income received from these activities in the project records and dispose of it according to the terms and conditions of the award.

§ 80.122 May a State fish and wildlife agency deduct the costs of generating program income from gross income?

(a) A State fish and wildlife agency may deduct the costs of generating program income from gross income when the agency calculates program income if the agency does not:

(1) Pay these costs with:
(i) Federal or cost-sharing funds under a Federal award; or
(ii) Federal funds unrelated to an award.

(2) Cover these costs by accepting:
(i) Cost-sharing contributions for a Federal award; or

(ii) Donations of services, personal property, or real property unrelated to a Federal award.

(b) Examples of costs of generating program income that may qualify for deduction from gross income if they are consistent with the regulations in paragraph (a) of this section are:

(1) The cost of estimating the amount of commercially acceptable timber in a forest and marking it for harvest if the commercial harvest is incidental to a grant-funded habitat-management or facilities-construction project.

(2) The cost of publishing research results as a pamphlet or book for sale if the publication is incidental to a grant-funded research project.

§ 80.123 How may a State fish and wildlife agency use program income?

(a) A State fish and wildlife agency may choose any of the three methods listed in paragraph (b) of this section for applying program income to Federal and non-Federal outlays. The agency may also use a combination of these methods. The method or methods that the agency chooses will apply to the program income that it earns during the period of performance and to the program income that any subrecipient earns during the period of performance. The agency must indicate the method or methods that it wants to use in the project statement that the agency submits with each application for Federal assistance.

(b) Program income must be spent within the period of performance and program in which the income is earned and before the agency requests additional Federal funds for the activity for which the program income is earned.

(c) The three methods for applying program income to Federal and non-Federal outlays are set forth in table 1 to § 80.123(c):

TABLE 1 TO § 80.123(c)

Method	Requirements for using the method
(1) Deduction	(i) The agency must deduct the program income from total allowable costs to determine the net allowable costs. (ii) The agency must use program income for current costs under the award unless the Regional Director authorizes otherwise. (iii) If the agency does not indicate the method that it wants to use in the project statement, then the agency must use the deduction method.
(2) Addition	(i) The agency must request the Regional Director's approval in the project statement. (ii) The agency may add the program income to the Federal and non-Federal funds under the award. (iii) The agency must use the program income for the purposes of the award and under the terms of the award.
(3) Cost sharing	(i) The agency must request the Regional Director's approval in the project statement. (ii) The agency must explain in the project statement the expected program income, how the agency proposes to use the program income to satisfy cost-sharing requirements, how the agency will use program income earned in excess of required cost sharing, and the primary conservation or recreation objective sufficient to show income as a secondary benefit.

TABLE 1 TO § 80.123(c)—Continued

Method	Requirements for using the method
	(iii) If neither the agency's project statement nor the award indicates how program income in excess of cost-sharing requirements will be applied, the agency must use the deduction method.

§ 80.124 How may a State fish and wildlife agency use unexpended program income?

A State fish and wildlife agency must spend program income before requesting additional payments under an award. If the agency has unexpended program income on its final Federal financial report, it may use the income under a subsequent award for any activity eligible for funding in the grant program that generated the program income.

§ 80.125 How must a State fish and wildlife agency treat income that it earns after the period of performance?

(a) The State fish and wildlife agency must treat income that it earns after the period of performance as either:

- (1) License revenue for the administration of the agency; or
- (2) Additional funding for purposes consistent with the award or the program.

(b) The agency must indicate its choice of one of the alternatives set forth in paragraph (a) of this section in the project statement that the agency submits with each application for Federal assistance. If the agency does not record its choice in the project statement, the agency must treat the income earned after the period of performance as license revenue.

§ 80.126 How must a State fish and wildlife agency treat income earned by a subrecipient after the period of performance?

(a) The State fish and wildlife agency must treat income earned by a subrecipient after the period of performance as:

- (1) License revenue for the administration of the agency;
- (2) Additional funding for purposes consistent with the award or the program; or

(3) Income subject only to the terms of the subaward agreement and any subsequent contractual agreements between the agency and the subrecipient.

(b) The agency must indicate its choice of one of the above alternatives in the project statement that the agency submits with each application for Federal assistance. If the agency does not indicate its choice in the project statement, the subrecipient does not have to account for any income earned after the period of performance unless

required to do so in the subaward agreement or in any subsequent contractual agreement.

Subpart J—Real Property

§ 80.130 Must a State fish and wildlife agency hold title to real property acquired under an award?

A State fish and wildlife agency must hold title to an ownership interest in real property acquired under an award to the extent possible under State law.

(a) Some States do not authorize their fish and wildlife agency to hold the title to real property that the agency manages. In these cases, the State or one of its administrative units may hold the title to grant-funded real property if the agency has the authority to manage the real property for its authorized purpose under the award. The agency, the State, or another administrative unit of State government must not hold title to an undivided ownership interest in the real property concurrently with a subrecipient or any other entity.

(b) An ownership interest is an interest in real property that gives the person who holds it the right to use and occupy a parcel of land or water and to exclude others. Ownership interests include fee and leasehold interests but not easements.

§ 80.131 Must a State fish and wildlife agency hold an easement acquired under an award?

A State fish and wildlife agency must hold an easement acquired under an award, but it may share certain rights or responsibilities as described in paragraph (b) of this section if consistent with State law.

(a) Any sharing of rights or responsibilities does not diminish the agency's responsibility to manage the easement for its authorized purpose.

(b) The agency may share the holding or enforcement of an easement only in the following situations:

(1) The State or an administrative unit of State government may hold an easement on behalf of its fish and wildlife agency.

(2) The agency may issue a subaward with the concurrent right to hold the easement to a nonprofit organization or to a local or Tribal government. A concurrent right to hold an easement means that both the State agency and

the subrecipient hold the easement and share its rights and responsibilities.

(3) The agency may issue a subaward with a right of enforcement to a nonprofit organization or to a local or Tribal government. This right of enforcement may allow the subrecipient to have reasonable access and entry to property protected under the easement for purposes of inspection, monitoring, and enforcement. The subrecipient's right of enforcement must not supersede and must be concurrent with the agency's right of enforcement.

§ 80.132 Must a State fish and wildlife agency have control over the land or water where it completes capital improvements?

Yes. A State fish and wildlife agency must control the parcel of land or water on which the agency completes a grant-funded capital improvement. An agency must exercise this control by holding title to a fee or leasehold interest or through another legally binding agreement. Control must be adequate for the protection, maintenance, and use of the improvement for its authorized purpose during its useful life even if the agency did not acquire the parcel with award funds.

§ 80.133 Must a State fish and wildlife agency maintain acquired or completed capital improvements?

Yes. A State fish and wildlife agency is responsible for maintaining capital improvements acquired or completed under an award to ensure that each capital improvement continues to serve its authorized purpose during its useful life.

§ 80.134 How must a State fish and wildlife agency use real property?

(a) If an award funds acquisition of an interest in a parcel of land or water, the State fish and wildlife agency must use the land or water for the purpose authorized in the award.

(b) If an award funds construction of a capital improvement, the agency must use the capital improvement for the purpose authorized in the award during the useful life of the capital improvement. The agency must comply with this requirement even if the agency did not use award funds to:

- (1) Acquire the parcel on which the capital improvement is located; or
- (2) Build the structure in which the capital improvement is a component.

(c) If an award funds management, operation, or maintenance of a parcel of land or water, or a capital improvement, the agency must use the parcel or capital improvement for the purpose authorized in the award during the period of performance. The agency must comply with this requirement even if the agency did not acquire the parcel or construct the capital improvement with award funds.

(d) A State agency may allow commercial, recreational, and other secondary uses of a grant-funded parcel of land or water or capital improvement if these secondary uses do not interfere with the authorized purpose of the award.

(e) Real property acquired with license revenue (see § 80.20(b)) must be controlled by the State fish and wildlife agency and used only for administration of the agency (see § 80.10(c)).

§ 80.135 What if a State fish and wildlife agency allows a use of real property that interferes with its authorized purpose?

(a) When a State fish and wildlife agency allows a use of real property that interferes with the authorized purpose of the real property under an award, the agency must fully restore the real property to its authorized purpose.

(b) If the agency cannot fully restore the real property to its authorized purpose, then the agency must replace the real property using non-Federal funds.

(c) The agency must determine that the replacement property:

(1) Is of at least equal value at current market prices; and

(2) Has fish-, wildlife-, and public-use benefits consistent with the purposes of the original award.

(d) The Regional Director may require the agency to obtain an appraisal and appraisal review to estimate the value of the replacement property at current market prices if the agency cannot support its assessment of value.

(e) The agency must obtain the Regional Director's approval of:

(1) The agency's determination of the value and benefits of the replacement property; and

(2) The documentation supporting this determination.

(f) The agency may have up to 3 years from the date of notification by the Regional Director to restore the real property to its authorized purpose or acquire replacement property. If the

agency does not restore the real property to its authorized purpose or acquire replacement property within 3 years, the Director may declare the agency ineligible to receive new awards in the program or programs that funded the original acquisition.

§ 80.136 Is it a diversion if a State fish and wildlife agency does not use real property acquired under an award for its authorized purpose?

If a State fish and wildlife agency does not use real property acquired under an award for its authorized purpose, a diversion occurs only if both of the following conditions apply:

(a) The agency used license revenue as cost sharing for the award; and

(b) The unauthorized use is for a purpose other than management of the fish-and-wildlife-related resources for which the agency has authority under State law.

§ 80.137 What if real property is no longer useful or needed for its original purpose?

If the director of the State fish and wildlife agency and the Regional Director jointly decide that real property acquired with award funds is no longer useful or needed for the original purpose of the real property under the award, the director of the agency must:

(a) Propose another eligible purpose for the real property under the grant program and ask the Regional Director to approve this proposed purpose; or

(b) Follow the regulations at 2 CFR 200.311 and consult with the Regional Director on how to treat proceeds from the disposition of real property.

Subpart K—Revisions and Appeals

§ 80.150 How does a State fish and wildlife agency revise an award?

(a) A State fish and wildlife agency requests approval for a revision to a project or award by providing the Service the following documents:

(1) The Office of Management and Budget (OMB)-approved common application information for Federal assistance, approved by the director of the agency or the director's designee, to update or request a change in the information that the agency submitted in an approved application.

(2) A statement that explains:

(i) How the requested revision would affect the information that the agency submitted with the original grant application; and

(ii) Why the requested revision is necessary.

(b) If the State maintains the process under Executive Order 12372, Intergovernmental Review of Federal Programs, the agency must follow its processes for sending any requested revision of the purpose or objectives of a project or award to the State Clearinghouse or Single Point of Contact.

§ 80.151 May a State fish and wildlife agency appeal a decision?

Yes. A State fish and wildlife agency may appeal the Director's or Regional Director's decision on any matter subject to this part.

(a) The agency must send the appeal to the Director within 30 days of the date that the Director or Regional Director mails or otherwise informs an agency of a decision.

(b) The agency may appeal the Director's decision on an appeal made under paragraph (a) of this section to the Secretary. An appeal to the Secretary must be made within 30 days of the date the decision was mailed and must follow procedures in 43 CFR part 4, subpart G.

Subpart L—Information Collection

§ 80.160 What are the information collection requirements of this part?

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this part 80 and assigned the following OMB Control Numbers 1018–0088, “National Survey of Fishing, Hunting, and Wildlife-Associated Recreation (FHWAR)” and 1018–0100, “Administrative Procedures for U.S. Fish and Wildlife Service Financial Assistance Programs.” Federal agencies 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. Direct comments regarding the burden estimate or any other aspect of the information collection to the Service's Information Collection Clearance Officer at the address provided at 50 CFR 2.1(b).

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks, Department of Interior.

[FR Doc. 2024–27095 Filed 11–29–24; 8:45 am]

BILLING CODE 4333–15–P



FEDERAL REGISTER

Vol. 89

Monday,

No. 231

December 2, 2024

Part V

Department of Homeland Security

8 CFR Parts 214 and 274a

Department of Labor

Employment and Training Administration

20 CFR Part 655

Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2025 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers; Final Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214 and 274a

[CIS No. 2788–25]

RIN 1615–AC95

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

[DOL Docket No. ETA–2024–0002]

RIN 1205–AC20

Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2025 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS), and Employment and Training Administration and Wage and Hour Division, U.S. Department of Labor (DOL).

ACTION: Temporary rule.

SUMMARY: DHS, in consultation with DOL, is exercising time-limited Fiscal Year (FY) 2025 authority and increasing the total number of noncitizens who may receive an H–2B nonimmigrant visa by up to 64,716 for the entirety of FY 2025. These supplemental visas will be distributed in four allocations throughout the fiscal year. This rule reserves 20,000 of these visas for nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. All visas will be available only to businesses that are suffering or will suffer impending irreparable harm, as attested by the employer. In addition, DHS is again providing temporary portability flexibility.

DATES:

Effective dates: The amendments at instructions 1, 3, and 5 are effective December 2, 2024; instructions 2 and 4 amending 8 CFR 214.2 and 274a.12, respectively, are effective from December 2, 2024, through December 2, 2027; instruction 6, adding 20 CFR 655.64, is effective from December 2, 2024, through September 30, 2025; and instruction 7, adding 20 CFR 655.68, is effective from December 2, 2024, through September 30, 2028.

Petition dates: DHS will not accept any H–2B petitions under provisions related to the FY 2025 supplemental numerical allocations after September

15, 2025, and will not approve any such H–2B petitions after September 30, 2025. The provisions related to portability are only available to petitioners and H–2B nonimmigrant workers initiating employment through the end of January 24, 2026.

Comments on the Information Collection: The Office of Foreign Labor Certification within the U.S. Department of Labor will accept comments in connection with the new information collection Form ETA–9142B–CAA–9 associated with this rule until January 31, 2025. The electronic Federal Docket Management System will accept comments prior to midnight eastern time at the end of that day.

ADDRESSES: You may submit written comments on the new information collection Form ETA–9142B–CAA–9, identified by Regulatory Information Number (RIN) 1205–AC20, electronically by the following method:

Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions on the website for submitting comments.

Instructions: Include the agency's name and the RIN 1205–AC20 in your submission. All comments received will become a matter of public record and may be posted without change to <https://www.regulations.gov>. Comments submitted after the deadline for submission will not be considered. Please do not submit comments containing trade secrets, confidential or proprietary commercial or financial information, personal health information, sensitive personally identifiable information (for example, social security numbers, driver's license or state identification numbers, passport numbers, or financial account numbers), or other information that you do not want to be made available to the public. The agency reserves the right to redact or refrain from posting such information and libelous or otherwise inappropriate comments, including those that contain obscene, indecent, or profane language; that contain threats or defamatory statements; or that contain hate speech directed at race, color, sex, sexual orientation, national origin, ethnicity, age, religion, or disability. Please note that depending on how information is submitted through [regulations.gov](https://www.regulations.gov), the agency may not be able to redact the information and instead reserves the right to refrain from posting the information or comment in such situations.

FOR FURTHER INFORMATION CONTACT:

Regarding 8 CFR parts 214 and 274a: Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of

Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone 240–721–3000 (this is not a toll-free number).

Regarding 20 CFR part 655 and Form ETA–9142B–CAA–9: Brian D. Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Ave. NW, Room N–5311, Washington, DC 20210, telephone (202) 693–8200 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

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I. Executive Summary

FY 2025 H–2B Supplemental Cap

With this temporary final rule (TFR), the Secretary of Homeland Security, following consultation with the Secretary of Labor, is authorizing the release of an additional 64,716 H–2B visas for FY 2025, subject to certain conditions. The 64,716 visas are divided into the following allocations:

- For the first half of FY 2025: 20,716 immediately available visas limited to

returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2022, 2023, or 2024, regardless of country of nationality. These petitions must request employment start dates on or before March 31, 2025;

- For the early second half of FY 2025 (April 1 to May 14): 19,000 visas limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2022, 2023, or 2024 regardless of country of nationality. These early second half of FY 2025 petitions must request employment start dates from April 1, 2025, to May 14, 2025. Furthermore, employers must file these petitions no earlier than 15 days after the second half statutory cap¹ is reached;

- For the late second half of FY 2025 (May 15 to September 30): 5,000 visas limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2022, 2023, or 2024 regardless of country of nationality. These late second half of FY 2025 petitions must request employment start dates from May 15, 2025, to September 30, 2025. Furthermore, employers must file these petitions no earlier than 45 days after the second half statutory cap is reached; and

- For the entirety of FY 2025: 20,000 visas reserved for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica (country-specific allocation) as attested by the petitioner (regardless of whether such nationals are returning workers). Employers requesting an employment start date in the first half of FY 2025 may file such petitions immediately after the publication of this TFR. Employers requesting an employment start date in the second half of FY 2025 must file such petitions no earlier than 15 days after the second half statutory cap is reached.

To qualify for the FY 2025 supplemental caps provided by this temporary final rule, eligible petitioners must:

- Meet all existing H–2B eligibility requirements, including obtaining an approved temporary labor certification (TLC) from DOL before filing the Form I–129, Petition for a Nonimmigrant Worker, with USCIS;

- Properly file the Form I–129, Petition for a Nonimmigrant Worker, with USCIS at the current filing

location, on or before September 15, 2025;

- Submit an attestation affirming, under penalty of perjury, that the employer is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on the petition, and that they are seeking to employ returning workers only, unless the H–2B worker is a Salvadoran, Guatemalan, Honduran, Haitian, Colombian, Ecuadorian, or Costa Rican national and is counted towards the 20,000 cap exempt from the returning worker requirement; and

- Prepare and retain a detailed written statement describing how the employer is suffering irreparable harm or will suffer impending irreparable harm and how evidence demonstrates irreparable harm and supports their application.

Employers filing an H–2B petition 30 or more days after the certified start date on the TLC, must attest to engaging in the following additional steps to recruit U.S. workers:

- No later than 1 business day after filing the petition, place a new job order with the relevant State Workforce Agency (SWA) for at least 15 calendar days;

- Contact the nearest American Job Center serving the geographic area where work will commence and request staff assistance in recruiting qualified U.S. workers;

- Contact the employer's former U.S. workers who left employment with the employer on or after January, 1, 2023, including those the employer furloughed or laid off, and until the date the H–2B petition is filed, disclose the terms of the job order and solicit their return to the job;

- Provide written notification of the job opportunity to the bargaining representative for the employer's employees in the occupation and area of employment, or post notice of the job opportunity at the anticipated worksite if there is no bargaining representative;

- Where the occupation is traditionally or customarily unionized, provide written notification of the job opportunity to the nearest American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) office covering the area of intended employment, by providing a copy of the job order and requesting assistance in recruiting qualified U.S. workers for the job opportunity;

- Contact in writing and in a language understood by the worker, all U.S. workers currently employed at the place of employment, disclose the terms of the job order, and request assistance in

recruiting qualified U.S. workers for the job;

- Where the employer maintains a website for its business operations, post the job opportunity in a conspicuous location on the employer's website; and
- Hire any qualified U.S. worker who applies or is referred for the job opportunity until the later of either (1) the date on which the last H–2B worker departs for the place of employment, or (2) 30 days after the last date of the SWA job order posting.

Petitioners filing H–2B petitions under this FY 2025 supplemental cap must retain documentation of compliance with the attestation requirements for 3 years from the date DOL approved the TLC and must provide the documents and records upon the request of DHS or DOL, as well as fully cooperate with any compliance reviews such as audits.

Through audits and investigations, both Departments have received evidence of employer non-compliance with the terms and conditions of the H–2B program, as well as violations of other labor and employment laws. DOL Office of Foreign Labor Certification (OFLC), DOL Wage and Hour Division (WHD), and USCIS Fraud Detection and National Security (FDNS) personnel have encountered non-compliance issues such as failure to pay the promised wage, failure to employ returning workers, failure to demonstrate irreparable harm, failure to conduct the additional recruitment steps, failure to cooperate with the audit or investigation process, and failure to accurately disclose the beneficiary's work location(s).

Such non-compliance can harm U.S. workers by undermining wages and working conditions. It also directly harms H–2B workers. Further, H–2B workers depend on ongoing employment with the petitioning employer to maintain status in the United States. This dependence creates a power imbalance between the employer and H–2B worker, making the H–2B worker particularly vulnerable to exploitation and violations. An employer's failure to cooperate with or respond to an audit or investigation severely hinders the Departments' ability to assess whether it has complied with the H–2B program requirements and to determine if any temporary foreign or U.S. workers were affected by program violations. In recognition of the substantial impact that non-compliance can have on both U.S. workers and H–2B workers, DHS and DOL intend to conduct a significant number of audits focusing on irreparable harm and other worker protection provisions. And as it

¹ The term "statutory cap" refers to the 66,000 cap set forth at INA section 214(g)(1)(B) or the 33,300 semiannual caps at INA section 214(g)(10).

did as part of the supplemental cap TFRs in recent years, DHS will again subject employers that have committed labor law violations in the H-2B program to additional scrutiny in the supplemental cap petition process.² DHS intends for this additional scrutiny to help ensure compliance with H-2B program requirements and obligations.

Specifically, falsifying information in H-2B program attestation(s) can result not only in penalties relating to perjury, but also in, among other things, a finding of fraud or willful misrepresentation; denial or revocation of the H-2B petition requesting supplemental workers; and debarment by DOL and DHS from the H-2B program and any other foreign labor programs administered by DOL. Falsifying information also may subject a petitioner/employer to other criminal and/or civil penalties.

DHS will not approve H-2B petitions filed in connection with the FY 2025 supplemental cap authority on or after October 1, 2025.

H-2B Portability

In addition to exercising its time-limited authority to make additional FY 2025 H-2B visas available, DHS is again providing additional flexibilities to H-2B petitioners under its general programmatic authority by allowing nonimmigrant workers in the United States³ in valid H-2B status and who are beneficiaries of non-frivolous H-2B petitions received on or after January 25, 2025, or who are the beneficiaries of non-frivolous H-2B petitions that are pending as of January 25, 2025, to begin work with a new employer after an H-2B petition (supported by a valid TLC) is filed and before the petition is approved, generally for a period of up to 60 days. However, such employment authorization would end 15 days after USCIS denies the H-2B petition or such petition is withdrawn. This H-2B

portability ends one year after the provision's effective date of January 25, 2025, in other words, at the end of January 24, 2026.⁴

II. Background

A. Legal Framework

The Immigration and Nationality Act (INA), as amended, establishes the H-2B nonimmigrant classification for a nonagricultural temporary worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b). Employers must petition DHS in such form and containing such information as the Secretary prescribes for classification of prospective temporary workers as H-2B nonimmigrants. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). Generally, DHS must approve this petition before the beneficiary can be considered eligible for an H-2B visa. In addition, the INA requires that “[t]he question of importing any alien as [an H-2B] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS],⁵ after consultation with appropriate agencies of the Government.” INA section 214(c)(1), 8 U.S.C. 1184(c)(1). The INA generally charges the Secretary of Homeland Security with the administration and enforcement of the immigration laws, and provides that the Secretary “shall establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority” under the INA. *See* INA section 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3); *see also* 6 U.S.C. 202(4) (charging the

Secretary with “[e]stablishing and administering . . . governing the granting of visas or other forms of permission . . . to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States”). With respect to nonimmigrants in particular, the INA provides that “[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe.” INA section 214(a)(1), 8 U.S.C. 1184(a)(1); *see also* INA section 274A(a)(1) and (h)(3), 8 U.S.C. 1324a(a)(1) and (h)(3) (prohibiting employment of noncitizens⁶ not authorized for employment). The Secretary may designate officers or employees to take and consider evidence concerning any matter that is material or relevant to the enforcement of the INA. INA sections 287(a)(1), (b), 8 U.S.C. 1357(a)(1), (b), and INA section 235(d)(3), 8 U.S.C. 1225(d)(3). INA section 291, 8 U.S.C. 1361, establishes that the petitioner or applicant for a visa or other immigration document bears the burden of proof with respect to eligibility and inadmissibility, including that the noncitizen is entitled to the immigration status being sought.

Finally, under section 101 of the HSA, 6 U.S.C. 111(b)(1)(F), a primary mission of DHS is to “ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.”

DHS regulations provide that an approved TLC from the U.S. Department of Labor (DOL), issued pursuant to regulations established at 20 CFR part 655, or from the Guam Department of Labor if the workers will be employed on Guam, must accompany an H-2B petition for temporary employment in the United States. 8 CFR 214.2(h)(6)(iii)(A) and (C) through (E), (h)(6)(iv)(A); *see also* INA section 103(a)(6), 8 U.S.C. 1103(a)(6). The TLC serves as DHS’s consultation with DOL with respect to whether a qualified U.S. worker is available to fill the petitioning H-2B employer’s job opportunity and whether a foreign worker’s employment in the job opportunity will adversely affect the wages and working conditions of similarly-employed U.S. workers. *See* INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D).

⁶ For purposes of this discussion, the Departments use the term “noncitizen” colloquially to be synonymous with the term “alien” as it is used in the Immigration and Nationality Act.

² *See Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers*, 87 FR 30334, 30335 (May 18, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers*, 87 FR 76816, 76818 (Dec. 15, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers*, 88 FR 80394 (Nov. 17, 2023).

³ The term “United States” includes the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands. INA section 101(a)(38), 8 U.S.C. 1101(a)(38).

⁴ On September 20, 2023, DHS issued *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*, Notice of Proposed Rulemaking (NPRM), 88 FR 65040, 65066. In that NPRM, DHS proposed to extend portability to H-2A and H-2B workers on a permanent basis. The Department’s proposal does not interfere with the portability provision of this rule. However, should DHS publish a final rule making H-2 portability permanent, any such provision would not expire on a specific date, unlike the portability provision made effective by this temporary final rule.

⁵ As of March 1, 2003, in accordance with section 1517 of Title XV of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Immigration and Nationality Act describing functions which were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA “shall be deemed to refer to the Secretary” of Homeland Security. *See* 6 U.S.C. 557 (2003) (codifying HSA, Title XV, sec. 1517); 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

To determine whether to issue a TLC, the Departments have established regulatory procedures under which DOL certifies whether a qualified U.S. worker is available to fill the job opportunity described in the employer's petition for a temporary nonagricultural worker, and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See* 20 CFR part 655, subpart A. The regulations establish the process by which employers obtain a TLC and rights and obligations of workers and employers.

Once the petition is approved, under the INA and current DHS regulations, H-2B workers do not have employment authorization outside of the validity period listed on the approved petition unless otherwise authorized, and the workers are limited to employment with the H-2B petitioner. *See* 8 U.S.C. 1184(c)(1), 8 CFR 274a.12(b)(9). An employer or U.S. agent generally may submit a new H-2B petition, with a new, approved TLC, to USCIS to request an extension of H-2B nonimmigrant status for the validity of the TLC or for a period of up to 1 year. 8 CFR 214.2(h)(15)(ii)(C). Except as provided for in the preceding H-2B supplemental cap TFRs⁷ and in this rule, and except for certain professional athletes being traded among organizations,⁸ H-2B workers seeking to extend their status with a new employer may not begin employment with the new employer until the new H-2B petition is approved.

The INA also authorizes DHS to impose appropriate remedies against an employer for a substantial failure to meet the terms and conditions of employing an H-2B nonimmigrant worker, or for a willful misrepresentation of a material fact in a petition for an H-2B nonimmigrant worker. INA section 214(c)(14)(A), 8 U.S.C. 1184(c)(14)(A). The INA expressly authorizes DHS to delegate certain enforcement authority to DOL. INA section 214(c)(14)(B), 8 U.S.C.

1184(c)(14)(B); *see also* INA section 103(a)(6), 8 U.S.C. 1103(a)(6). DHS has delegated its authority under INA section 214(c)(14)(A)(i), 8 U.S.C. 1184(c)(14)(A)(i), to DOL. *See* DHS, Delegation of Authority to DOL under Section 214(c)(14)(A) of the INA (Jan. 16, 2009); *see also* 8 CFR 214.2(h)(6)(ix) (stating that DOL may investigate employers to enforce compliance with the conditions of an H-2B petition and a DOL-approved TLC). This enforcement authority has been delegated within DOL to the Wage and Hour Division (WHD), and is governed by regulations at 29 CFR part 503.

B. H-2B Numerical Limitations Under the INA

The maximum annual number ("statutory cap") of noncitizens who may be issued H-2B visas or otherwise provided H-2B nonimmigrant status to perform temporary nonagricultural work is 66,000, distributed semiannually beginning in October and April. *See* INA sections 214(g)(1)(B) and (g)(10), 8 U.S.C. 1184(g)(1)(B) and (g)(10). Accordingly, with certain exceptions as described below, up to 33,000 noncitizens may be issued H-2B visas or provided H-2B nonimmigrant status in the first half of a fiscal year, and the remaining annual allocation, including any unused nonimmigrant H-2B visas from the first half of a fiscal year, are available for employers seeking to hire H-2B workers during the second half of the fiscal year.⁹ If the number of petitions approved by DHS is insufficient to use all H-2B numbers in a given fiscal year, DHS cannot carry over the unused numbers for petition approvals for employment start dates beginning on or after the start of the next fiscal year.

In FYs 2005, 2006, 2007, and 2016, Congress exempted H-2B workers identified as returning workers from the annual H-2B cap of 66,000.¹⁰ A returning worker is an H-2B worker who was previously counted against the annual H-2B cap during a designated period of time.¹¹ For example, Congress designated that returning workers for FY

2016 needed to have been counted against the cap during FY 2013, 2014, or 2015 to qualify for the exemption.¹² DHS and the Department of State (DOS) worked together to confirm that all workers requested under the returning worker provision in fact were eligible for exemption from the annual cap (in other words, were issued an H-2B visa or provided H-2B status during one of the prior 3 fiscal years) and were otherwise eligible for H-2B classification.

Because of the strong demand for H-2B visas in recent years, the statutorily-limited semiannual visa allocation, the DOL regulatory requirement that employers apply for a TLC 75 to 90 days before the start date of work,¹³ and the DHS regulatory requirement that an approved TLC accompany all H-2B petitions,¹⁴ employers that wish to obtain visas for their workers under the semiannual allotment must act early to receive a TLC and file a petition with U.S. Citizenship and Immigration Services (USCIS). As a result, the date on which USCIS has reached sufficient H-2B petitions to reach the first half of the fiscal year statutory cap has generally trended earlier in recent years.¹⁵ For FY 2022, for the first time in more than a decade, USCIS received sufficient H-2B petitions to reach the first half of the fiscal year statutory cap before the start of the fiscal year.¹⁶ This

¹² *See* Consolidated Appropriations Act, 2016, Public Law 114–113, div. F, tit. V, sec 565.

¹³ *See* 20 CFR 655.15(b).

¹⁴ *See* 8 CFR 214.2(h)(6)(vi)(A).

¹⁵ In fiscal years 2017 through 2021, USCIS received a sufficient number of H-2B petitions to reach or exceed the relevant first half statutory cap on January 10, 2017, December 15, 2017, December 6, 2018, November 15, 2019, and November 16, 2020, respectively. *See* USCIS, *USCIS Reaches the H-2B Cap for the First Half of Fiscal Year 2017*, <https://www.uscis.gov/archive/uscis-reaches-the-h-2b-cap-for-the-first-half-of-fiscal-year-2017> (Jan. 13, 2017); USCIS, *USCIS Reaches H-2B Cap for the First Half of Fiscal Year 2018*, <https://www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018> (Dec. 21, 2017); USCIS, *USCIS Reaches H-2B Cap for the First Half of Fiscal Year 2019*, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2019> (Dec. 12, 2018); USCIS, *USCIS Reaches H-2B Cap for the First Half of Fiscal Year 2020*, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2020> (Nov. 20, 2019); USCIS, *USCIS Reaches H-2B Cap for the First Half of Fiscal Year 2021*, <https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021> (Nov. 18, 2020).

¹⁶ On October 12, 2021, USCIS announced that it had received sufficient petitions to reach the congressionally mandated cap on H-2B visas for temporary nonagricultural workers for the first half of fiscal year 2022, and that September 30, 2021, was the final receipt date for new cap-subject H-2B worker petitions requesting an employment start date before April 1, 2022. *See* USCIS, *USCIS Reaches H-2B Cap for the First Half of Fiscal Year 2022*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022>.

Continued

⁷ For instance, the FY 2023 and FY 2024 H-2B supplemental cap TFRs both included a portability provision at 8 CFR 214.2(h)(29) and (31), respectively. Portability under 8 CFR 214.2(h)(31) remains in effect through January 24, 2025. *See e.g.*, *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 76816 (Dec. 15, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 88 FR 80394 (Nov. 17, 2023).

⁸ *See* 8 CFR 214.2(h)(6)(vii) and 8 CFR 274a.12(b)(9).

⁹ The Federal Government's fiscal year runs from October 1 of the prior year through September 30 of the year being described. For example, fiscal year 2025 is from October 1, 2024, through September 30, 2025.

¹⁰ *See* INA section 214(g)(9)(A), 8 U.S.C. 1184(g)(9)(A), *see also* Consolidated Appropriations Act, 2016, Public Law 114–113, div. F, tit. V, sec 565; John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109–364, div. A, tit. X, sec. 1074, (2006); Save Our Small and Seasonal Businesses Act of 2005, Public Law 109–13, div. B, tit. IV, sec. 402.

¹¹ *See* INA section 214(g)(9)(A), 8 U.S.C. 1184(g)(9)(A).

occurred even earlier in FY 2023, when USCIS received enough H–2B petitions to reach the FY 2023 first-half statutory cap on September 12, 2022.¹⁷ For FY 2024, USCIS received sufficient H–2B petitions to reach the first half of the fiscal year statutory cap on October 11, 2023.¹⁸ For FY 2025, USCIS received sufficient H–2B petitions to reach the first half of the fiscal year statutory cap on September 18, 2024.¹⁹ This trend in recent years of increased demand for H–2B workers is even more apparent in the second half of the fiscal year.²⁰

reaches-h-2b-cap-for-first-half-of-fy-2022 (Oct 12, 2021).

¹⁷ On September 14, 2022, USCIS announced that it had received sufficient petitions to reach the congressionally mandated cap on H–2B visas for temporary nonagricultural workers for the first half of fiscal year 2023, and that September 12, 2022, was the final receipt date for new cap-subject H–2B worker petitions requesting an employment start date before April 1, 2023. See USCIS, *USCIS Reaches H–2B Cap for the First Half of Fiscal Year 2023*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023> (Sept. 14, 2022).

¹⁸ On October 13, 2023, USCIS announced that it had received sufficient petitions to reach the congressionally mandated cap on H–2B visas for temporary nonagricultural workers for the first half of fiscal year 2024, and that October 11, 2023, was the final receipt date for new cap-subject H–2B worker petitions requesting an employment start date before April 1, 2024. See USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024> (October 13, 2023). While this date was slightly later than the prior two years, the Departments note that DOL received 2,157 applications for the first half of the FY 2024 statutory cap during the initial three-day filing window of July 3–5, 2023, covering 40,947 worker positions; a 59% increase in TLC workload when compared to the same time period in 2022. See DOL, *OFLC Publishes List of Randomized H–2B Applications Submitted July 3–5, 2023, for Employers Seeking H–2B Workers Starting October 1, 2023*, <https://www.dol.gov/agencies/eta/foreign-labor/news> (July 10, 2023).

¹⁹ On September 19, 2024, USCIS announced that it had received sufficient petitions to reach the congressionally mandated cap on H–2B visas for temporary nonagricultural workers for the first half of fiscal year 2025, and that September 18, 2024, was the final receipt date for new cap-subject H–2B worker petitions requesting an employment start date before April 1, 2025. See USCIS, *USCIS Reaches H–2B Cap for First Half of Fiscal Year 2025*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025> (Sept. 19, 2024). While this date was slightly later than in fiscal year 2023, the Departments note that DOL received 2,158 applications for the first half of the FY 2025 statutory cap during the initial three-day filing window of July 3–5, 2024, covering 44,238 worker positions; a 59% increase in TLC workload and 48% increase in requested worker positions when compared to the same time period for fiscal year 2023. See DOL, *OFLC Publishes List of Randomized H–2B Applications Submitted July 3–5, 2024, for Employers Seeking H–2B Workers Starting October 1, 2024*, <https://www.dol.gov/agencies/eta/foreign-labor/news> (July 9, 2024).

²⁰ In recent years, DOL has received an increasing number of TLC applications for an increasing number of H–2B workers with April 1 start dates: DOL received 4,500 applications on January 1, 2018, covering more than 81,600 worker positions;

Congress, in recognition of historical and current demand has, for the last several fiscal years, authorized supplemental caps.²¹ The authorization for the current supplemental cap is under sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83 (Sept. 26, 2024) (FY 2025 authority), which extended the authorization previously provided in section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47 (Mar. 23, 2024) (“FY 2024 Omnibus”), as discussed below.

C. FY 2025 Public Law 118–83

On March 23, 2024, President Joseph Biden signed the FY 2024 Omnibus, which contains a provision, section 105 of Division G, Title I, permitting the Secretary of Homeland Security, under certain circumstances and after consultation with the Secretary of Labor, to increase the number of H–2B visas available to U.S. employers, notwithstanding the otherwise-

DOL received 5,276 applications by January 8, 2019, covering more than 96,400 worker positions; DOL received 5,677 applications during the initial three-day filing window in 2020 covering 99,362 worker positions; DOL received 5,377 applications during the initial three-day filing window in 2021 covering 96,641 worker positions; DOL received 7,875 applications by January 4, 2022, covering 136,555 worker positions; DOL received 8,693 applications during the initial three-day filing window in 2023, covering 142,796 worker positions; and DOL received 8,817 H–2B applications by January 8, 2024, covering 138,847 worker positions. See DOL, *Announcements*, <https://www.dol.gov/agencies/eta/foreign-labor/news>.

²¹ See section 543 of Division F of the Consolidated Appropriations Act, 2017, Public Law 115–31 (FY 2017 Omnibus); section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115–141 (FY 2018 Omnibus); section 105 of Division H of the Consolidated Appropriations Act, 2019, Public Law 116–6 (FY 2019 Omnibus); section 105 of Division I of the Further Consolidated Appropriations Act, 2020, Public Law 116–94 (FY 2020 Omnibus); section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116–260 (FY 2021 Omnibus); section 105 of Division O of the Consolidated Appropriations Act, 2021, FY 2021 Omnibus, sections 101 and 106(3) of Division A of Public Law 117–43, Continuing Appropriations Act, 2022, and section 101 of Division A of Public Law 117–70, Further Continuing Appropriations Act, 2022 through February 18, 2022 (together, FY 2022 authority); section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117–103 (FY 2022 Omnibus); section 303 of Division O of the Consolidated Appropriations Act, 2023, Public Law 117–328 (FY 2023 Omnibus); Division A of Public Law 118–15, Continuing Appropriations Act, 2024 and Other Extensions Act, through November 17, 2023, as well as section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47 (FY 2024 Omnibus), signed into law on March 23, 2024, and the Continuing Appropriations and Extensions Act, 2025, sections 101(6) and 106 of Division A, Title I of Public Law 118–83 (Sept. 26, 2024).

established statutory numerical limitation set forth in the INA.²² Specifically, section 105 provides that “the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon determining that the needs of American businesses cannot be satisfied in [FY] 2024 with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor,” may increase the total number of noncitizens who may receive an H–2B visa in FY 2024 by the highest number of H–2B nonimmigrants who participated in the H–2B returning worker program in any fiscal year in which returning workers were exempt from the H–2B numerical limitation.

On September 25, 2024, Congress passed the FY 2025 authority, Public Law 118–83, which the President signed the next day. This law extends authorization under the same terms and conditions provided in section 105 of Division G, Title I of the FY 2024 Omnibus permitting the Secretary of Homeland Security to increase the number of H–2B visas available to U.S. employers in FY 2025, and expires on December 20, 2024.²³ In other words, Public Law 118–83 permits the Secretary of Homeland Security, after consultation with the Secretary of Labor, to provide up to 64,716 additional H–2B visas for FY 2025, notwithstanding the otherwise-established statutory numerical limitation set forth in the INA, for eligible employers whose employment needs for FY 2025 cannot be met.²⁴ Under the Public Law 118–83 authority, DHS and DOL are jointly publishing this

²² Further Consolidated Appropriations Act, 2024, Public Law 118–47 (Mar. 23, 2024).

²³ See secs. 101(6) and 106, Div. A, Title I, Pub. L. 118–83 (Sept. 26, 2024), and section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47 (Mar. 23, 2024) (FY 2024 Omnibus).

²⁴ Appropriations and authorities provided by the continuing resolutions are available for the needs of the entire fiscal year to which the continuing resolution applies, although DHS’s ability to obligate funds or exercise such authorities may lapse at the sunset of such resolution. See, e.g., Comments on Due Date and Amount of District of Columbia’s Contributions to Special Employee Retirement Funds, B–271304 (Comp. Gen. Mar. 19, 1996) (explaining that “a continuing resolution appropriates the full annual amount regardless of its period of duration. . . . Standard continuing resolution language makes it clear that the appropriations are available to the extent and in the manner which would be provided by the pertinent appropriations act that has yet to be enacted (unless otherwise provided in the continuing resolution).”). Consistent with this principle, DHS interprets the current continuing resolution to provide DHS with the ability to authorize additional H–2B visa numbers with respect to all of FY 2025 subject to the same terms and conditions as the FY 2024 authority at any time before the continuing resolution expires, notwithstanding the reference to FY 2024 in the FY 2024 Omnibus.

temporary final rule to authorize the issuance of no more than 64,716 additional visas for FY 2025 to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, as attested by the employer on a new attestation form. The authority to approve H-2B petitions under this FY 2025 supplemental cap expires at the end of that fiscal year. Therefore, USCIS will not approve H-2B petitions filed in connection with this FY 2025 supplemental cap authority on or after October 1, 2025.

As noted above, since FY 2017, Congress has enacted a series of public laws providing the Secretary of Homeland Security with the discretionary authority to increase the H-2B cap beyond the annual numerical limitation set forth in section 214 of the INA. The previous statutory provisions were materially identical to section 105 of the FY 2024 Omnibus, which is the same authority provided for FY 2025 by the recent continuing resolution. During each fiscal year from FY 2017 through FY 2019, and FY 2021 through FY 2024, the Secretary of Homeland Security, after consulting with the Secretary of Labor, determined that some American businesses could not satisfy their needs in such year with U.S. workers who were willing, qualified, and able to perform temporary nonagricultural labor. On the basis of these determinations, on July 19, 2017, and May 31, 2018, DHS and DOL jointly published temporary final rules for FY 2017 and FY 2018, respectively, each of which allowed an increase of up to 15,000 additional H-2B visas for those businesses that attested that if they did not receive all of the workers requested on the Petition for a Nonimmigrant Worker (Form I-129), they were likely to suffer irreparable harm, in other words, suffer a permanent and severe financial loss.²⁵ USCIS approved a total of 12,294 workers for H-2B classification under petitions filed pursuant to the FY 2017 supplemental cap increase.²⁶ In FY 2018, USCIS received petitions for more than 15,000 beneficiaries during the first 5 business days of filing for the supplemental cap and held a lottery on June 7, 2018. The total number of H-2B workers approved

toward the FY 2018 supplemental cap increase was 15,788.²⁷ The vast majority of the H-2B petitions received under the FY 2017 and FY 2018 supplemental caps requested premium processing (Form I-907)²⁸ and were adjudicated within 15 calendar days.

On May 8, 2019, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 30,000 additional H-2B visas for the remainder of FY 2019.²⁹ The additional visas were limited to returning workers who had been counted against the H-2B cap or were otherwise granted H-2B status in the previous three fiscal years, and for those businesses that attested to a level of need such that, if they did not receive all of the workers requested on the Form I-129, they were likely to suffer irreparable harm, in other words, suffer a permanent and severe financial loss.³⁰ The Secretary determined that limiting returning workers to those who were issued an H-2B visa or granted H-2B status in the past 3 fiscal years was appropriate, as it mirrored the standard that Congress designated in previous returning worker provisions. On June 5, 2019, approximately 30 days after the supplemental visas became available, USCIS announced that it received sufficient petitions filed pursuant to the FY 2019 supplemental cap increase. USCIS did not conduct a lottery for the FY 2019 supplemental cap increase. The total number of H-2B workers approved towards the FY 2019 supplemental cap increase was 32,680.³¹ The vast majority of these petitions requested premium processing and were adjudicated within 15 calendar days.

Although Congress provided the Secretary of Homeland Security with the discretionary authority to increase

the H-2B cap in FY 2020, the Secretary did not exercise that authority. DHS initially intended to exercise its authority and, on March 4, 2020, announced that it would make available 35,000 supplemental H-2B visas for the second half of the fiscal year.³² On March 13, 2020, then-President Trump declared a National Emergency concerning COVID-19, a communicable disease caused by the coronavirus SARS-CoV-2.³³ On April 2, 2020, DHS announced that the rule to increase the H-2B cap was on hold due to economic circumstances, and that DHS would not release additional H-2B visas until further notice.³⁴ DHS also noted that the Department of State had suspended routine visa services.³⁵

In FY 2021, DHS in consultation with DOL determined it was appropriate to increase the H-2B cap for FY 2021 coupled with additional protections (for example, post-adjudication audits, investigations, and compliance checks), based on the demand for H-2B workers in the second half of FY 2021, continuing economic growth, the improving job market, and increased visa processing capacity by the Department of State. Accordingly, on May 25, 2021, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 22,000 additional H-2B visas for the remainder of FY 2021.³⁶ The supplemental visas were available only to employers that attested they were likely to suffer irreparable harm without the additional workers. The allocation of 22,000 additional H-2B visas under that rule consisted of 16,000 visas available only to H-2B returning workers from one of the last three fiscal years (FY 2018, 2019, or 2020) and 6,000 visas that were initially reserved for nationals of the Northern Central American countries of El Salvador, Guatemala, and Honduras, who were exempt from the returning worker requirement. By August 13, 2021, USCIS had received enough petitions for returning workers to reach the additional 22,000 H-2B visas made

²⁵ See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2017 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, 82 FR 32987, 32998 (July 19, 2017); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, 83 FR 24905, 24917 (May 31, 2018).

²⁶ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2022, TRK 10625.

²⁷ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2022, TRK 10625. The number of approved workers exceeded the number of additional visas authorized for FY 2018 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

²⁸ Premium processing allows for expedited processing for an additional fee. See INA 286(u), 8 U.S.C. 1356(u).

²⁹ See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, 84 FR 20005, 20021 (May 8, 2019).

³⁰ See 84 FR at 20021.

³¹ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2022, TRK 10625. The number of approved workers exceeded the number of additional visas authorized for FY 2019 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

³² See DHS, *DHS to Improve Integrity of Visa Program for Foreign Workers* (March 5, 2020), <https://www.dhs.gov/news/2020/03/05/dhs-improve-integrity-visa-program-foreign-workers>.

³³ See Proclamation 9994 of Mar. 13, 2020, *Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak*, 85 FR 15337 (Mar. 18, 2020).

³⁴ See <https://twitter.com/DHSGov/status/1245745115458568192?s=20>.

³⁵ See <https://twitter.com/DHSGov/status/1245745116528156673>.

³⁶ See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 86 FR 28198 (May 25, 2021).

available under the FY 2021 H–2B supplemental visa temporary final rule.³⁷ The total number of H–2B workers approved towards the FY 2021 supplemental cap increase was 30,707.³⁸ This total number included approved H–2B petitions for 23,937 returning workers, as well as 6,805 beneficiaries from the Northern Central American countries.³⁹

On January 28, 2022, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 20,000 additional H–2B visas for FY 2022 positions with start dates on or before March 31, 2022.⁴⁰ These supplemental visas were available only to employers that attested they were suffering or would suffer impending irreparable harm without the additional workers. The allocation of 20,000 additional H–2B visas under that rule consisted of 13,500 visas available only to H–2B returning workers from one of the last three fiscal years (FY 2019, 2020, or 2021) and 6,500 visas reserved for Salvadoran, Guatemalan, Honduran, and Haitian nationals, who were exempted from the returning worker requirement. USCIS data show that the total number of H–2B workers approved towards the first half FY 2022 supplemental cap increase was 17,381, including 14,150 workers under the returning worker allocation, as well as 3,231 workers approved towards the Haitian/Northern Central American allocation.⁴¹

For the second half of FY 2022, DHS in consultation with DOL determined it was appropriate to increase the H–2B

cap for FY 2022 positions with start dates beginning on April 1, 2022 through September 30, 2022, based on the continued demand for H–2B workers for the remainder of FY 2022, continuing economic growth, increased labor demand, and increased visa processing capacity by the Department of State. Accordingly, on May 18, 2022, DHS and DOL jointly published a temporary final rule authorizing an increase of no more than 35,000 additional H–2B visas for the second half of FY 2022.⁴² As in the January 2022 TFR, the supplemental visas were available only to employers that attested they were suffering or would suffer impending irreparable harm without the additional workers. The allocation of 35,000 additional H–2B visas under the rule applicable to the second half of FY 2022 consisted of 23,500 visas available only to H–2B returning workers from one of the last three fiscal years (FY 2019, 2020, or 2021) and 11,500 visas reserved for Salvadoran, Guatemalan, Honduran, and Haitian nationals, who were exempted from the returning worker requirement. By May 25, 2022, USCIS had received enough petitions for returning workers to reach the additional 23,500 H–2B visas made available under the second half FY 2022 H–2B supplemental visa temporary final rule.⁴³ USCIS data show that the total number of H–2B workers approved towards the second half FY 2022 supplemental cap increase was 43,798, including 31,480 workers under the returning worker allocation, as well as 12,318 workers approved towards the Haitian/Northern Central American allocation.⁴⁴

On December 15, 2022, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 64,716 additional H–2B visas for the entirety of FY 2023.⁴⁵ As in the FY 2022 TFRs, the

additional visas were available only to employers that attested they were suffering or would suffer impending irreparable harm without the additional workers. The 64,716 additional visas included 44,716 reserved for returning workers from one of the last three fiscal years (FY 2020, 2021, or 2022), which were distributed in several allocations based on date of employer need: 18,216 for employers with requested employment start dates on or before March 31, 2023; 16,500 for employers with requested employment start dates from April 1, 2023, to May 14, 2023 (early second half allocation); and 10,000 for employers with requested employment start dates from May 15, 2023, to Sept. 30, 2023 (late second half allocation). The remaining 20,000 visas were available for the entirety of FY 2023, and were set aside for nationals of El Salvador, Guatemala, Honduras, and Haiti, who were exempt from the returning worker requirement. By January 30, 2023, USCIS received enough petitions to reach the cap for the additional 18,216 H–2B visas made available for returning workers for the first half of fiscal year, and by March 30, 2023, USCIS received enough petitions to reach the cap for the additional 16,500 H–2B visas made available for returning workers for the early second half of fiscal year.⁴⁶ USCIS data show that the total number of H–2B workers approved towards the FY 2023 supplemental cap increase was 78,302, including 54,470 workers under the returning worker allocation, as well as 23,832 workers approved towards the Haitian/Northern Central American allocation.⁴⁷

On November 17, 2023, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 64,716 additional H–2B visas for the entirety of

³⁷ See USCIS, *Cap Reached for Remaining H–2B Visas for Returning Workers for FY 2021*, <https://www.uscis.gov/news/alerts/cap-reached-for-remaining-h-2b-visas-for-returning-workers-for-fy-2021> (Aug. 19, 2021).

³⁸ The number of approved workers exceeded the number of additional visas authorized for FY 2021 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023.

³⁹ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023.

⁴⁰ See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 87 FR 4722 (Jan. 28, 2022); 87 FR 6017 (Feb. 3, 2022) (correction).

⁴¹ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023.

⁴² See *Temporary Final Rule, Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 87 FR 30334 (May 18, 2022).

⁴³ See USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for Second Half of FY 2022*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-second-half-of-fy-2022> (May 31, 2022).

⁴⁴ The number of approved workers exceeded the number of additional visas authorized for the second half of FY 2022 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023.

⁴⁵ See *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for*

the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers, 87 FR 76816 (Dec. 15, 2022); 87 FR 77979 (Dec. 21, 2022) (correction).

⁴⁶ See USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for the First Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-first-half-of-fy-2023> (Jan. 31, 2023); USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for the Early Second Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-early-second-half-of-fy-2023> (Mar. 31, 2023).

⁴⁷ The number of approved workers exceeded the number of additional visas authorized for FY 2023 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. See DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023.

FY 2024.⁴⁸ As in the FY 2023 TFR, the additional visas were available only to employers that attested they were suffering or would suffer impending irreparable harm without the additional workers. The 64,716 additional visas included 44,716 reserved for returning workers from one of the last three fiscal years (FY 2021, 2022, or 2023), which were distributed in several allocations based on date of employer need: 20,716 for employers with requested employment start dates on or before March 31, 2024; 19,000 for employers with requested employment start dates from April 1, 2024, to May 14, 2024 (early second half allocation); and 5,000 for employers with requested employment start dates from May 15, 2024, to September 30, 2024 (late second half allocation). The remaining 20,000 visas were available for the entirety of FY 2024, and were set aside for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica, who were exempt from the returning worker requirement. By January 9, 2024, USCIS received enough petitions to reach the cap for the additional 20,716 H–2B visas made available for returning workers for the first half of fiscal year, and by April 17, 2024, USCIS received enough petitions to reach the cap for the additional 19,000 H–2B visas made available for returning workers for the early second half of fiscal year.⁴⁹ USCIS data show that the total number of H–2B workers approved towards the FY 2024 supplemental cap increase was 85,577, including 61,102 workers under the returning worker allocation, as well as 24,475 workers approved towards the country-specific allocation.⁵⁰

Once again, DHS, in consultation with DOL, believes that it is appropriate to increase the H–2B cap for FY 2025 based on the demand for H–2B workers

in the first half of FY 2025, anticipated demand for the second half of FY 2025, recent economic growth, and strong labor demand.⁵¹ Similar to the preceding temporary rule, DHS and DOL also believe that it is appropriate and important to couple this cap increase with additional worker protections, as described below.

D. Joint Issuance of the Final Rule

As in prior years, DHS and DOL (the Departments) have determined that it is appropriate to jointly issue this temporary final rule.⁵² The determination to issue the temporary final rule jointly follows conflicting court decisions concerning DOL's authority to independently issue legislative rules to carry out its consultative and delegated functions pertaining to the H–2B program under the INA.⁵³ Although DHS and DOL each have authority to independently issue rules implementing their respective

⁵¹ The term “strong labor demand” in this context relies on the most recently released figure from a Bureau of Labor Statistics (BLS) survey at the time this TFR was written. The BLS Job Openings and Labor Turnover Survey (JOLTS) reports 9.6 million job openings in August 2023. See DOL, BLS, Job Openings and Labor Turnover—August 2023, https://www.bls.gov/news.release/archives/jolts_10032023.htm.

⁵² See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2017 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program*, 82 FR 32987 (Jul. 19, 2017); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program*, 83 FR 24905 (May 31, 2018); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2019 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program*, 84 FR 20005 (May 8, 2019); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 86 FR 28198 (May 25, 2021); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 87 FR 4722 (Jan. 28, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 87 FR 30334 (May 18, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 87 FR 76816 (Dec. 15, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 88 FR 80394 (Nov. 17, 2023).

⁵³ See *Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, 983 F.3d 671 (4th Cir. 2020), cert. denied, 142 S. Ct. 425 (2021); see also *Temporary Non-Agricultural Employment of H–2B Aliens in the United States*, 80 FR 24041, 24045 (Apr. 29, 2015).

duties under the H–2B program,⁵⁴ the Departments are implementing the numerical increase in this manner to ensure there can be no question about the authority underlying the administration and enforcement of the temporary cap increase. This approach is consistent with rules implementing DOL's general consultative role under INA section 214(c)(1), 8 U.S.C. 1184(c)(1), and delegated functions under INA sections 103(a)(6) and 214(c)(14)(B), 8 U.S.C. 1103(a)(6), 1184(c)(14)(B).⁵⁵

III. Discussion

A. Statutory Determination

Following consultation with the Secretary of Labor, the Secretary of Homeland Security has determined that some U.S. employers cannot satisfy their needs in FY 2025 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor. In accordance with the FY 2025 continuing resolution extending the authority provided in section 105 of the FY 2024 Omnibus, the Secretary of Homeland Security has determined that it is appropriate, for the reasons stated below, to raise the numerical limitation on H–2B nonimmigrant visas through the end of FY 2025 by up to 64,716 additional visas for those American businesses that attest that they are suffering irreparable harm or will suffer impending irreparable harm, in other words, a permanent and severe financial loss, without the ability to employ all of the H–2B workers requested on their petition. These businesses must retain documentation, as described below, supporting this attestation.

As in connection with H–2B supplemental visa temporary final rules in recent years, and consistent with existing authority, DHS and DOL intend to conduct a significant number of audits with respect to petitions filed under this TFR requesting supplemental H–2B visas during the period of temporary need. The Departments will use their discretion to select which petitions to audit, and the Departments will use the audits to verify compliance with H–2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule. If the Departments find that an employer's documentation does not meet the irreparable harm standard, or that the employer fails to provide

⁵⁴ See *Outdoor Amusement Bus. Ass'n*, 983 F.3d at 684–89.

⁵⁵ See 8 CFR 214.2(h)(6)(iii)(A) and (C), (h)(6)(iv)(A).

⁴⁸ *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 88 FR 80394 (Nov. 17, 2023).

⁴⁹ See USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for the First Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-first-half-of-fy-2024> (Jan. 12, 2024); USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for the Early Second Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-early-second-half-of-fy-2024> (Apr. 18, 2024).

⁵⁰ The number of approved workers exceeded the number of additional visas authorized for FY 2024 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. See DHS, USCIS, Office of Performance and Quality, ELIS, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221.

evidence demonstrating irreparable harm or comply with the audit process, the Departments may consider it to be a willful violation resulting in an adverse agency action against the employer, including revocation of the TLC or program debarment. Of the audits completed so far, some audits conducted of employers that received visas under past supplemental caps revealed concerns surrounding payment of the promised wage, employment of returning workers, documentation of irreparable harm, need for all requested workers, employment for the reported number of hours and employment at the listed location, recruitment of U.S. workers, and cooperation with the audit process, which may warrant further review and action.

Based on the insufficient responses and evidence generally provided in response to these audits, which indicate a lack of compliance with the audit process and program requirements, DOL has added clarifying language to the regulatory text at 20 CFR 655.64(a)(1) and (a)(5) to provide more information on how employers can provide sufficient evidence to establish irreparable harm in response to an audit or investigation and further explain how failing to respond to audits or failing to establish compliance with H-2B program requirements can result in debarment from the program and all programs administered by OFLC, consistent with the Department's regulations at 20 CFR 655.70 and 20 CFR 655.73. While the requirements remain the same, DOL believes adding these clarifications would benefit the public and regulated community at large.

As he did in recent years, the Secretary of Homeland Security has also again determined, following consultation with the Secretary of Labor, that for certain employers, additional recruitment steps are necessary to confirm that there are no qualified U.S. workers available for the positions. In addition, the Secretary of Homeland Security has determined, following consultation with the Secretary of Labor, that the supplemental visas will be limited to returning workers, with the exception that up to 20,000 of the 64,716 visas will be exempt from the returning worker requirement and, similar to FY 2024, will be reserved for H-2B workers who are nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica.⁵⁶ DHS is reserving these

20,000 H-2B visas for nationals of these countries to further the United States' objectives in the Western Hemisphere to manage irregular migration through various lines of efforts including increasing and expanding access to lawful pathways for nationals of countries that have extensively collaborated with the United States on migration issues, such as through endorsing the Los Angeles Declaration on Migration and Protection (L.A. Declaration),⁵⁷ joining the United States to ramp up efforts to address the irregular migration flows through the Darien,⁵⁸ and hosting Safe Mobility Offices (SMOs) so that migrants do not trek north to the U.S. Southwest Border.⁵⁹ The 20,000 set-aside will also

2B allocations) because noncitizens covered by the special allocation under section 105 of the FY 2024 Omnibus are not "subject to the numerical limitations of [section 214(g)(1)]." See, e.g., INA section 214(g)(3); INA section 214(g)(10); Continuing Appropriations Act, 2025, div. A, sec. 101(6) (extending the authority provided in FY 2024 Omnibus div. G, sec. 3105 ("Notwithstanding the numerical limitation set forth in section 214(g)(1)(B) of the [INA]")).

⁵⁷ The White House, Los Angeles Declaration on Migration and Protection, June 10, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/>. On May 7, 2024, Guatemala hosted the third Los Angeles Declaration Ministerial with foreign ministers and senior representatives from 21 endorsing countries, including U.S. Secretary of State Antony Blinken. The White House, *Fact Sheet: Third Ministerial Meeting on the Los Angeles Declaration Migration and Protection in Guatemala* (May 7, 2024), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/07/fact-sheet-third-ministerial-meeting-on-the-los-angeles-declaration-on-migration-and-protection-in-guatemala/>. On September 25, the United States hosted the fourth Los Angeles Declaration Ministerial with foreign ministers and senior representatives from the other 21 endorsing countries. The White House, *Fact Sheet: Fourth Ministerial Meeting on the Los Angeles Declaration Migration and Protection* (September 26, 2024), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2024/09/26/fact-sheet-fourth-ministerial-meeting-on-the-los-angeles-declaration-on-migration-and-protection/>.

⁵⁸ Trilateral Joint Statement, April 11, 2023, <https://www.dhs.gov/news/2023/04/11/trilateral-joint-statement>.

⁵⁹ The White House, *Joint Statement from the United States and Guatemala on Migration* (June 1, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/01/joint-statement-from-the-united-states-and-guatemala-on-migration/>; United States Department of State, *U.S.-Colombia Joint Commitment to Address the Hemispheric Challenge of Irregular Migration* (June 4, 2023), <https://www.state.gov/u-s-colombia-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>; The White House, *Readout of Principal Deputy National Security Advisor Jon Finer's Meeting with Colombian Foreign Minister Alvaro Leyva* (June 11, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/11/readout-of-principal-deputy-national-security-advisor-jon-finers-meeting-with-colombian-foreign-minister-alvaro-leyva/>; United States Department of State, *U.S.-Costa Rica Joint Commitment to Address the Hemispheric Challenge*

deliver on the objectives of E.O. 14010, which, among other initiatives, instructs the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access to visa programs for nationals of the Northern Central American countries.⁶⁰ DHS is also allocating these visas to specific countries to further promote development and economic stability of these countries to reduce irregular migration throughout the Western Hemisphere.⁶¹

DHS observed robust employer interest in response to the FY 2021 H-2B supplemental visa allocation for Salvadoran, Guatemalan, and Honduran nationals and the FY 2022 and FY 2023 supplemental visa allocations for Salvadoran, Guatemalan, Honduran, and Haitian nationals, with USCIS approving petitions on behalf of 6,805 beneficiaries under the FY 2021 allocation,⁶² 3,231 beneficiaries under

of Irregular Migration (June 12, 2023), <https://www.state.gov/u-s-costa-rica-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>; United States Department of State, *Announcement of Safe Mobility Office in Ecuador* (October 19, 2023), <https://www.state.gov/announcement-of-safe-mobility-office-in-ecuador/#:~:text=The%20United%20States%20is%20pleased,authorized%20channels%20of%20lawful%20migration.>

⁶⁰ See Section 3(c) of E.O. 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, signed February 2, 2021, <https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf>. E.O. 14010 referred to the three countries of El Salvador, Guatemala, and Honduras as the "Northern Triangle," but this rule refers to these countries collectively as the Northern Central American countries.

⁶¹ See https://twitter.com/DHSGov/status/1580310211931144194?ref_src=twsrc%5Etfw (this supplemental allocation to workers from Haiti, Honduras, Guatemala, and El Salvador "advances the Biden Administration's pledge, under the L.A. Declaration to expand legal pathways as an alternative to irregular migration"); The White House, *Fact Sheet: The Los Angeles Declaration on Migration and Protection U.S. Government and Foreign Partner Deliverables*, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/fact-sheet-the-los-angeles-declaration-on-migration-and-protection-u-s-government-and-foreign-partner-deliverables/> (addressing several measures, including the H-2B allocation for nationals of Haiti, as part of "the President's commitment to support the people of Haiti."). We also note Congress' statement, in a provision within the FY 2022 Omnibus, that it is the policy of the United States to support the sustainable rebuilding and development of Haiti. See Section 102 of Division V of the Consolidated Appropriations Act, 2022, Public Law 117-103. See also DHS, *Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, 86 FR 62562 (Nov. 10, 2021) (sustainable development and the stability of Haiti is vital to the interests of the United States as a close partner and neighbor).

⁶² While USCIS approved a greater number of beneficiaries from the Northern Central American

⁵⁶ These conditions and limitations are not inconsistent with sections 214(g)(3) ("first in, first out" H-2B processing) and (g)(10) (fiscal year H-

the FY 2022 first half supplemental allocation,⁶³ 12,318 beneficiaries for the second half of the fiscal year FY 2022, and 23,832 beneficiaries under the FY 2023 allocation.⁶⁴ DHS also observed robust employer interest in response to the FY 2024 H–2B supplemental visa allocation for Salvadoran, Guatemalan, Honduran, Haitian, Colombian, Ecuadoran, and Costa Rican nationals. For FY 2024, USCIS approved 24,475 beneficiaries under the country-specific allocation.⁶⁵ In addition, the Biden-Harris administration has conducted outreach efforts to ensure U.S. businesses are able to address their labor needs by utilizing this country specific allocation for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica while at the same time promoting the availability of this lawful pathway for nationals of these countries seeking economic opportunity in the United States.⁶⁶

countries than the 6,000 visas allocated under the FY 2021 supplemental cap for those countries, the Department of State issued 3,079 visas to nationals from those countries. See DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023. This discrepancy can be attributed to adverse impacts on consular processing caused by the COVID–19 pandemic, travel restrictions, as well as lack of readily available processes to efficiently match workers from Northern Central American countries with U.S. recruiters/employers on an expedited timeline.

⁶³ See DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023.

⁶⁴ See DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023. While USCIS approved a greater number of beneficiaries from the Northern Central American countries and Haiti than the 11,500 visas allocated under the FY 2022 second half supplemental cap for those countries, the Department of State issued approximately 7,405 visas to nationals from those countries. Similarly, while USCIS approved a greater number of beneficiaries from the Northern Central American countries and Haiti than the 20,000 visas allocated under the FY 2023 supplemental cap for those countries, the Department of State issued approximately 16,713 visas to nationals from those countries.

⁶⁵ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, ELIS, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221. While USCIS approved a greater number of beneficiaries under the country-specific allocation than the 20,000 visas allocated, the Department of State issued approximately 17,695 visas under this allocation. *Id.*

⁶⁶ See, e.g., USAID, *Administrator Samantha Power at the Summit of the Americas Fair Recruitment and H–2 Visa Side Event*, <https://www.usaid.gov/news-information/speeches/jun-9-2022-administrator-samantha-power-summit-americas-fair-recruitment-and-h-2-visa> (June 9, 2022) (“Our combined efforts [with the labor ministries in Honduras and Guatemala, and the Foreign Ministry in El Salvador] . . . resulted in a

DHS will not accept and will reject petitions submitted for the country-specific allocation with a date of need on or after April 1, 2025, that are received earlier than 15 days after the INA section 214(g) cap for the second half of FY 2025 is met or are received after the applicable numerical limitation has been reached or after September 15, 2025. Requiring petitioners to wait to submit H–2B supplemental cap petitions with start dates of need on or after April 1, 2025, is consistent with the supplemental cap authority in section 105 of the FY 2024 Omnibus, as extended to FY 2025 by Public Law 118–83 (September 26, 2024), and will facilitate the orderly intake and processing of supplemental cap petitions for the country-specific allocation. As discussed above, similar limitations apply to the intake and processing of returning worker petitions with start dates of need on or after April 1, 2025.

Similar to previous temporary final rules, the Secretary of Homeland Security has also determined to limit the supplemental visas to H–2B returning workers,⁶⁷ unless the employer indicates on the new attestation form that it is requesting workers who are nationals of one of the specified countries and who are therefore counted towards the 20,000 country-specific allocation regardless of whether they are new or returning workers. If the 20,000 country-specific allocation is reached and visas remain available under the returning worker cap, USCIS would reject a petition seeking workers under the 20,000 allocation and return any fees submitted to the petitioner. In such a case, a petitioner may continue to request workers who are nationals of one of these countries, but the petitioner must file a new Form I–129 petition, with fee, and attest that these noncitizens will be returning workers, in other words, workers who were issued H–2B visas or were otherwise granted H–2B status in FY 2022, 2023, or 2024.⁶⁸ Like the

record number of H–2 visas issued in 2021, including a nearly forty percent increase over the pre-pandemic levels in H–2B visas issued across all three countries.”); USCIS, *H–2B Visa Program: Overview and Country Specific Allocations Recruitment Webinar*, <https://www.uscis.gov/outreach/upcoming-national-engagements/h-2b-visa-program-overview-and-country-specific-allocations-recruitment-webinar> (March 7, 2024).

⁶⁷ For purposes of this rule, these returning workers could have been H–2B cap exempt or extended H–2B status in FY 2022, 2023, or 2024. Additionally, they may have been previously counted against the annual H–2B cap of 66,000 visas during FY 2022, 2023, or 2024, or the supplemental caps in FY 2022, 2023, or 2024.

⁶⁸ The returning worker allocations are for workers who were issued H–2B visas or held H–2B

temporary final rules in recent years, if the 20,000 returning worker exemption cap for specific nationals remains unfilled, DHS will *not* make unfilled visas reserved for these nationals available to the general returning worker cap. The DHS decision not to make available unfilled visas from the country-specific allocation to the general supplemental cap for returning workers is consistent with the administration’s goal of providing a lawful pathway for such nationals to temporarily work in the United States. To that end, not permitting rollover into the returning worker allocation provides employers with more time to petition for, and bring in, workers from these countries and encourages full use of the 20,000 country-specific allocation to meet employer needs. This, in turn, contributes to our country’s efforts to promote and improve safety, security and economic stability in these countries to help stem the flow of irregular migration to the United States.

The Secretary of Homeland Security’s determination to increase the numerical limitation is based, in part, on the conclusion that some businesses are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on their petition. As stated in prior TFRs, in the past, members of Congress have informed the Secretaries of Homeland Security and Labor about the needs of some U.S. businesses for H–2B workers (after the statutory cap for the relevant half of the fiscal year has been reached) and about the potentially negative impact on state and local economies if the cap is not increased.⁶⁹ U.S. businesses, chambers of commerce, employer organizations, and state and local elected officials have also previously expressed concerns to the DHS and Labor Secretaries regarding the unavailability of H–2B visas after the statutory cap was reached.⁷⁰ In addition, while DHS did not request comments for the FY 2024 TFR, several commenters on the FY 2023 TFR supported the Departments’ decision to publish one rule covering the entire

status in fiscal years 2022, 2023, or 2024, regardless of country of nationality. Therefore, a petitioner may choose to petition for Salvadoran, Guatemalan, Honduran, Haitian, Colombian, Ecuadorian, or Costa Rican nationals who meet this requirement under an available returning worker allocation, regardless of whether the separate 20,000 allocation for these nationals has been reached.

⁶⁹ See, e.g., *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 87 FR 76816 (Dec. 15, 2022).

⁷⁰ These letters were retained in the administrative record for those rules.

fiscal year for 2023, and urged the Departments to once again publish one rule covering the entire fiscal year for 2024 in order to save time in the second half of the fiscal year, conserve limited agency resources, and reduce uncertainty for employers.⁷¹

After considering the full range of evidence and diverse points of view, the Secretary of Homeland Security has deemed it appropriate to take action to prevent further severe and permanent financial loss for those employers currently suffering irreparable harm and to avoid impending irreparable harm for other employers unable to obtain H-2B workers under the statutory cap, including potential wage and job losses by their U.S. workers, as well as other adverse downstream economic effects.⁷² At the same time, the Secretary of Homeland Security believes it is appropriate to condition receipt of supplemental visas on adherence to additional worker protections, as discussed below.

The decision to afford the benefits of this temporary cap increase to U.S. businesses that need H-2B workers because they are suffering irreparable harm already or will suffer impending irreparable harm, and that will comply with additional worker protections, rather than applying the cap increase to any and all businesses seeking temporary workers, is consistent with DHS's time-limited authority to increase the cap, as explained below. The Secretary of Homeland Security, in implementing section 105 of the FY 2024 Omnibus, as extended by Public

Law 118–83, and determining the scope of any such increase, has broad discretion, following consultation with the Secretary of Labor, to identify the business needs that are most relevant, while bearing in mind the need to protect U.S. workers.⁷³ Within that context, for the below reasons, the Secretary of Homeland Security has determined to allow an overall increase of up to 64,716 additional visas solely for the businesses facing permanent, severe financial loss or those who will face such loss in the near future.⁷⁴

First, as explained in earlier TFRs, DHS has long interpreted the reference to “the needs of American businesses” reiterated in section 105 of the FY 2024 Omnibus, as extended by Public Law 118–83, as describing a need different from the need ordinarily required of employers in petitioning for an H-2B worker. Under the generally applicable H-2B program, each individual H-2B employer must demonstrate that it has a temporary need for the services or labor for which it seeks to hire H-2B workers. *See* 8 CFR 214.2(h)(6)(ii); 20 CFR 655.6. The use of the phrase “needs of American businesses,” which is not found in INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b), and the regulations governing the standard H-2B cap, authorizes the Secretary of Homeland

Security in allocating additional H-2B visas under section 105 of the FY 2024 Omnibus, as extended by Public Law 118–83, to require that employers establish a need above and beyond the normal standard under the H-2B program, that is, an inability to find sufficient qualified U.S. workers willing and available to perform temporary services or labor and that the employment of the H-2B worker will not adversely affect the wages and working conditions of U.S. workers, *see* 8 CFR 214.2(h)(6)(i)(A). DOL concurs with this interpretation. Accordingly, the Secretaries have determined that it is appropriate, within the limits discussed below, to tailor the availability of this temporary cap increase to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, in other words, those facing permanent and severe financial loss.

Second, the approach set forth in this rule, which is similar to the implementation of the supplemental caps in previous fiscal years, provides protections against adverse effects on U.S. workers that may result from a cap increase, including, as in previous rules, requiring employers seeking H-2B workers under the supplemental cap to engage in additional recruitment efforts for U.S. workers.

In sum, this rule increases the numerical limitation by up to 64,716 additional H-2B visas for the entirety of FY 2025, but also restricts the availability of those additional visas by prioritizing only the most significant business needs, and limiting eligibility to H-2B returning workers, unless the worker is a national of one of the countries included in the 20,000 country-specific allocation that is exempt from the returning worker limitation. This rule also distributes the supplemental visas in several allocations to assist U.S. businesses that need workers to begin work on different start dates. These provisions are each described in turn below.

B. Numerical Increase and Allocations for Fiscal Year 2025

Making the Maximum Number of Visas Available

The increase of up to 64,716 visas will help address the urgent needs of eligible employers for additional H-2B workers for those employers with employment needs in fiscal year 2025.⁷⁵ The

⁷¹ See the docket for *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 76816 (Dec. 15, 2022) for access to these comments.

⁷² See, e.g., *Impacts of the H-2B Visa Program for Seasonal Workers on Maryland's Seafood Industry and Economy*, Maryland Department of Agriculture Seafood Marketing Program and Chesapeake Bay Seafood Industry Association (March 2, 2020), <https://mda.maryland.gov/documents/2020-H2B-Impact-Study.pdf> (last visited Sept. 29, 2023); *Hospitality Employment Rose in May, But Hoteliers Report Lingering Labor Woes*, Hotel Dive (Jun. 7, 2023), <https://www.hoteldive.com/news/hotel-employment-labor-shortage-increased-wage/> 652308/ (last visited Oct. 2, 2023); *Feds Double Seasonal Worker Visas Ahead of 2024 Crab Season*, Chesapeake Bay Magazine (Nov. 7, 2023), <https://www.chesapeakebaymagazine.com/feds-double-seasonal-worker-visas-ahead-of-2024-crab-season/>; Senator Chris Van Hollen, *Van Hollen Meets with Eastern Shore Crab Houses, Highlights Efforts to Support Seafood Industry's Employment Needs* (March 21, 2024), <https://www.vanhollen.senate.gov/news/press-releases/van-hollen-meets-with-eastern-shore-crab-houses-highlights-efforts-to-support-seafood-industrys-employment-needs>; HotelDive, *Hotel Employment Rose in May, But Owners' Labor Woes Remained* (June 11, 2024), <https://www.hoteldive.com/news/hotel-employment-labor-challenges/718560/>.

⁷³ Congress has delegated to DHS the broad authority to administer and enforce the immigration laws in title 8 of the U.S.C. as well as other immigration and naturalization laws. *See, e.g.*, INA sec. 103(a)(1), 214(a)(1), (c)(1); 8 U.S.C. 1103(a)(1), 1184(a)(1), (c)(1); *see Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (“In a case involving an agency, of course, the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes ‘expressly delegate’ to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to fill up the details of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as ‘appropriate’ or ‘reasonable.’”) (cleaned up and internal citations omitted).

⁷⁴ The statute explicitly provides that the Secretary of Homeland Security, after consulting with the Secretary of Labor, and upon the determination that the needs of United States businesses cannot be satisfied during fiscal year 2025 with U.S. workers to perform temporary nonagricultural labor, may determine the appropriate number of H-2B supplemental visas to be issued in fiscal year 2025, limited to the highest number of H-2B nonimmigrants who participated in the H-2B returning worker program. Consistent with the discretion afforded thereunder by Congress, and commensurate with authorities including those afforded under section 103 and 214 of the INA, 8 U.S.C. 1103 and 1184, DHS, in consultation with DOL, is making available additional H-2B temporary nonagricultural worker visas for fiscal year 2025, as in past years, to employers who are suffering irreparable harm or will suffer impending irreparable harm. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. at 2263 (2024).

⁷⁵ In contrast with section 214(g)(1) of the INA, 8 U.S.C. 1184(g)(1), which establishes a cap on the number of individuals who may be issued visas or otherwise provided H-2B status (emphasis added), and section 214(g)(10) of the INA, 8 U.S.C.

determination to make available up to 64,716 additional H–2B visas reflects a balancing of a number of factors including: the demand for H–2B visas during the first half of FY 2025 and expected demand for the second half of FY 2025; current labor market conditions; the general trend of increased demand for H–2B visas from FY 2017 to FY 2024; H–2B returning worker data; the amount of time for employers to hire and obtain H–2B workers in this fiscal year; and the objectives of the Biden-Harris Administration to address the root causes of irregular migration as outlined in E.O. 14010 and the L.A. Declaration. DHS believes the numerical increase both addresses the needs of U.S. businesses and, as explained in more detail below, furthers the foreign policy interests of the United States.

Section 105 of the FY 2024 Omnibus, as extended by Public Law 118–83, sets the highest number of H–2B returning workers who were exempt from the cap in certain previous years as the maximum limit for any increase in the H–2B numerical limitation for FY 2025.⁷⁶ Consistent with the statute's reference to H–2B returning workers, in determining the appropriate number by which to increase the H–2B numerical limitation, the Secretary of Homeland Security focused on the number of visas allocated to such workers in years in which Congress enacted returning worker exemptions from the H–2B numerical limitation. During each of the

1184(g)(10), which imposes a first half of the fiscal year cap on H–2B issuance with respect to the number of individuals who may be issued visas *or are accorded [H–2B] status*" (emphasis added), section 105 of the FY 2024 Omnibus only authorizes DHS to increase the number of available H–2B visas. Accordingly, DHS will not permit individuals authorized for H–2B status pursuant to an H–2B petition approved under section 105 of the FY 2024 Omnibus to change to H–2B status from another nonimmigrant status. See INA section 248, 8 U.S.C. 1258; see also 8 CFR part 248. If a petitioner files a petition seeking H–2B workers in accordance with this rule and requests a change of status on behalf of someone in the United States, the change of status request will be denied, but the petition will be adjudicated in accordance with applicable DHS regulations. Any noncitizen authorized for H–2B status under the approved petition would need to obtain the necessary H–2B visa at a consular post abroad and then seek admission to the United States in H–2B status at a port of entry.

⁷⁶ During fiscal years 2005 to 2007, and 2016, Congress enacted "returning worker" exemptions to the H–2B visa cap, allowing workers who were counted against the H–2B cap in one of the three preceding fiscal years not to be counted against the upcoming fiscal year cap. Save Our Small and Seasonal Businesses Act of 2005, Public Law 109–13, Sec. 402 (May 11, 2005); John Warner National Defense Authorization Act, Public Law 109–364, Sec. 1074 (Oct. 17, 2006); Consolidated Appropriations Act of 2016, Public Law 114–113, Sec. 565 (Dec. 18, 2015).

years the returning worker provision was in force, U.S. employers' standard business needs for H–2B workers exceeded the statutory 66,000 cap. The highest number of H–2B returning workers approved was 64,716 in FY 2007. In setting the number of additional H–2B visas to be made available for FY 2025, DHS considered this number, overall indications of increased need, and the availability of U.S. workers, as discussed below. On the basis of these considerations, DHS determined that it is appropriate to make available up to 64,716 additional visas, which is the maximum allowed, under the FY 2025 supplemental cap authority. The Secretary further considered the objectives the Biden-Harris Administration to address the root causes of irregular migration consistent with the E.O. 14010 and the L.A. Declaration, and managing migration through expansion of lawful pathways while increasing the consequences for those who do not use these pathways and unlawfully enter the United States.⁷⁷ Accordingly, the Secretary determined that it is appropriate to reserve up to 20,000 of the up to 64,716 additional visas and exempt this number from the returning worker requirement for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica.

In past years, the number of beneficiaries covered by H–2B petitions filed exceeded the number of additional visas allocated under recent supplemental caps. In FY 2018, USCIS received petitions for approximately 29,000 beneficiaries during the first 5 business days of filing for the 15,000 supplemental cap. USCIS therefore conducted a lottery on June 7, 2018, to randomly select petitions that it would accept under the supplemental cap. Of the selected petitions, USCIS issued approvals for 15,672 beneficiaries.⁷⁸ In FY 2019, USCIS received sufficient petitions for the 30,000 supplemental cap on June 5, 2019, but did not conduct a lottery to randomly select petitions

that it would accept under the supplemental cap. Of the petitions received, USCIS issued approvals for 32,717 beneficiaries. In FY 2021, USCIS received a sufficient number of petitions for the 22,000 supplemental cap on August 13, 2021, including a significant number for workers from Northern Central American countries.⁷⁹ Of the petitions received, USCIS issued approvals for 30,707 beneficiaries, including approvals for 6,805 beneficiaries under the allocation for the nationals of the Northern Central American countries.⁸⁰

In FY 2022, DHS made the supplemental cap available twice, once in January 2022 and again in May 2022. Under the earlier FY 2022 supplemental cap for petitions with start dates in the first half of FY 2022, USCIS had issued approvals for 17,381 beneficiaries, including approvals for 3,231 beneficiaries under the allocation for nationals of the Northern Central American countries and Haiti.⁸¹ For the second half of FY 2022, within the first five business days of filing, USCIS received petitions for more beneficiaries than the additional 23,500 supplemental visas made available for returning workers, thus necessitating a random selection of petitions to meet the returning worker allotment.⁸² Of the

⁷⁹ On June 3, 2021, USCIS announced that it had received enough petitions to reach the cap for the additional 16,000 H–2B visas made available for returning workers only, but that it would continue accepting petitions for the additional 6,000 visas allotted for nationals of the Northern Central American countries. See USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for FY 2021*, <https://www.uscis.gov/news/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-fy-2021> (Jun. 3, 2021). On July 23, 2021, USCIS announced that, because it did not receive enough petitions to reach the allocation for the Northern Central American countries by the July 8 filing deadline, the remaining visas were available to H–2B returning workers regardless of their country of origin. See USCIS, *Employers May File H–2B Petitions for Returning Workers for FY 2021*, <https://www.uscis.gov/news/alerts/employers-may-file-h-2b-petitions-for-returning-workers-for-fy-2021> (Jul. 23, 2021).

⁸⁰ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122. The number of approved workers exceeded the number of additional visas authorized for FY 2018, FY 2019, as well as for FY 2021 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. Unlike these past supplemental cap TFRs, petitions filed under the first half FY 2022 TFR did not exceed the additional allocation of 20,000 H–2B visas provided by that rule.

⁸¹ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122.

⁸² See USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for Second Half of FY* Continued

⁷⁷ See *Circumvention of Lawful Pathways*, 88 FR 31314 (May 16, 2023); *Securing the Border*, 89 FR 81156, (Oct. 7, 2025).

⁷⁸ USCIS recognizes it may have received petitions for more than 29,000 supplemental H–2B workers if the cap had not been exceeded within the first 5 days of opening. However, DHS estimates that not all of the 29,000 workers requested under the FY 2018 supplemental cap would have been approved and/or issued visas. For instance, although DHS approved petitions for 15,672 beneficiaries under the FY 2018 cap increase, the Department of State data shows that as of January 15, 2019, it issued only 12,243 visas under that cap increase. Similarly, DHS approved petitions for 12,294 beneficiaries under the FY 2017 cap increase, but the Department of State data shows that it issued only 9,160 visas.

petitions received for the second half of FY 2022, USCIS issued approvals for 43,798 beneficiaries, including approvals for 12,318 beneficiaries under the allocation for nationals of the Northern Central American countries and Haiti.⁸³

In FY 2023, USCIS received enough petitions to reach the cap for the additional 18,216 H-2B visas made available for returning workers for the first half of fiscal year by January 30, 2023, and USCIS received enough petitions to reach the cap for the additional 16,500 H-2B visas made available for returning workers for the early second half of fiscal year by March 30, 2023.⁸⁴ Of the petitions for supplemental H-2B visas in FY 2023, USCIS issued approvals for 78,302 beneficiaries, including 7,157 beneficiaries under the allocation of 10,000 visas made available for returning workers for the late second half of the fiscal year and 23,832 beneficiaries under the allocation of 20,000 visas reserved for nationals of the Northern Central American countries and Haiti.⁸⁵

In FY 2024, USCIS received a sufficient number of H-2B petitions to reach the first half of the FY 2024 fiscal year statutory cap on October 11, 2023.⁸⁶ USCIS received enough petitions to reach the cap for the additional 20,716 H-2B visas made

available for returning workers for the first half of fiscal year by January 9, 2024, and USCIS received enough petitions to reach the cap for the additional 19,000 H-2B visas made available for returning workers for the early second half of fiscal year by April 17, 2024.⁸⁷ Of the petitions for supplemental H-2B visas in FY 2024, USCIS issued approvals for 85,577 beneficiaries, including 6,314 beneficiaries under the allocation of 5,000 visas made available for returning workers for the late second half of the fiscal year and 24,475 beneficiaries under the allocation of 20,000 visas reserved for nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica.⁸⁸

Data for the first half of FY 2025 clearly indicate an immediate need for additional supplemental H-2B visas for employers with start dates on or before March 31, 2025. USCIS received a sufficient number of H-2B petitions to reach the first half of the FY 2025 fiscal year statutory cap on September 18, 2024.⁸⁹ Further, the date on which USCIS received sufficient H-2B petitions to reach the first half semiannual statutory cap has generally trended earlier in recent years. In fiscal years 2017 through 2025, USCIS received a sufficient number of H-2B petitions to reach or exceed the relevant first half statutory cap on January 10,

2017, December 15, 2017, December 6, 2018, November 15, 2019, November 16, 2020, September 30, 2021, September 12, 2022, October 11, 2023, and September 18, 2024, respectively.⁹⁰

Through the third quarter of FY 2024, approximately 90 percent of H-2B filings were for positions within just six sectors.⁹¹ NAICS 56 (Administrative and Support and Waste Management and Remediation Services) accounted for 38.57% of filings, NAICS 71 (Arts, Entertainment, and Recreation) accounted for 11.73%, NAICS 72 (Accommodation and Food Services) accounted for 23.14%, NAICS 23, (Construction) accounted for 11.91%, NAICS 31 (Animal Food Manufacturing) accounted for 2.01% of filings, and NAICS 11 (Agriculture, Forestry, Fishing and Hunting) accounted for 2.39% of filings.

Relevant unemployment data also supports the need for additional supplemental H-2B visas. Within these industries, DOL data show higher labor demand relative to recent history. More specifically, industry unemployment data from the Bureau of Labor Statistics (BLS) show that the industry unemployment rate for most of these industries (except for NAICS 11, which accounts for the lowest percentage of filings among these industries) is lower than the long term (10-year) average.⁹²

2022, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-second-half-of-fy-2022> (May 31, 2022).

⁸³ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, queried 10/2023, TRK 13122, FY 2023 H-2B Northern Central American Cap Approvals by Validity Start Date Month. The number of approved workers exceeded the number of additional visas authorized for the second half of FY 2022 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

⁸⁴ See USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for the First Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-first-half-of-fy-2023> (Jan. 31, 2023); USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for the Early Second Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-early-second-half-of-fy-2023> (Mar. 31, 2023).

⁸⁵ See DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023. The number of approved workers exceeded the number of additional visas authorized for FY 2023 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

⁸⁶ See USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2024*, <https://www.uscis.gov/newsroom/>

alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024 (Oct. 13, 2023).

⁸⁷ See USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for the First Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-first-half-of-fy-2024> (Jan. 12, 2024); USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for the Early Second Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-early-second-half-of-fy-2024> (Apr. 18, 2023).

⁸⁸ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, ELIS, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221. The number of approved workers exceeded the number of additional visas authorized for FY 2024 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

⁸⁹ See USCIS, *USCIS Reaches H-2B Cap for First Half of Fiscal Year 2025*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025> (Sept. 19, 2024).

⁹⁰ See USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2017*, <https://www.uscis.gov/archive/uscis-reaches-the-h-2b-cap-for-the-first-half-of-fiscal-year-2017> (Jan. 13, 2017); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2018*, <https://www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018> (Dec. 21, 2017); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2019*, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2019> (Dec. 12, 2018); USCIS, *USCIS Reaches H-2B Cap for First Half of*

FY 2020, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2020> (Nov. 20, 2019); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2021*, <https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021> (Nov. 18, 2020); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2022*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022> (Oct. 12, 2021); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023> (Sept. 14, 2022); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024>; USCIS, *USCIS Reaches H-2B Cap for First Half of Fiscal Year 2025*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025> (Sept. 19, 2024).

⁹¹ USCIS analysis of DOL OLFC Performance data.

⁹² USCIS has elected to use a long-term average as a reference point so as to minimize the impact that the Covid-19 pandemic has on the comparison of the industry employment rate. All data are taken from the respective BLS "Industry at a Glance" pages. See <https://www.bls.gov/iag/tgs/iag11.htm>, <https://www.bls.gov/iag/tgs/iag23.htm>, <https://www.bls.gov/iag/tgs/iag60.htm>, <https://www.bls.gov/iag/tgs/iag71.htm>, <https://www.bls.gov/iag/tgs/iag72.htm>, <https://www.bls.gov/iag/tgs/iag311.htm>. All data accessed September 23, 2024.

10-YEAR AVERAGE OF INDUSTRY UNEMPLOYMENT RATE

NAICS 11	NAICS 23	NAICS 56 *	NAICS 71	NAICS 72	NAICS 31
7.61	6.13	4.82	7.96	7.90	5.22

* Supersector is used as a proxy, see footnote 94.

AUGUST 2024 INDUSTRY UNEMPLOYMENT RATE

NAICS 11	NAICS 23	NAICS 56 *	NAICS 71	NAICS 72	NAICS 31
11.3	3.2	4.2	4.1	5.9	3.7

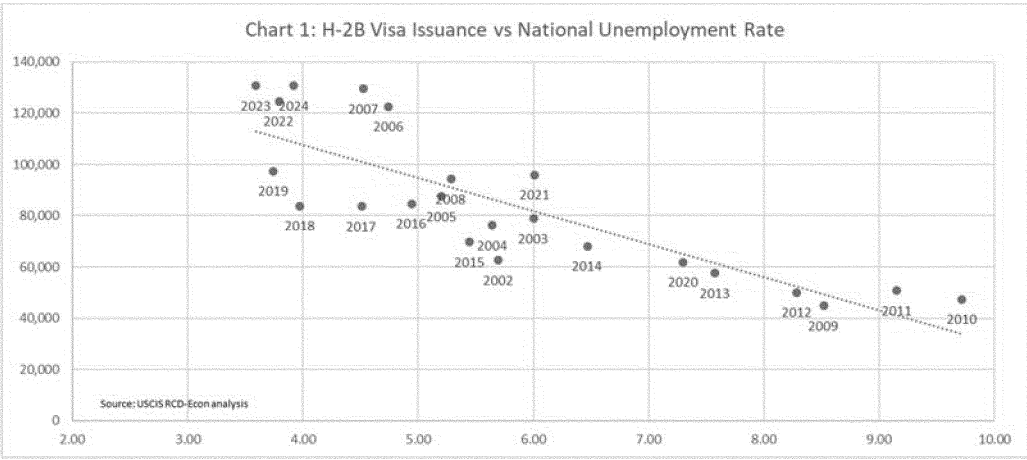
* Supersector is used as a proxy, see footnote 94.

In August 2024, the industry unemployment for NAICS 56⁹³ was 4.2 percent, which is 0.62 points lower than its 10-year average of 4.82 percent, while the industry unemployment rate for NAICS 71 was 4.1 percent which is 3.86 points lower than its 10-year average of 7.96 percent. The August 2024 industry unemployment rate for NAICS 72 (5.9 percent) was 2 points lower than its 10-year average of 7.9 percent while the rate for NAICS 23 (3.2 percent) was 2.93 points lower than its 10-year average of 6.13 percent. The industry unemployment rate for NAICS 11 (11.3 percent) was 3.69 points higher than its 10-year average of 7.61 percent, making it the only industry among the top 5 H-2B industries that has a higher industry unemployment rate relative to

its historical average. The relatively low unemployment rate across most of these industries is a clear indication of a strong labor demand within these industries. The Departments believe that the supplemental allocation of H-2B visas described in this temporary final rule will help to meet demand in these industries.

Economy-wide data also indicate that labor-market tightness continues to exist. The most recent Employment Situation released by the Bureau of Labor Statistics (BLS) stated that the unemployment rate was 4.2 percent in August 2024.⁹⁴ Historically, the availability of H-2B visas addressed a need in the labor market during periods of lower unemployment. Chart 1⁹⁵ shows that the H-2B visa allocations for

Fiscal Year 2024⁹⁶ made by this rule are slightly higher than the historical trend but are generally consistent with what the current unemployment rate alone would predict. Additionally, when the unemployment rate is below 6 percent, there is greater variance in the total number of H-2B visas issued in a given year; for example, in years 2022, 2007 and 2006, when the unemployment rate ranged from approximately 3.5 percent to 4.6 percent, the total number of H-2B visas issued were comparable to what is planned for 2024. The data presented in chart 1 is meant to provide additional context and to demonstrate that the total allocation of H-2B visas is reasonable given labor market conditions.



Given the level of demand for H-2B workers, the continued economic

recovery, and continued job growth, DHS believes it is appropriate to release

the maximum amount of additional visas at this time.

⁹³ Data presented here are for the Professional and Business Services Supersector, which is comprised of NAICS 54, NAICS 55 and NAICS 56. See <https://www.bls.gov/iag/tgs/iag60.htm>. As such, the data presented here should be understood to be the best possible proxy for changes in NAICS 56 and not a direct measurement of any specific change in the actual underlying sectors. The latest data available, for July 2023 from the Department of Labor's Current Employment Statistics program indicates that NAICS 56 accounted for just under 42% of

employment in Professional Business Services. All data accessed September 23, 2024.

⁹⁴ See DOL, BLS, *The Employment Situation—August 2024*, https://www.bls.gov/news.release/archives/empst_10042024.pdf (Sept. 6, 2024).

⁹⁵ Annual data presented here is on a fiscal year basis. Fiscal year averages were calculated by taking the average of the monthly unemployment rate for the months in each respective fiscal year (October–September). Data for fiscal year 2024 are for October

2023–August 2024. Unemployment rate for 2024 is based on median Federal Reserve projections. See <https://www.federalreserve.gov/monetarypolicy/files/fomcprotabl20240918.pdf> (accessed September 23, 2024).

⁹⁶ The number of estimated visas issued for Fiscal Year 2024 is based on the sum of the fiscal year statutory cap for H-2B workers (66,000) and the supplemental allocation for this rule (64,716), for a total H-2B visa allocation of 130,716.

Making allocations for all of FY 2025 in a single rule.

As in FY 2023 and FY 2024, DHS believes that it is appropriate to issue a single rule for the entire fiscal year for multiple reasons.⁹⁷ First, DHS expects that there is demand for supplemental visas in the first half of FY 2025. As previously discussed, USCIS already received enough petitions to reach the congressionally mandated cap on H-2B visas for temporary nonagricultural workers for the first half of FY 2025.⁹⁸ Further, the date on which USCIS received sufficient H-2B petitions to reach the first half semiannual statutory caps has generally trended earlier in recent years. In fiscal years 2017 through 2025, USCIS received a sufficient number of H-2B petitions to reach or exceed the relevant first half statutory cap on January 10, 2017, December 15, 2017, December 6, 2018, November 15, 2019, November 16, 2020, September 30, 2021, September 12, 2022, October 11, 2023, and September 18, 2024, respectively.⁹⁹

Second, based on relevant data, DHS expects that USCIS will reach the statutory cap for the second half of FY 2025 and that there will accordingly be demand for supplemental visas in the second half of FY 2025. For example, in fiscal years 2017 through 2023, USCIS received a sufficient number of H-2B petitions to reach or exceed the relevant

second half statutory cap on March 13, 2017, February 27, 2018, February 19, 2019, February 18, 2020, February 12, 2021, February 25, 2022, February 27, 2023, and March 7, 2024.¹⁰⁰ In addition, DOL data shows consistently high demand in recent years, particularly during the second half of the fiscal year. In recent years, DOL has received an increasing number of TLC applications for an increasing number of H-2B workers with April 1 start dates: DOL received 4,500 applications on January 1, 2018, covering more than 81,600 worker positions; DOL received 5,276 applications by January 8, 2019, covering more than 96,400 worker positions; DOL received 5,677 applications during the initial three-day filing window in 2020 covering 99,362 worker positions; DOL received 5,377 applications during the initial three-day filing window in 2021 covering 96,641 worker positions; DOL received 7,875 applications by January 4, 2022, covering 136,555 worker positions; DOL received 8,693 applications during the initial three-day filing window in 2023, covering 142,796 worker positions; and DOL received 8,817 H-2B applications by January 8, 2024, covering 138,847 worker positions.¹⁰¹

Finally, publishing one rule that addresses all the visas available for FY 2025 benefits the regulated public by giving more notice and certainty of what will become available for the second half. As noted in comments received in response to the FY 2023 TFR, this

approach allows businesses to better plan ahead for their seasonal workforce needs.¹⁰²

Filing Deadline of September 15, 2025 for All Petitions

The authority to approve H-2B petitions under this FY 2025 supplemental cap expires at the end of the fiscal year, *i.e.*, the end of September 30, 2025. Therefore, DHS is requiring employers requesting any supplemental visas under this TFR, regardless of the employment start date(s), to properly file their H-2B petition with USCIS no later than September 15, 2025. USCIS will reject any cases that are received after September 15, 2025. *See* new 8 CFR 214.2(h)(6)(xv)(C). Because DHS believes that 15 days from the end of the fiscal year is generally the minimum time needed for petitions to be adjudicated, DHS has set September 15, 2025 as the last day to file in order to provide USCIS with adequate time for petition processing before the expiration of the authority at the end of the fiscal year, although USCIS cannot guarantee the time period will be sufficient for adjudication of petitions in all cases.

In addition, the filing deadline will be earlier than September 15, 2025 if the applicable numerical limit for the relevant supplemental visa allocation is reached before that date. *See* new 8 CFR 214.2(h)(6)(xv)(C). In such a case, USCIS will also reject any cases that are received after the applicable numerical limitation has been reached.

Returning Worker Allocation for the First Half of FY 2025 (October 1, 2024 Through March 31, 2025)

For the first half of FY 2025, DHS will make 20,716 visas immediately available upon publication of this TFR that are limited to returning workers, in other words, those workers who were issued H-2B visas or held H-2B status in fiscal years 2022, 2023, or 2024, regardless of country of nationality. These petitions must request a date of need starting on or before March 31, 2025. *See* new 8 CFR 214.2(h)(6)(xv)(C).

DHS anticipates that employers will use all of the first half allocation for returning workers, given how quickly USCIS reached the FY 2025 first half statutory cap and the first half supplemental allocation for FY 2024. As noted previously, USCIS received enough H-2B petitions to reach the FY 2025 first half statutory cap on

⁹⁷ Further, DHS believes that 64,716 is an appropriate number of supplemental visas to make available, as this rule will cover both the first and second half of FY 2025.

⁹⁸ USCIS, *USCIS Reaches H-2B Cap for First Half of Fiscal Year 2025*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025> (Sept. 19, 2024).

⁹⁹ *See* USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2017*, <https://www.uscis.gov/archive/uscis-reaches-the-h-2b-cap-for-the-first-half-of-fiscal-year-2017> (Jan. 13, 2017); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2018*, <https://www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018> (Dec. 21, 2017); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2019*, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2019> (Dec. 12, 2018); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2020*, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2020> (Nov. 20, 2019); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2021*, <https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021> (Nov. 18, 2020); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2022*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022> (Oct. 12, 2021); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023> (Sept. 14, 2022); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024> (Oct. 13, 2023); USCIS, *USCIS Reaches H-2B Cap for First Half of Fiscal Year 2025*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025> (Sept. 19, 2024).

¹⁰⁰ *See* USCIS, *USCIS Reaches the H-2B Cap for Fiscal Year 2017*, <https://www.uscis.gov/archive/alerts/uscis-reaches-the-h-2b-cap-for-fiscal-year-2017> (Mar. 16, 2017); USCIS, *USCIS Completes Random Selection Process for H-2B Visa Cap for Second Half of FY 2018*, <https://www.uscis.gov/archive/uscis-completes-random-selection-process-for-h-2b-visa-cap-for-second-half-of-fy-2018> (Mar. 1, 2018); USCIS, *H-2B Cap Reached for FY 2019*, <https://www.uscis.gov/archive/h-2b-cap-reached-for-fy-2019> (Feb. 22, 2019); USCIS, *H-2B Cap Reached for Second Half of FY 2020*, <https://www.uscis.gov/news/alerts/h-2b-cap-reached-for-second-half-of-fy-2020> (Feb. 26, 2020); USCIS, *H-2B Cap Reached for Second Half of FY 2021*, <https://www.uscis.gov/news/alerts/h-2b-cap-reached-for-second-half-of-fy-2021> (Feb. 24, 2021); USCIS, *H-2B Cap Reached for Second Half of FY 2022*, <https://www.uscis.gov/newsroom/alerts/h-2b-cap-reached-for-second-half-of-fy-2022> (Mar. 1, 2022); USCIS, *USCIS Reaches H-2B Cap for Second Half of FY 2023 and Announces Filing Dates for the Second Half of FY 2023 Supplemental Visas*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-second-half-of-fy-2023-and-announces-filing-dates-for-the-second-half-of> (Mar. 2, 2023); USCIS, *USCIS Reaches H-2B Cap for Second Half of FY 2024 and Announces Filing Dates for the Second Half of FY 2024 Supplemental Visas*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-second-half-of-fy-2024-and-announces-filing-dates-for-the-second-half-of> (Mar. 8, 2024).

¹⁰¹ *See* DOL, *Announcements*, <https://www.dol.gov/agencies/eta/foreign-labor/news>.

¹⁰² *See* the docket for *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 76816 (Dec. 15, 2022) for access to these comments.

September 18, 2024.¹⁰³ Under the FY 2024 TFR, which published on November 17, 2023, USCIS received enough petitions to reach the 20,716 first half allocation by January 9, 2024.¹⁰⁴ Similarly, as with the FY 2024 TFR, the relatively early publication of this rule will provide interested employers more time to prepare their petitions, increasing the likelihood that the first half allocation for returning workers will be used.¹⁰⁵ To the extent that the first half allocation for returning workers is used, this TFR may provide affected employers with some relief by making available a separate allocation of visas for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica, which will be available for the entirety of FY 2025.

As in previous years, in the event that USCIS approves insufficient petitions to use all 20,716 visas, the unused numbers will not carry over for the second half allocation because DHS believes that the operational burdens of calculating and administering a process to carry over unused visas, combined with the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations, would outweigh the benefits. As explained in the FY 2024 TFR, in order to make any unused first half visas available for employers with second half start dates, DHS would need to set a filing cutoff date prior to September 15, 2025 for the first half allocation, upon which it would stop accepting such petitions and make a calculation of how many visas should be re-released for second half employers. Calculating visas to be re-released could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which would significantly increase operational burdens. In addition to increasing operational burdens, DHS believes that the opening, closing, and potential re-opening of this allocation (and/or other cap allocations) could cause confusion for the public and adjudicators. Furthermore, not setting a

filing cutoff date prior to September 15, 2025 will maximize employers' opportunity to avail themselves of the first half allocation. While DHS acknowledges that this approach could potentially result in some employers with a demonstrated business need in the second half of the fiscal year losing the opportunity to receive a supplemental visa, it is DHS's expectation that, as occurred in FY 2024, there will be sufficient demand from employers with first half start dates to use the entire allocation.

Initial Returning Worker Allocation for the Early Second Half (April 1, 2025, Through May 14, 2025)

For the second half of FY 2025, DHS will initially make available 19,000 visas limited to returning workers, in other words, those workers who were issued H-2B visas or held H-2B status in fiscal years 2022, 2023, or 2024, regardless of country of nationality. These petitions must request a date of need starting on or after April 1, 2025, through and including May 14, 2025. Limiting this allocation to employers with employment start dates on or before May 14, 2025 reflects DHS's intentions to give employers with needs later in the season a better opportunity to access the H-2B program, and to prevent employers from petitioning under both of the second-half allocations to fill the same need.

To mitigate complications from concurrent administration of the statutory second half cap, these petitions must be filed no earlier than 15 days after the second half statutory cap is reached, a date that USCIS will identify in a public announcement.¹⁰⁶ When USCIS announces that it has received a sufficient number of petitions to reach the second half statutory cap, it will also announce the earliest possible filing date (15 days after the second half statutory cap) for this allocation. Concurrent administration of the second half statutory cap with the second half supplemental cap would pose significant operational challenges, particularly considering the volume of H-2B petitions USCIS would have to process at the same time. A cushion of 15 days after the second half statutory cap is reached should provide USCIS with sufficient time to process H-2B petitions filed under the second half statutory cap and prepare to process

petitions under this supplemental cap, and should also provide petitioners not selected under the statutory cap with enough time to refile under this supplemental cap. Furthermore, making this allocation available *after* the second half statutory cap has been reached builds in flexibility to account for variations in the timing of that cap being reached. DHS cannot predict with certainty when the FY 2025 second half statutory cap will be reached (or if it will be reached), and therefore, did not specify a date for when to first allow petitioners to file for FY 2025 second half supplemental visas. In the event that the statutory second half FY 2025 cap is not reached, the supplemental allocation for returning workers for the second half of FY 2025 will not become available.

Based on historical data showing increasingly high demand for H-2B workers with April 1 start dates, DHS expects all 19,000 visas to be used quickly once the supplemental allocation becomes available as occurred in FY 2024 on April 17, 2024. However, in the event that USCIS approves insufficient petitions to use all 19,000 visas, the unused numbers will not carry over for petition approvals for employment start dates beginning on or after May 15, 2025. DHS chose to limit these 19,000 visas to start dates on or before May 14, 2025, without the ability for these visas to be carried over into the next allocation. As previously stated, DHS believes that the operational burdens of calculating and administering a process to carry over unused visas, combined with the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations, would outweigh the benefits. In order to make any unused visas from this allocation available for late second half of FY 2025 petitions, DHS would need to set a filing cutoff date that would be after the cutoff for the first half allocation but prior to any cutoff for late second half of FY 2025 petitions and prior to September 15, 2025, upon which it would stop accepting petitions and make a calculation of how many visas should be re-released for late second half employers. Calculating visas to be re-released could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which would significantly increase operational burdens. In addition to increasing operational burdens, DHS believes that the opening, closing, and potential re-opening of this allocation

¹⁰³ See USCIS, *USCIS Reaches H-2B Cap for First Half of Fiscal Year 2025*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025> (Sept. 19, 2024).

¹⁰⁴ USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for the First Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-first-half-of-fy-2024> (Jan. 12, 2023).

¹⁰⁵ Compare the publication dates of the FY 2024 TFR and this rule with December 15, 2022, the date the FY 2023 TFR was first published, and January 28, 2022, the date the temporary final rule making available additional H-2B visas for the first half of FY 2022 was first published.

¹⁰⁶ Pursuant to new 8 CFR 214.2(h)(6)(xv)(C)(2), USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(1)(ii) of this section requesting employment start dates from April 1, 2025 to May 14, 2025 that are received earlier than 15 days after the INA section 214(g) cap for the second half FY 2025 has been met.

(and/or other cap allocations) could cause confusion for the public and adjudicators. Furthermore, not setting a filing cutoff date prior to September 15, 2025, will maximize employers' opportunity to avail themselves of the early second half allocation. While DHS acknowledges that this approach could result in employers in the late second half losing the opportunity to receive a supplemental visa, it is DHS's expectation that there will be sufficient demand from employers to use this entire allocation. As anticipated in the FY 2024 TFR, employers did, in fact, use the entire early second half of FY 2024 allocation.¹⁰⁷

Additional Returning Worker Allocation for the Late Second Half (on or After May 15, 2025, Through September 30, 2025)

For the late second half of FY 2025, DHS will make available an additional allocation of 5,000 visas limited to returning workers, in other words, those workers who were issued H-2B visas or held H-2B status in fiscal years 2022, 2023, or 2024, regardless of country of nationality. To assist employers needing workers to begin work during the late spring and summer seasons in the fiscal year (also referred to as "late season employers"), these petitions must request a date of need starting on or after May 15, 2025. These petitions must be filed no sooner than 45 days after the second half statutory cap is reached, a date that USCIS will identify in a public announcement.¹⁰⁸ When USCIS announces that it has received a sufficient number of petitions to reach the second half statutory cap, it will also announce the earliest possible filing date (45 days after the second half statutory cap is reached) for this allocation. The cushion of 45 days after the second half statutory cap is reached is intended to provide USCIS with sufficient time to process H-2B petitions filed under the second half statutory cap that remain pending, as well as to process the expected influx of petitions under the early second half supplemental cap that will begin 15 days after the second half statutory cap

is reached.¹⁰⁹ By allowing USCIS to manage its workload in this way, the 45-day period will help USCIS prepare to process petitions under the late second half supplemental cap and mitigate the complications from concurrent administration of these various caps.

This is the third supplemental cap reserved for late season employers that need workers to begin work during the late spring and summer seasons in the fiscal year.¹¹⁰ By regulation, employers may only apply for a TLC 75 to 90 days before the start date of need,¹¹¹ and, as such, employers needing workers to begin work on or after May 15 are not eligible to file TLC applications until on or after February 15. As noted in the FY 2023 and FY 2024 TFRs, in past years, because of this requirement and the strong demand for H-2B workers in recent years to begin work on the earliest employment start date (*i.e.*, April 1), late season employers were unable to receive cap-subject H-2B workers because they did not have an opportunity to file visa petitions for cap-subject H-2B workers before the second semiannual statutory cap was reached. Since, based on recent years' data,¹¹² USCIS has typically received sufficient H-2B petitions to meet the statutory cap for the second half of the fiscal year around mid-February to early March, many of these late season employers may have decided to not file a TLC application.

DHS, in consultation with DOL, has again determined that it is appropriate to make a separate allocation available for late season employers whose late season labor needs may have put them at a disadvantage in accessing H-2B workers in recent years. While there was significant demand for the late second half allocation in FY 2024, the full

allocation of 5,000 visas was not reached. As of September 30, 2024, DOS has issued 3,906 towards the late second half allocation, while USCIS approved 6,314 beneficiaries towards the late second half allocation.¹¹³ Therefore, in order to meet the employer demand in the late second half of FY 2025, while still maximizing the overall usage of supplemental visas, DHS has determined it is appropriate to again limit the late second half allocation for FY 2025 to up to 5,000 visas. DHS, in consultation with DOL, has determined that authorizing two allocations for the second half of FY 2025 based on an employer's start date of need, in addition to requiring that the employer's start date of need on the Form I-129 match the start date of need on the approved TLC,¹¹⁴ will provide employers with late season needs a better opportunity to receive H-2B workers to avoid irreparable harm. Specifically, employers with early season needs that need work to begin on or after April 1 will have the opportunity to file H-2B petitions under both the statutory cap and the first allocation of the supplemental cap, while employers with late season needs do not have that opportunity.

To mitigate complications from concurrent administration of the additional returning worker allocation for the second half of the fiscal year for late season employers and either the statutory second half cap or the initial supplemental allocation for returning workers for the second half of the fiscal year (or both), these petitions must be filed no earlier than 45 days after the second half statutory cap is reached. When USCIS announces that it has received a sufficient number of petitions to reach the second half statutory cap, it will also announce the earliest possible filing date (45 days after the second half statutory cap is reached) for this allocation. In the event that the statutory second half FY 2025 cap is not reached, this supplemental allocation for late season filers workers will not become available. Furthermore, in the event that USCIS does not approve sufficient petitions to use all 5,000 visas for late season employers, DHS will not carry over the unused numbers for petition approvals for any other allocation. For example, any unused

¹⁰⁷ USCIS, *Temporary Increase in H-2B Nonimmigrant Visas for FY 2024*, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/temporary-increase-in-h-2b-nonimmigrant-visas-for-fy-2024> (last visited Aug. 20, 2024).

¹⁰⁸ Pursuant to new 8 CFR 214.2(h)(6)(xv)(C)(3), USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(1)(iii) of this section requesting employment start dates from May 15, 2025 to September 30, 2025, that are received earlier than 45 days after the INA section 214(g) cap for the second half FY 2025 has been met.

¹⁰⁹ While petitioners may continue to submit petitions under the early second half supplemental cap through September 15, DHS expects the heaviest filing to occur soon after the visas become available. This expectation is based on historical filing patterns, as well as an assumption that employers will try act quickly to secure workers consistent with their dates of need.

¹¹⁰ See *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 76816 (Dec. 15, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 88 FR 2023 (Nov. 17, 2023).

¹¹¹ See 20 CFR 655.15(b).

¹¹² As noted above, in fiscal years 2017 through 2024, USCIS received a sufficient number of H-2B petitions to reach or exceed the relevant second half statutory cap on March 13, 2017, February 27, 2018, February 19, 2019, February 18, 2020, February 12, 2021, February 25, 2022, February 27, 2023, and March 7, 2024, respectively.

¹¹³ Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, ELIS, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221.

¹¹⁴ See 8 CFR 214.2(h)(6)(iv)(D) ("an H-2B petition must state an employment start date that is the same as the date of need stated on the approved temporary labor certification").

numbers would not carry over to petitions under the country-specific allocation. As noted above, DHS believes the operational burdens of calculating and administering a process to carry over unused visas would outweigh the benefits because of the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations. A process to carry over unused visas could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which significantly increase operational burdens and may add further confusion to the public and adjudicators.

Allocation for Nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica

As in FY 2024, DHS will make available 20,000 additional visas that are reserved for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica, as attested by the petitioner (regardless of whether such nationals are returning workers). These 20,000 visas will be available for petitioners requesting an employment start date before the end of FY 2025, up to and including September 30, 2025. As discussed in the Legal Framework section as well as in the section addressing the irreparable harm standard, DHS has a broad delegation from Congress to administer and enforce U.S. immigration laws and issue regulations regarding the same, as well as broad discretion over the admission of nonimmigrants, and the adjudication of nonimmigrant petitions, after consultation with other agencies, including DOL. *See* INA sec. 103(a)(1), 214(a)(1), (c)(1); 8 U.S.C. 1103(a)(1), 1184(a)(1), (c)(1). In addition, through the temporary enactment authorizing the Secretary of DHS to increase the number of H-2B visas,¹¹⁵ Congress delegated to the Secretary of DHS, after

consultation with the Secretary of Labor, the discretion to establish a framework for determining that the needs of American businesses cannot be satisfied with the existing workforce and the conditions under which to authorize additional visas to further the purpose of the enactment. In the most recent, as well as each prior annual enactment, Congress consistently used the word “may” when describing the Secretary’s authority, and the use of the word “may” indicates a grant of discretion, absent contrary legislative intent, structure and purpose of the statute.¹¹⁶ As in prior years, the Departments have determined that the temporary enactment together with DHS’s broad authority over immigration provide the Secretary of DHS with discretion to implement the temporary enactment in a manner that addresses two complimentary policy objectives: the need to provide access to H-2B workers to American businesses, and the objective to provide lawful pathways for able, willing, and qualified workers from designated countries to come temporarily to the United States and perform nonagricultural labor. In issuing this TFR, and as in prior years, the Departments are implementing appropriate policy choices in exercising the discretionary authority provided by Congress.¹¹⁷ This policy choice was previously ratified by Congress¹¹⁸—legislative history of the FY2023 Omnibus indicates that Congress was aware of and approved of the country-specific allocations.¹¹⁹ While prior fiscal years’ country-specific allocations have not been reached, the number has been trending upwards, and DHS anticipates a higher likelihood that the 20,000 visas allocated for certain nationals by this rule will be reached by the end of this fiscal year. As discussed above, DHS observed robust employer interest in response to the FY 2021 H-2B supplemental visa allocation for Salvadoran, Guatemalan, and Honduran nationals and the FY 2022 and FY 2023

supplemental visa allocations for Salvadoran, Guatemalan, Honduran, and Haitian nationals, and the data show a trend of increased participation by Haitian, Salvadoran, Guatemalan, and Honduran workers in the H-2B program.¹²⁰ In FY 2024, the inclusion of nationals from the additional countries of Colombia, Ecuador, and Costa Rica increased the likelihood that the 20,000 visas would be used and the data show a continued trend of increased usage of the country-specific allocation.¹²¹

Employers requesting workers under the country-specific allocation with an employment start date in the first half of FY 2025 may file their petitions immediately after the publication of this TFR. Employers requesting workers under the country-specific allocation with an employment start date in the second half of FY 2025 must file their petitions no earlier than 15 days after the second half statutory cap is reached. The requirement to file the petition no earlier than 15 days after the second half statutory cap is reached is consistent with the approach taken for the initial returning worker allocation for the early second half of the fiscal year, and is in line with the Departments’ longstanding interpretation of their authority to make available supplemental (or in other words, additional) visas contingent upon the exhaustion of visas under the statutory cap.¹²²

As in FY 2023 and FY 2024, the Departments have decided not to further divide the 20,000 visas for workers from specific countries into separate allocations for the first and second half of the fiscal year. The Departments intend for this additional flexibility of allowing any employment start date within FY 2025 to encourage U.S. employers that are suffering irreparable harm or will suffer impending

¹¹⁵ Public Law 118–47, Division G, Title I, sec. 105 states: “Notwithstanding the numerical limitation set forth in section 214(g)(1)(B) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(1)(B)), the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of United States businesses cannot be satisfied during fiscal year 2024 with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor, may increase the total number of aliens who may receive a visa under section 101(a)(15)(H)(ii)(b) of such Act (8 U.S.C. 1101(a)(15)(H)(ii)(b)) in such fiscal year by not more than the highest number of H-2B nonimmigrants who participated in the H-2B returning worker program in any fiscal year in which returning workers were exempt from such numerical limitation.”

¹¹⁶ *See generally* *U.S. v. Rodgers*, 461 U.S. 677, 706 (1983) (The word “may,” when used in a statute, usually implies some degree of discretion unless there is indication of contrary legislative intent, or an obvious contrary inference from the structure and purpose of the statute.).

¹¹⁷ *See Loper Bright Enterprises*, 144 S. Ct. at 2263 (2024).

¹¹⁸ *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.”).

¹¹⁹ *See* S. Rep. No. 118–85, at p. 104 (Jul. 27, 2023) (“Further, the Committee supports the Departments’ efforts to set aside visas for certain nationalities, including nationals from El Salvador, Guatemala, Honduras, and Haiti, regardless of whether they are returning workers.”).

¹²⁰ As previously noted, USCIS approved petitions on behalf of 6,805 beneficiaries under the FY 2021 country-specific allocation, 3,231 beneficiaries under the FY 2022 first half country-specific supplemental allocation, 12,318 beneficiaries for the second half country-specific allocation of the fiscal year FY 2022, and 23,832 beneficiaries under the FY 2023 country-specific allocation. *See* DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023.

¹²¹ As of October 28, 2024, USCIS approved petitions on behalf of 24,475 beneficiaries under the FY 2024 country-specific allocation. *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, ELIS, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221.

¹²² Pursuant to new 8 CFR 214.2(h)(6)(xv)(C)(4), USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(2) of this section that have a date of need on or after April 1, 2025 and are received earlier than 15 days after the INA section 214(g) cap for the second half of FY 2025 is met.

irreparable harm to seek out workers from such countries, and, at the same time, increase interest among nationals of the Northern Central American countries, Haiti, Colombia, Ecuador, and Costa Rica seeking a legal pathway for temporary employment in the United States. While this approach could potentially result in employers with start dates in the first half of FY 2025 using all 20,000 visas for nationals of the specified countries, and consequently, employers with start dates in the second half of FY 2025 losing the opportunity to utilize this particular allocation, DHS believes that the benefits of increasing the flexibility of this allocation outweighs the potential risk. Moreover, employers with start dates in the second half of FY 2025 seeking to employ nationals under the country-specific allocation may request a visa under one of the two second half supplemental allocations which are available for returning workers regardless of country of nationality.

In the event that USCIS does not approve sufficient petitions to use all 20,000 visas under the country-specific allocation by the end of FY 2025, DHS will not carry over the unused numbers for petition approvals for any other allocation. For example, any unused numbers would not carry over to petitions for returning workers with employment start dates in the second half of FY 2025. As noted above, DHS believes the operational burdens of calculating and administering a process to carry over unused visas would outweigh the benefits because of the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations. A process to carry over unused visas could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which significantly increase operational burdens and may add further confusion to the public and adjudicators. Further, this single filing cutoff approach provides employers with incentive and more time to petition for, and bring in, workers from El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica to meet employer needs, consistent with the administration's efforts and outreach to promote and improve safety, security, and economic stability in these countries.

Process if Cap Allocations Are Reached

Finally, recognizing the high demand for H-2B visas, it is plausible that the additional H-2B supplemental

allocations provided in this rule will be reached prior to September 15, 2025. Specifically, the following scenarios may still occur:

- The 20,716 supplemental cap visas limited to returning workers that will be immediately available for employers with dates of need on or after October 1, 2024, through March 31, 2025, will be reached before September 15, 2025;
- The 19,000 supplemental cap visas limited to returning workers that will be available for employers with dates of need starting on or after April 1, 2025, through May 14, 2025, will be reached before September 15, 2025;
- The 5,000 supplemental cap visas limited to returning workers that will be available for late season employers with dates of need on or after May 15, 2025, through September 30, 2025, will be reached before September 15, 2025; or
- The 20,000 supplemental cap visas limited to nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica will be reached before September 15, 2025.

Under this rule, new 8 CFR 214.2(h)(6)(xv)(D) reaffirms the existing processes that are in place when H-2B numerical limitations under INA section 214(g)(1)(B) or (g)(10), 8 U.S.C. 1184(g)(1)(B) or (g)(10), are reached,¹²³ as applicable to each of the scenarios described above that involve numerical limitations of the supplemental cap. Specifically, for each of the scenarios mentioned above, DHS will monitor petitions received, and make projections of the number of petitions necessary to achieve the projected numerical limit of approvals. USCIS will also notify the public of the dates that USCIS has received the necessary number of petitions (the "final receipt dates") for each of these scenarios. The day the public is notified will not control the final receipt dates. Moreover, USCIS may randomly select, via computer-generated selection, from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals for each of the scenarios involving numerical limitations to the supplemental cap. USCIS may, but will not necessarily, conduct a lottery if: the 20,716 supplemental cap visas limited to returning workers that will be immediately available for employers with dates of need on or after October 1, 2024, through March 31, 2025, is reached before September 15, 2025; the 19,000 supplemental cap visas limited to returning workers that will be available for employers with dates of

need on or after April 1, 2025, through May 14, 2025, is reached before September 15, 2025; the 5,000 supplemental cap visas limited to returning workers that will be available for late season employers with dates of need on or after May 15, 2025, through September 30, 2025, is reached before September 15, 2025; or the 20,000 visas limited to certain nationals is reached before September 15, 2025. Similar to the processes applicable to the H-2B semiannual statutory cap, if the final receipt date is any of the first 5 business days on which petitions subject to the applicable numerical limit may be received (in other words, if the numerical limit is reached on any one of the first 5 business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those 5 business days.

C. Returning Workers

As noted above, to address the increased and, in some cases, impending need for H-2B workers in this fiscal year, the Secretary of Homeland Security, in consultation with the Secretary of Labor, has determined that employers may petition for supplemental visas on behalf of up to 44,716 workers who were issued an H-2B visa or were otherwise granted H-2B status in FY 2022, 2023, or 2024. This temporal limitation mirrors prior fiscal years' temporal limitation in the returning worker definition¹²⁴ and the temporal limitation Congress imposed in previous returning worker statutes.¹²⁵ Such workers (in other words, those who recently participated in the H-2B program and who now seek a new H-2B visa from DOS) may obtain their new visas through DOS and begin work more expeditiously because they have previously obtained H-2B visas and therefore have been vetted by DOS and would have departed the United States as generally required by the terms of their nonimmigrant admission.¹²⁶ DOS

¹²⁴ See e.g., *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 88 FR 80394 (Nov. 17, 2023) (defining "returning workers" as those who were issued H-2B visas or held H-2B status in fiscal years 2021, 2022, or 2023).

¹²⁵ See INA section 214(g)(9)(A), 8 U.S.C. 1184(g)(9)(A); Consolidated Appropriations Act, 2016, Public Law 114-113, div. F, tit. V, sec. 565; John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, div. A, tit. X, sec. 1074, (2006); Save Our Small and Seasonal Businesses Act of 2005, Public Law 109-13, div. B, tit. IV, sec. 402.

¹²⁶ The previous review of an applicant's qualifications and current evidence of lawful travel

¹²³ See 8 CFR 214.2(h)(8)(vii).

has informed DHS that, in general, H-2B visa applicants who are able to demonstrate clearly that they have previously abided by the terms of their status granted by DHS have a higher visa issuance rate when applying to renew their H-2B visas, as compared with the overall visa applicant pool from a given country. Furthermore, consular officers are authorized to waive the in-person interview requirement for certain nonimmigrant visa applicants, including certain H-2B applicants renewing visas in the same classification within 48 months of the prior visa's expiration, who otherwise meet the strict limitations set out under INA section 222(h), 8 U.S.C. 1202(h).¹²⁷ Limiting the supplemental cap to returning workers is beneficial because these workers have generally followed immigration law in good faith and demonstrated their willingness to return home when they have completed their temporary labor or services or their period of authorized stay, which is a condition of H-2B status. The returning worker condition therefore provides a basis to believe that H-2B workers under this cap increase will again abide by the terms and conditions of their visa or nonimmigrant status.

The returning worker condition also benefits employers that seek to re-hire known and trusted workers who have a proven positive employment track record while previously employed as workers in this country. While the Departments recognize that the returning worker requirement may limit to an extent the flexibility of employers that might wish to hire non-returning workers, the requirement provides an important safeguard against H-2B abuse, which DHS considers to be a significant consideration.

To ensure compliance with the requirement that additional visas only be made available to returning workers, DHS will require petitioners seeking H-2B workers under the supplemental cap to attest that each employee requested or instructed to apply for a visa under the FY 2025 supplemental cap was

issued an H-2B visa or otherwise granted H-2B status in FY 2022, 2023, or 2024, unless the H-2B worker is a national of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica and is counted towards the 20,000 cap. This attestation will serve as prima facie initial evidence to DHS that each worker, unless a national of one of these countries who is counted against the 20,000 country-specific cap, meets the returning worker requirement. DHS and DOS retain the right to review and verify that each beneficiary is in fact a returning worker any time before and after approval of the petition or visa. DHS has authority to review and verify this attestation during the course of an audit or investigation, as otherwise discussed in this rule.

With respect to satisfying the returning worker requirement, employers must maintain evidence that the employer requested and/or instructed that each of the workers petitioned by the employer in connection with this temporary rule were issued H-2B visas or otherwise granted H-2B status in FY 2022, 2023, or 2024, unless the H-2B worker is a national of one of the specific countries counted towards the 20,000 cap. Such evidence would include, but is not limited to, a date-stamped written communication from the employer to its agent(s) and/or recruiter(s) that instructs the agent(s) and/or recruiter(s) to only recruit and provide instruction regarding an application for an H-2B visa to those foreign workers who were previously issued an H-2B visa or granted H-2B status in FY 2022, 2023, or 2024.

D. 20,000 Allocation for Nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica

As described above, the Secretary of Homeland Security has determined that up to 20,000 additional H-2B visas will be limited to workers who are nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. These 20,000 visas will be exempt from the returning worker requirement.

Because the returning worker allocations have no restrictions related to a worker's country of nationality, if the 20,000 visa limit has been reached and the 44,716 returning worker cap has not, petitioners may continue to request workers who are nationals of one of these countries, but the workers must be specifically requested as returning workers who were issued H-2B visas or were otherwise granted H-2B status in FY 2022, 2023, or 2024.

While DHS reiterates the benefits of allocating visas under the supplemental

cap to returning workers, the Secretary of Homeland Security has determined that the 20,000 country-specific allocation which is exempted from the returning worker requirement is beneficial for following reasons. First, this country-specific allocation furthers the U.S. foreign policy objective of managing irregular migration with partner countries through expanding access to lawful pathways to nationals of these countries seeking economic opportunity in the United States. Several of these countries have extensively collaborated with the United States on migration issues such as through endorsing the L.A. Declaration, joining the United States to ramp up efforts to address the irregular migration flows through the Darien and participating in the Safe Mobility Initiative to increase migrant integration in host countries and, where appropriate, facilitate access to lawful pathways to the United States and other countries, including expedited refugee processing. After a series of negotiations, on June 1, 2023, the United States and Guatemala issued a joint statement to commit to take a series of critical steps to humanely reduce irregular migration and expand lawful pathways under the L.A. Declaration.¹²⁸ For example, as part of a comprehensive program to manage irregular migration, Guatemala agreed to participate in the Safe Mobility Initiative, hosting SMOs since June 12, 2023.¹²⁹ On June 4, 2023, the United States and Colombia announced the impending establishment of SMOs that would provide information about the wide range of existing services and support available for refugees and other migrants in Colombia, with the goal of reaching migrants on the move, or even before they begin irregular migration journey.¹³⁰ The Safe Mobility initiative launched in Colombia on June 28, 2023, with SMOs currently operational in three cities. Furthermore, on June 12,

¹²⁸ See The White House, *Joint Statement from the United States and Guatemala on Migration* (June 1, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/01/joint-statement-from-the-united-states-and-guatemala-on-migration/>.

¹²⁹ *Id.*

¹³⁰ See United States Department of State, *U.S.-Colombia Joint Commitment to Address the Hemispheric Challenge of Irregular Migration* (June 4, 2023), <https://www.state.gov/u-s-colombia-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>. See also The White House, *Readout of Principal Deputy National Security Advisor Jon Finer's Meeting with Colombian Foreign Minister Alvaro Leyva* (June 11, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/11/readout-of-principal-deputy-national-security-advisor-jon-finers-meeting-with-colombian-foreign-minister-alvaro-leyva/>.

to the United States will generally lead to a shorter processing time of a renewal application.

¹²⁷ The interview waiver authority for certain H-2B applicants renewing visas in the same classification within 48 months of the prior visa's expiration has no sunset date. Currently, certain first-time H-2B visa applicants or certain H-2B visa applicants previously issued any type of visa within the last 48 months may be eligible for an interview waiver; the authority for these interview waivers is in place until further notice. See DOS, *Important Update on Waivers of the Interview Requirement for Certain Nonimmigrant Visa Applicants*, <https://travel.state.gov/content/travel/en/News/visas-news/important-update-on-waivers-of-the-interview-requirement-for-certain-nonimmigrant-visa-applicants.html> (last updated Dec. 21, 2023).

2023, the United States and the Government of Costa Rica launched SMOs in Costa Rica, in furtherance of bilateral partnership and addressing hemispheric challenge of irregular migration.¹³¹ On October 19, 2023, the United States and Ecuador announced their partnership in establishing SMOs in Ecuador.¹³² This allocation for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica will promote safe, orderly and lawful migration to the United States, as well as help provide U.S. employers with additional labor from these countries with whom the United States Government has engaged in outreach efforts to promote the H-2B program.¹³³

Second, in addition to the allocation for returning workers, the country-specific allocation will also address the needs of certain H-2B employers that are suffering irreparable harm or will suffer impending irreparable harm.

Third, the 20,000 set-aside will deliver on the objectives of E.O. 14010, which, among other initiatives, instructs the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access for nationals of the Northern Central American countries of El Salvador, Guatemala, and Honduras to visa programs, as appropriate and consistent with applicable law. E.O. 14010 also directs relevant government agencies to create a comprehensive regional framework to address the causes of migration, and to manage migration throughout North and Central America.¹³⁴

¹³¹ See United States Department of State, *U.S.-Costa Rica Joint Commitment to Address the Hemispheric Challenge of Irregular Migration* (June 12, 2023), <https://www.state.gov/u-s-costa-rica-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>.

¹³² See United States Department of State, *Announcement of Safe Mobility Office in Ecuador* (Oct. 19, 2023), <https://www.state.gov/announcement-of-safe-mobility-office-in-ecuador/>.

¹³³ See, e.g., USAID, *Administrator Samantha Power at the Summit of the Americas Fair Recruitment and H-2 Visa Side Event*, <https://www.usaid.gov/news-information/speeches/jun-9-2022-administrator-samantha-power-summit-americas-fair-recruitment-and-h-2-visa> (Jun. 9, 2022) (“Our combined efforts [with the labor ministries in Honduras and Guatemala, and the Foreign Ministry in El Salvador] . . . resulted in a record number of H-2 visas issued in 2021, including a nearly forty percent increase over the pre-pandemic levels in H-2B visas issued across all three countries.”).

¹³⁴ See also National Security Council, *Collaborative Migration Management Strategy*, <https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf> (July 2021) (stating that “The United States has strong national security, economic, and humanitarian interests in reducing irregular migration and promoting safe, orderly, and humane migration” within North and Central America).

Fourth, DHS is allocating these visas to specific countries to further promote development and economic stability of these countries to reduce irregular migration throughout the Western Hemisphere, including from Haiti.¹³⁵

As in prior years, DOS will work with the relevant countries to facilitate consular interviews, if required,¹³⁶ and channels for reporting incidents of fraud and abuse within the H-2 programs. Further, each country’s own consular networks will maintain contact with the workers while in the United States and ensure the workers know their rights and responsibilities under the U.S. immigration laws, which are all valuable protections to the immigration system, U.S. employers, U.S. workers, and workers entering the country on H-2 visas. DHS has determined that reserving 20,000 supplemental H-2B visas towards the country-specific allocation and continuing to include these countries is reasonable given the progressively increasing use of H-2B visas among the Northern Central American countries of Guatemala, Honduras and El Salvador, and the other three countries—Colombia, Costa Rica and Ecuador—added to this allocation in fiscal year 2024. DHS believes these aspects will encourage U.S. employers that are suffering irreparable harm or will suffer impending irreparable harm to seek out workers from such countries, while, at the same time, increase interest among

¹³⁵ See, e.g., https://twitter.com/DHSgov/status/1580310211931144194?ref_src=twsrc%5Etfw (this supplemental allocation to workers from Haiti, Honduras, Guatemala, and El Salvador “advances the Biden Administration’s pledge, under the L.A. Declaration to expand legal pathways as an alternative to irregular migration”); The White House, *Fact Sheet: The Los Angeles Declaration on Migration and Protection U.S. Government and Foreign Partner Deliverables*, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/fact-sheet-the-los-angeles-declaration-on-migration-and-protection-u-s-government-and-foreign-partner-deliverables/> (addressing several measures, including the H-2B allocation for nationals of Haiti, as part of “the President’s commitment to support the people of Haiti”).

¹³⁶ As noted previously, some consular officers may waive the in-person interview requirement for H-2B applicants whose prior visa expired within a specific timeframe and who otherwise meet the strict limitations set out under INA section 222(h), 8 U.S.C. 1202(h). The authority allowing for waiver of interview of certain H-2 (temporary agricultural and non-agricultural workers) applicants is in place until further notice and is reviewed annually. Certain applicants renewing a visa in the same classification within 48 months of the prior visa’s expiration are also eligible for interview waiver. DOS, *Important Update on Waivers of the Interview Requirement for Certain Nonimmigrant Visa Applicants*, <https://travel.state.gov/content/travel/en/News/visas-news/important-update-on-waivers-of-the-interview-requirement-for-certain-nonimmigrant-visa-applicants.html> (last updated Dec. 21, 2023).

such nationals seeking a legal pathway for temporary employment in the United States. DHS also believes its outreach efforts with the governments of these countries, along with efforts in some of these countries by USAID to increase access to the H-2B program, support the decision to provide this allocation of 20,000 visas. USAID has worked to build capacity in Northern Central America to facilitate access to temporary worker visas under the H-2 program. Collaborating closely with the governments of El Salvador, Guatemala, and Honduras, USAID has strengthened the capacity of relevant government ministries to transparently and efficiently match qualified workers to temporary labor opportunities in the United States. In fiscal years 2021, 2022, and 2023 USAID increased funding to expand capacity building activities in El Salvador, Guatemala, and Honduras in response to the increased demand generated by the supplemental allocations of H-2B visas for Northern Central American nationals included in the FY 2021, FY 2022, and FY 2023 TFRs. The acceleration of USAID’s activities likely helped increase uptake of H-2B visas issuance under the FY 2021, FY 2022, and FY 2023 TFRs, as H-2B visa issuances to Salvadorans, Guatemalans and Hondurans increased significantly over prior years,¹³⁷ and USAID’s assistance helped reduce the average period of time to match qualified workers from these three countries to requests from U.S. employers—from 42 days to 14 days in El Salvador, 55 days to 17 days in Guatemala, and 24 days to 8 days in Honduras.¹³⁸ USAID’s programs also strengthen worker protections by helping crowd out unethical recruiters and providing labor rights education and resources to seasonal workers.

DOS issued a combined total of approximately 26,630 H-2B visas to nationals of the Northern Central American countries and Haiti from FY 2015 through FY 2020, an average of approximately 4,400 per year.¹³⁹ In FY

¹³⁷ See DOS, *Nonimmigrant Visa Issuance Statistics, Nonimmigrant Visa Issuances by Visa Class and by Nationality*, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html> (last visited Sept. 26, 2023); U.S. Dep’t of Homeland Security, U.S. Citizenship and Immigr. Servs., Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, Issuances for FY 2023 H-2Bs By Requested Nationality Code.

¹³⁸ See USAID, *H-2 Visa Opportunities in Guatemala, Honduras, and El Salvador*, https://www.usaid.gov/sites/default/files/2024-06/USAID%20H-2%20Fact%20Sheet%20%283_7_24%29.pdf (Mar. 7, 2024).

¹³⁹ The “combined total” includes all H-2B visas and are not limited to visas issued under

2021, the first year in which supplemental H–2B visas were reserved for nationals of Northern Central American countries, DOS issued a combined total of 6,277 H–2B visas to nationals of those countries.¹⁴⁰ In FY 2022, DOS issued a combined total of 15,058 H–2B visas to nationals of Haiti and the Northern Central American countries.¹⁴¹ In FY 2023, DOS issued a combined total of 23,816 H–2B visas to nationals of Haiti and the Northern Central American countries.¹⁴² This increase is likely due in part to the additional H–2B visas made available to nationals of these countries by the FY 2021, FY 2022, and FY 2023 H–2B supplemental visa temporary final rules. In addition, based in part on the vital U.S. interest of promoting sustainable development and the stability of Haiti, in November 2021, DHS added Haiti to the list of countries whose nationals are eligible to participate in the H–2A and H–2B programs.¹⁴³ In FY 2024, DOS issued a combined total of 17,879 H–2B supplemental visas to nationals of Haiti, the North Central American countries, and Colombia, Ecuador, and Costa Rica.¹⁴⁴ Therefore, as previously stated, DHS has determined that the additional increase in FY 2025 will not only provide U.S. businesses that have been unable to find qualified and available U.S. workers with potential workers, but also promote further expansion of lawful immigration and lawful employment authorization for nationals of the specified countries.

The exemption from the returning worker requirement recognizes the small, albeit increasing, number of individuals from the three Northern Central American countries and Haiti, and the small number of individuals from Colombia, Ecuador, and Costa

Rica,¹⁴⁵ who were previously granted H–2B visas in recent years. Absent this exemption, there may be an insufficient number of qualifying workers from these countries to use the allocated visas. Exempting this population from the returning worker requirement will increase the ability of workers from these countries to pursue lawful temporary work in the U.S., encourage employers to seek out individuals from these countries, and maximize the chance of meeting the goal of reaching the full allocation.

USCIS will stop accepting petitions received under the country-specific allocation after September 15, 2025. This end date should provide H–2B employers ample time, should they choose, to petition for, and bring in, workers under the country-specific allocation. This, in turn, provides an opportunity for employers to contribute to our country's efforts to promote and improve safety, security and economic stability in these countries to help stem the flow of irregular migration to the United States. Nothing in this rule will limit the authority of DHS or DOS to deny, revoke, or take any other lawful action with respect to an H–2B petition or visa application at any time before or after approval of the H–2B petition or visa application.

E. Business Need Standard—Irreparable Harm and FY 2025 Attestation

To file any H–2B petition under this rule, petitioners must meet all existing H–2B eligibility requirements, including having an approved, valid, and unexpired TLC. *See* 8 CFR 214.2(h)(6) and 20 CFR part 655, subpart A. The TLC process focuses on establishing whether a petitioner has a temporary need for workers and whether there are U.S. workers who are able, willing, qualified, and available to perform the temporary service or labor, and does not address the harm a petitioner is facing or will face in the absence of such workers; the attestation addresses this question. In addition, under this rule, the petitioner must submit an attestation to USCIS in which the petitioner affirms, under penalty of perjury, that it

meets the business need standard—that they are suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H–2B workers requested on their petition.¹⁴⁶ In addition to asserting that it meets the business need standard, the employer must attest that, by the time of submission of the petition to USCIS, they have prepared and retained a detailed written statement describing how the evidence gathered in support of their petition demonstrates that irreparable harm is occurring or impending. The employer must also attest that, upon request, it will provide to DHS and/or DOL all of the types of documentary evidence it selected in the attestation form that support its claim of irreparable harm, along with the detailed written statement it prepared by the time of submitting the petition to USCIS describing how such evidence demonstrates irreparable harm. The petitioner must submit the attestation directly to USCIS, together with Form I–129, the approved and valid TLC,¹⁴⁷ and any other necessary documentation. As in the rules implementing prior years' temporary cap increases, employers will be required to complete the new attestation form which can be found at: <https://www.foreignlaborcert.doleta.gov/form.cfm>.¹⁴⁸

The irreparable harm standard is the same as in the temporary final rule for recent years. The irreparable harm standard requires employers to attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on the petition filed under this rule.

As noted above, Congress authorized the Secretary of Homeland Security, in consultation with the Secretary of

supplemental caps. *See* DOS, *Nonimmigrant Visa Issuance Statistics, Nonimmigrant Visa Issuances by Visa Class and by Nationality*, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html>.

¹⁴⁰ *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, DOS Issuance Data, queried 10/2022, TRK #10698.

¹⁴¹ *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, DOS Issuance Data, queried 10/2022, TRK #10698.

¹⁴² DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, Issuances for FY 2023 H–2Bs By Requested Nationality Code.

¹⁴³ *See Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs*, 86 FR 62559, 62562, <https://www.govinfo.gov/content/pkg/FR-2021-11-10/pdf/2021-24534.pdf> (Nov. 10, 2021).

¹⁴⁴ *See* DHS, USCIS, Office of Performance and Quality, ELIS, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221.

¹⁴⁵ During fiscal years 2021 and 2022, the Department of State issued 74 and 247 H–2B visas respectively to Colombian nationals, 35 and 115 H–2B visas respectively to Ecuadorian nationals, and 204 and 283 H–2B visas respectively to Costa Rican nationals. *See Characteristics of H–2B*

Nonagricultural Temporary Workers Fiscal Year 2021 Report to Congress, <https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY21-Characteristics-Report.pdf> (Mar. 10, 2022); *Characteristics of H–2B Nonagricultural Temporary Workers Fiscal Year 2022 Report to Congress*, https://www.uscis.gov/sites/default/files/document/data/USCIS_H2B_FY22_Characteristics_Report.pdf (Feb. 14, 2023).

¹⁴⁶ An employer may request fewer workers on the H–2B petition than the number of workers listed on the TLC. *See* Instructions for Petition for Nonimmigrant Worker, providing that “The total number of workers you request on an H–2B petition must not exceed the number of workers approved by the Department of Labor on the temporary labor certification.”

¹⁴⁷ Since July 26, 2019, USCIS has been accepting a printed copy of the electronic one-page ETA–9142B, Final Determination: H–2B Temporary Labor Certification Approval, as an original, approved TLC. *See Notice of DHS's Requirement of the Temporary Labor Certification Final Determination Under the H–2B Temporary Worker Program*, 85 FR 13178, 13179 (Mar. 6, 2020).

¹⁴⁸ The attestation requirement does not apply to workers who have already been counted under the H–2B statutory caps for fiscal year 2025. Further, the attestation requirement does not apply to noncitizens who are exempt from the fiscal year 2025 H–2B statutory cap, including those who are extending their stay in H–2B status. Accordingly, petitioners that are filing only on behalf of such workers are not subject to the attestation requirement.

Labor, to increase the total number of H-2B visas available “upon the determination that the needs of American businesses cannot be satisfied” with U.S. workers.¹⁴⁹ The irreparable harm standard in this rule aligns with this determination that Congress requires DHS to make before increasing the number of H-2B visas available to U.S. employers. In particular, requiring employers to attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the requested H-2B workers is directly relevant to the needs of the business—if an employer is suffering or will suffer irreparable harm, then their needs are not being satisfied. Because the authority to increase the statutory cap is tied to the needs of businesses, as in prior years, the Departments think, as a policy matter, that it is reasonable to require employers to attest that they are suffering irreparable harm or that they will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on their petition. If such employers are unable to attest to such harm and retain and produce (upon request) documentation of that harm, it calls into question whether the need set forth in this rule cannot in fact be satisfied without the ability to employ H-2B workers. This requirement falls within the broad discretion Congress gave to the Secretary to, in consultation with the Secretary of Labor, increase the number of H-2B workers in order to meet the needs of American businesses.¹⁵⁰ As discussed in the Legal Framework section as well as in the section addressing the country-specific allocation, DHS has broad delegation to administer and enforce U.S. immigration laws and issue regulations regarding the same, as well as broad discretion to establish conditions on the admission of nonimmigrants, and over the adjudication of nonimmigrant petitions, after consultation with other agencies, including DOL. See INA sec. 103(a)(1), 214(a)(1), (c)(1); 8 U.S.C. 1103(a)(1), 1184(a)(1), (c)(1). In addition, through the temporary enactment authorizing the Secretary of DHS to increase the number of H-2B visas,¹⁵¹

Congress delegated to the Secretary of DHS, after consultation with the Secretary of Labor, the discretion to establish a framework for determining that the needs of American businesses cannot be satisfied with the existing workforce and the conditions under which to authorize additional visas to further the purpose of the enactment. In the most recent, as well as each prior annual enactment,¹⁵² Congress has consistently used the word “may” when describing the Secretary’s authority, and the use of the word “may” indicates a grant of discretion, absent contrary legislative intent, structure and purpose of the statute.¹⁵³ As in prior years, the Departments have determined that the irreparable harm standard falls within the discretionary authority of the Secretary of DHS and furthers the legislative purpose behind the temporary enactment by making visas available to those American businesses that are most likely to be severely impacted by a lack of an able, willing, and qualified workforce.

This rule also requires an employer to attest that it has prepared a detailed written statement describing (i) how the employer’s business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all H-2B workers requested on the I-129 petition, and (ii) how each type of evidence selected in the attestation form and relied upon by the employer demonstrates the applicable irreparable harm. The employer will not submit this detailed written statement to DHS with its petition for supplemental visas, but will attest on the attestation form to having prepared a detailed written statement. The detailed written statement must be provided to DHS and/or DOL upon request in the event of an audit or during the course of an investigation. This requirement was first introduced in the FY 2023 TFR to provide additional

year 2024 with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor, may increase the total number of aliens who may receive a visa under section 101(a)(15)(H)(ii)(b) of such Act (8 U.S.C. 1101(a)(15)(H)(ii)(b)) in such fiscal year by not more than the highest number of H-2B nonimmigrants who participated in the H-2B returning worker program in any fiscal year in which returning workers were exempt from such numerical limitation.”

¹⁵² *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.”).

¹⁵³ See generally *U.S. v. Rodgers*, 461 U.S. 677, 706 (1983) (The word “may,” when used in a statute, usually implies some degree of discretion unless there is indication of contrary legislative intent, or an obvious inference from the structure and purpose of the statute.).

clarity informed by the Departments’ experiences in assessing the irreparable harm standard in previous years.

The attestation that irreparable harm is occurring or is impending cannot be based on a speculative analysis that permanent or severe financial loss “may occur” or “is likely to occur.” Rather, as of the time of submission to DHS, employers must have concrete evidence establishing that severe and permanent financial loss is occurring, with the scope and severity of harm clearly articulable, or that severe and permanent financial loss will occur in the near future without access to the supplemental visas. Even if no irreparable harm ultimately occurs because the employer is approved for supplemental visas under this rule, the employer must be able to articulate how permanent and severe financial loss was impending at the time of filing. Additionally, in DOL’s experience, employers sometimes do not retain the documentation they specifically attested they would retain, or will not or cannot explain how this documentation demonstrates the relevant irreparable harm to which they attested, which indicates that some of the employers seeking to benefit from hiring H-2B workers are not thoughtfully considering, or considering at all, whether their business needs qualify them for supplemental H-2B visas under these rules.

Additionally, the Departments continue to believe that the written statement is necessary in the case of an audit or investigation to explain, in detail, the employer’s reasoning as to why irreparable harm was occurring or impending without the ability to employ H-2B workers, and how the evidence supports the employer’s reasoning. In audits and investigations, some employers have provided hundreds of pages of evidence without any explanation as to how this evidence demonstrates irreparable harm, leaving DOL or DHS to determine how a voluminous compilation of complex and, sometimes, seemingly unrelated documents demonstrates irreparable harm without any understanding of the employer’s intent when providing the documents. A detailed, thoughtful explanation from the employer will clarify the purpose of these documents and allow the employer to clearly make their case that the business was experiencing irreparable harm or would experience impending irreparable harm at the time of petitioning for supplemental visas.

As such, the Departments believe that it is prudent to require employers to identify how they are suffering

¹⁴⁹ See section 105 of Pub. L. 118–47, as extended by Public Law 118–83.

¹⁵⁰ See *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2263 (2024).

¹⁵¹ Public Law 118–47, Division G, Title I, sec. 105, states: “Notwithstanding the numerical limitation set forth in section 214(g)(1)(B) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(1)(B)), the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of United States businesses cannot be satisfied during fiscal

irreparable harm (that is, permanent or severe financial loss), or will suffer impending irreparable harm, and how the evidence they will maintain shows that harm was occurring or impending, at the time they petition for H-2B visas under this rule. The written statement should identify, in detail, the severe and permanent financial loss that is occurring or will occur in the near future without access to the supplemental visas and should describe how the information contained in the documentary evidence demonstrates this severe and permanent financial loss. A written statement explaining that no irreparable harm occurred because the employer was approved for supplemental H-2B visas is insufficient; if no irreparable harm actually occurred, the employer must be able to show that irreparable harm was impending at the time of the petition's filing. Supporting evidence of the employer's irreparable harm (either occurring or impending) maintained and discussed in the detailed written statement may include, but is not limited to, the following types of documentation:

(1) Evidence that the business is suffering or will suffer in the near future permanent and severe financial loss due to the inability to meet financial or existing contractual obligations because they were unable to employ H-2B workers, including evidence of executed contracts, reservations, orders, or other business arrangements that have been or would be cancelled, and evidence demonstrating an inability to pay debts/bills;

(2) Evidence that the business is suffering or will suffer in the near future permanent and severe financial loss, as compared to prior years, such as financial statements (including profit/loss statements) comparing the employer's period of need to prior years; bank statements, tax returns, or other documents showing evidence of current and past financial condition; and relevant tax records, employment records, or other similar documents showing hours worked and payroll comparisons from prior years to the current year;

(3) Evidence showing the number of workers needed in the previous three seasons (FY 2022, 2023, and 2024) to meet the employer's need as compared to those currently employed or expected to be employed at the beginning of the start date of need. Such evidence must indicate the dates of their employment, and their hours worked (for example, payroll records) and evidence showing the number of H-2B workers it claims are needed, and the workers' actual

dates of employment and hours worked; and/or

(4) Evidence that the petitioner is reliant on obtaining a certain number of workers to operate, based on the nature and size of the business, such as documentation showing the number of workers it has needed to maintain its operations in the past, or will in the near future need, including but not limited to: a detailed business plan, copies of purchase orders or other requests for good and services, or other reliable forecast of an impending need for workers.

These examples are not exhaustive, nor will they necessarily establish that the business meets the irreparable harm standard; petitioners may retain other types of evidence they believe will satisfy these standards. Such evidence must be maintained and provided, with the written statement, to DOL and/or DHS upon request. It has been DOL's experience when reviewing documentation submitted to establish irreparable harm that employers commonly provide unexecuted contracts or letters of intent; contracts with redacted financial terms or dates of performance; or written statements memorializing verbal agreements that are not signed by all parties and thus may be insufficient evidence of the terms of such agreements and may call into question their credibility. In addition, DOL has encountered contracts among related entities that are owned, operated, or otherwise controlled by the employer or an individual with ownership interest in the employer. Such contracts may lack credibility as evidence of irreparable harm because the employer and related parties may share the same interest in obtaining H-2B workers even in situations where the employer is not suffering irreparable harm or will not suffer impending irreparable harm. In those instances, DOL may request that an employer provide additional credible evidence to demonstrate that it has met the legal standard. In other situations, the only documentation offered by the employer is a declaration, without any supporting documentary evidence. Given that the employer must establish that they are suffering irreparable harm or will suffer impending irreparable harm, in other words, a permanent and severe financial loss without the ability to employ all of the H-2B workers requested on their petition, an employer's irreparable harm cannot be properly assessed without evidence of its financial business needs. As such, DOL is clarifying that merely asserting irreparable harm, or providing documentation that lacks sufficient facts

or indicia of validity (e.g., signatures) for DOL to determine that the employer was suffering or would suffer impending irreparable harm without the ability to employ all of the H-2B workers requested under the supplemental cap at the time of filing their petition, will be insufficient to make an irreparable harm determination. In such instances where the evidence is insufficient or the petitioner merely submits a declaration without supporting documentation, DOL may require the employer to provide additional credible evidence. This is because mere assertions or the absence of key financial terms or dates of performance in a contract due to redaction, for example, hinder the Department's ability to evaluate whether the employer was in fact suffering irreparable harm or would have suffered impending irreparable harm without the ability to employ all of the H-2B workers it requested for a given period. Factors that can demonstrate the credibility of a contract or similar commitment or obligation may include evidence of an agreement, preferably in writing, that includes the financial terms, dates of performance, and evidence it was signed and/or agreed upon before the petition was filed.

While the employer will not submit the detailed written statement nor the supporting evidence to DHS at the time of filing a petition for H-2B visas under this rule, the Departments emphasize that the employer must prepare the detailed written statement and compile the evidence at the time of filing. The employer must complete the analysis as to whether the employer is experiencing irreparable harm or will experience impending irreparable harm at the time the employer petitions for supplemental visas using evidence available at this time. In the interest of efficiency, the Departments do not require the submission of this statement to DHS at the time of filing the petition. Instead, the employer must attest that it has prepared the detailed written statement and that it will keep it as part of its records, to be provided to the Departments, upon request.

As the burden rests with the petitioner to prove eligibility for supplemental H-2B visas under the time-limited authority implemented with this temporary final rule by a preponderance of the evidence, it is the petitioner's burden to establish that it meets the irreparable harm standard. INA sec. 291, 8 U.S.C. 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). The attestation form will serve as prima facie initial evidence to DHS that the petitioner's business is

suffering irreparable harm or will suffer impending irreparable harm. USCIS will reject in accordance with 8 CFR 103.2(a)(7)(ii) or may deny in accordance with 8 CFR 103.2(b)(8)(ii), as applicable, any petition requesting H-2B workers under this FY 2025 supplemental cap that is lacking the requisite attestation form. Although this rule does not require submission of the evidence selected in the attestation and/or a detailed written statement at the time of filing of the petition, other than an attestation, the employer must have the evidence selected in the attestation and the accompanying detailed written statement on hand and ready to present to DHS and/or DOL at any time starting with the date of filing the I-129 petition, through the prescribed document retention period discussed below.

As with petitions filed under the supplemental TFRs in recent years, the Departments intend to select a significant number of petitions for audit examination to verify compliance with program requirements, including the irreparable harm standard and recruitment provisions implemented through this rule. The Departments may consider failure to provide evidence demonstrating irreparable harm, to prepare or provide the detailed written statement explaining irreparable harm, or to comply with the audit process to be a willful violation resulting in an adverse agency action on the employer, including revocation of the TLC or program debarment. Similarly, failure to cooperate with any compliance review, evaluation, verification, or inspection conducted by DHS and/or DOL as required by 8 CFR

214.2(h)(6)(xv)(B)(2)(v) and (vi) may constitute a violation of the terms and conditions of an approved petition and lead to petition revocation under 8 CFR 214.2(h)(11)(iii)(A)(3).

The attestation submitted to USCIS will also state that the employer:

(1) meets all other eligibility criteria for the available visas, including the returning worker requirement, unless exempt because the H-2B worker is a national of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica who is counted against the 20,000 visas reserved for such workers;

(2) will comply with all assurances, obligations, and conditions of employment set forth in the *Application for Temporary Employment Certification* (Form ETA 9142B and appendices) certified by DOL for the job opportunity (which serves as the TLC);

(3) will conduct additional recruitment of U.S. workers in accordance with the requirements of

this rule and discussed further below; and

(4) will document and retain evidence of such compliance.

Because petitioners will submit the attestation to USCIS as initial evidence with Form I-129, DHS considers the attestation to be evidence that is incorporated into and a part of the petition consistent with 8 CFR 103.2(b)(1). Accordingly, USCIS may deny or revoke, as applicable, a petition based on or related to statements made in the attestation, including but not limited to the following grounds: (1) the employer failed to demonstrate employment of all of the requested workers is necessary under the appropriate business need standard; or (2) the employer failed to demonstrate that it requested and/or instructed that each worker petitioned for is a returning worker, or a national of one of the specified countries, as required by this rule. The petitioner may appeal any denial or revocation on such basis, however, under 8 CFR part 103, consistent with DHS regulations and existing USCIS procedures.

It is the view of the Secretaries of Homeland Security and Labor that requiring a post-TLC attestation to USCIS is the most practical approach to applying the eligibility requirements of this rule without causing undue delays in the filing or adjudication processes for those employers with start dates in the first half of the fiscal year, many of whom will have already begun or completed the TLC application process. The Departments have determined that, if such employers were required to submit the attestation form to DOL before filing a petition with DHS, the attendant delays would negatively impact the ability of American businesses to timely get the help that they need given TLC processing timeframes. For consistency and to avoid confusion, the Departments will also maintain the post-TLC attestation process for employers with start dates in the second half of the fiscal year that seek supplemental H-2B visas under this rule. This approach, in conjunction with additional integrity safeguards, has been used consistently in prior supplemental H-2B temporary final rules, and the Departments will continue to monitor its effectiveness and sufficiency.

As in prior years, all employers under this rule are required to retain documentation, which the employer must provide upon request by DHS and/or DOL, supporting the new attestations regarding (1) the irreparable harm standard; (2) the returning worker requirement, or, alternatively,

documentation supporting that the H-2B worker(s) requested is a national of one of the specified countries who is counted against the 20,000 country-specific allocation (which may be satisfied by the separate Form I-129 that employers are required to file for such workers in accordance with this rule); and (3) a recruitment report for any additional recruitment required under this rule for a period of 3 years from the date of certification. *See* 20 CFR 655.68. Although the employer must have such documentation on hand at the time it files the petition, the Departments do not believe it is necessary or efficient for all employers to submit such documentation to USCIS at the time of filing the petition. However, as noted above, the Departments will employ program integrity measures, including additional scrutiny by DHS of employers that have committed labor law violations in the H-2B program, and continue to conduct audits, investigations, and/or post-adjudication compliance reviews on a significant number of H-2B petitions. As part of that process, USCIS may issue a request for additional evidence, a notice of intent to revoke, or a revocation notice, based on the review of such documentation, *see* 8 CFR 103.2(b) and 8 CFR 214.2(h)(11), and DOL's OFLC and WHD will be able to review this documentation and enforce the attestations during the course of an audit examination or investigation.

In accordance with the attestation requirements, under which petitioners attest that they meet the irreparable harm standard, that they are seeking to employ only returning workers (unless exempt as described above), and that they meet the document retention requirements at 20 CFR 655.68, petitioners must retain documents and records fulfilling their responsibility to demonstrate compliance with this rule for 3 years from the date the TLC was approved, and must provide the documents and records upon the request of DHS and/or DOL. As mentioned above, the employer bears the burden of establishing that they are suffering or will suffer impending irreparable harm. With regard to the irreparable harm standard, employers attesting that they are suffering irreparable harm must be able to provide concrete evidence establishing severe and permanent financial loss that is occurring; the scope and severity of the harm must be clearly articulable. Employers attesting that they will suffer impending irreparable harm must be able to demonstrate that severe and permanent financial loss will occur in

the near future without access to the supplemental visas. It will not be enough to provide evidence suggesting that such harm may or is likely to occur; rather, the documentary evidence must show that impending harm is occurring or will occur and document the form of such harm. Examples of possible types of evidence to be maintained are listed earlier in this section.

When a petition is selected for audit examination, or investigation, DHS and/or DOL will review all evidence available to it to confirm that the petitioner properly attested to DHS, at the time of filing the petition, that their business was suffering irreparable harm or would suffer impending irreparable harm, and that they petitioned for and employed only returning workers, unless the H-2B worker is a national of one of the specific countries counted towards the 20,000 country-specific allocation, among other attestations. If DHS subsequently finds that the evidence does not support the employer's attestations, DHS may deny or, if the petition has already been approved, revoke the petition at any time consistent with existing regulatory authorities. DHS may also, or alternatively, refer the petitioner to DOL for further investigation. In addition, DOL may independently take enforcement action, including by, among other things, debarring the petitioner from the H-2B program for not less than one year or more than five years from the date of the final agency decision, which also disqualifies the debarred party from filing any labor certification applications or labor condition applications with DOL for the same period set forth in the final debarment decision. *See, e.g.*, 20 CFR 655.73; 29 CFR 503.20, 503.24.¹⁵⁴

Evidence reflecting a preference for hiring H-2B workers over U.S. workers may warrant an investigation by additional agencies enforcing employment and labor laws, such as the Immigrant and Employee Rights Section (IER) of the Department of Justice's Civil Rights Division. *See* INA section 274B, 8 U.S.C. 1324b (prohibiting certain types of employment discrimination based on citizenship status or national origin). Moreover, DHS and DOL may

refer potential discrimination to IER pursuant to applicable interagency agreements. *See* IER, Partnerships, <https://www.justice.gov/crt/partnerships> (last visited Aug. 20, 2024). In addition, if members of the public have information that a participating employer may be abusing this program, DHS invites them to notify U.S. Immigration and Customs Enforcement (ICE) by completing the online ICE Tip Form, <https://www.ice.gov/webform/ice-tip-form> (last visited Aug. 20, 2024), or alternately, via the toll-free ICE Tip Line, (866) 347-2423.¹⁵⁵

DHS, in exercising its statutory authority under INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b), and section 105 of the FY 2024 Omnibus, as extended by Public Law 118-83, is responsible for adjudicating eligibility for H-2B classification. As in all cases, the burden rests with the petitioner to establish eligibility by a preponderance of the evidence. INA section 291, 8 U.S.C. 1361. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Accordingly, as noted above, where the petition lacks initial evidence, such as a properly completed attestation, USCIS will, as applicable, reject the petition in accordance with 8 CFR 103.2(a)(7)(ii) or may deny the petition in accordance with 8 CFR 103.2(b)(8)(ii). Further, where the initial evidence submitted with the petition contains inconsistencies or is inconsistent with other evidence in the petition and the underlying TLC, USCIS may issue a Request for Evidence, Notice of Intent to Deny, or Denial in accordance with 8 CFR 103.2(b)(8). In addition, where it is determined that an H-2B petition filed pursuant to the FY 2024 Omnibus, as extended by Public Law 118-83, was granted erroneously, the H-2B petition approval may be revoked. *See* 8 CFR 214.2(h)(11).

Because of the particular circumstances of this regulation, and because the attestation and other requirements of this rule play a vital role in achieving the purposes of this rule, DHS and DOL intend that the attestation requirement, DOL procedures, and other aspects of this rule be non-severable from the remainder of the rule, including the

increase in the numerical allocations.¹⁵⁶ Thus, if the attestation requirement or any other part of this rule is enjoined or held invalid, the Departments intend for the remainder of the rule, with the exception of the retention requirements being codified in 20 CFR 655.68, to cease operation in the relevant jurisdiction, without prejudice to workers already present in the United States under this regulation, as consistent with law.

F. Portability

As an additional option for employers that cannot find U.S. workers, and as an additional flexibility for H-2B employees seeking to begin work with a new H-2B employer, this rule allows petitioners to immediately employ certain H-2B workers who are present in the United States in H-2B status without waiting for approval of the H-2B petition, generally for a period of up to 60 days. Such workers must be beneficiaries of a timely, non-frivolous H-2B petition requesting an extension of stay received on or after January 25, 2025,¹⁵⁷ but no later than 1 year after that date.¹⁵⁸ In addition, such workers must have been lawfully admitted to the United States and have not worked without authorization subsequent to such lawful admission. Additionally, petitioners may immediately employ individuals who are beneficiaries of a non-frivolous H-2B petition requesting an extension of the worker's stay that is pending as of January 25, 2025 without waiting for approval of the H-2B petition. To be eligible for portability, employers must have received an approved TLC demonstrating that they have completed a test of the U.S. labor market, and that DOL determined that there were no qualified U.S. workers available to fill these temporary positions. DHS is making this portability available for an additional one-year period in order to provide

¹⁵⁶ The Departments' intentions with respect to non-severability extend to all features of this rule other than the portability provision, which is described in the section below.

¹⁵⁷ This rule uses January 25, 2025 as the starting date because the similar provision in the FY 2024 TFR expires January 24, 2025. As January 25, 2025 is a Saturday, however, the earliest a petition might be received after the expiration of 8 CFR 214.2(h)(31) is January 27, 2025. *See* 8 CFR 1.2 (definition of day) (explaining that when the last day of a period computed falls on a Saturday, Sunday, or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday).

¹⁵⁸ Individuals who are the beneficiaries of petitions filed on the basis of 8 CFR 214.1(c)(4) are not eligible to port to a new employer under 8 CFR 214.2(h)(32).

¹⁵⁴ Pursuant to the statutory provisions governing enforcement of the H-2B program, INA section 214(c)(14), 8 U.S.C. 1184(c)(14), a violation exists for purposes of DOL enforcement actions in the H-2B program where there has been a willful misrepresentation of a material fact in the petition or a substantial failure to meet any of the terms and conditions of the petition. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions. *See, e.g.*, INA section 214(c)(14)(D), 8 U.S.C. 1184(c)(14)(D); *see also* 29 CFR 503.19.

¹⁵⁵ DHS may publicly disclose information regarding the H-2B program consistent with applicable law and regulations. For information about DHS disclosure of information contained in a system of records, *see* <https://www.dhs.gov/system-records-notices-sorns>. Additional general information about DHS privacy policy can be accessed at <https://www.dhs.gov/policy>.

greater certainty for H-2B employers and workers.¹⁵⁹

The portability provision at new 8 CFR 214.2(h)(32) is substantively the same as the portability provision offered in the FY 2023 and FY 2024 H-2B supplemental visa temporary final rules, which were codified at 8 CFR 214.2(h)(29) and (h)(31), respectively, and will begin upon the expiration of 8 CFR 214.2(h)(31). See new 8 CFR 214.2(h)(32). Additionally, the provision is similar to temporary flexibilities that DHS has used previously to improve employer access to noncitizen workers during the COVID-19 pandemic.¹⁶⁰

The employment authorization provided under this provision would end 15 days after USCIS denies the H-2B petition or such petition is withdrawn. This 15-day period of employment following an H-2B petition denial or withdrawal is consistent with prior H-2B supplemental cap temporary final rules, as well as the 15-day period of employment following petition denial under existing DHS regulations at 8 CFR 274a.12(b)(21) for certain E-Verify participants to employ H-2A workers.

¹⁵⁹ On September 20, 2023, DHS issued *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*, Notice of Proposed Rulemaking (NPRM), 88 FR 65040, 65066. In that NPRM, DHS proposed to extend portability to H-2A and H-2B workers on a permanent basis. The Department's proposal does not interfere with the portability provision of this rule, however, should DHS publish a final rule making H-2 portability permanent, any such provision will not expire on a specific date, unlike the portability provision made effective by this temporary final rule.

¹⁶⁰ See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers* 86 FR 28198 (May 25, 2021). On May 14, 2020, DHS published a temporary final rule in the **Federal Register** to amend certain H-2B requirements to help H-2B petitioners seeking workers to perform temporary nonagricultural services or labor essential to the U.S. food supply chain. *Temporary Changes to Requirements Affecting H-2B Nonimmigrants Due to the COVID-19 National Emergency*, 85 FR 28843 (May 14, 2020). In addition, on April 20, 2020, DHS issued a temporary final rule which, among other flexibilities, allowed H-2A workers to change employers and begin work before USCIS approved the new H-2A petition for the new employer. *Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency*, 85 FR 21739 (April 20, 2020). DHS has subsequently extended that portability provision for H-2A workers through two additional temporary final rules, on August 20, 2020, and December 18, 2020, which have been effective for H-2A petitions that were received on or after August 19, 2020 through December 17, 2020, and on or after December 18, 2020 through June 16, 2021, respectively. *Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency: Partial Extension of Certain Flexibilities*, 85 FR 51304 (August 20, 2020) and *Temporary Changes to Requirements Affecting H-2A Nonimmigrants due to the COVID-19 National Emergency: Extension of Certain Flexibilities*, 85 FR 82291 (December 18, 2020).

As in the prior temporary final rules, the 15-day period is intended to account for the passage of time between USCIS denial of the H-2B petition and the petitioner receiving notice of such denial.¹⁶¹

DHS is strongly committed not only to protecting U.S. workers and helping U.S. businesses receive the documented workers authorized to perform temporary nonagricultural services or labor that they need, but also to protecting the rights and interests of H-2B workers (consistent with Executive Order 13563 and in particular its reference to “equity,” “fairness,” and “human dignity”). In the FY 2020 DHS Further Consolidated Appropriations Act (Public Law 116-94), Congress directed DHS to provide options to improve the H-2A and H-2B visa programs, to include options that would protect worker rights.¹⁶² DHS has determined that providing H-2B nonimmigrant workers with the flexibility of being able to begin work with a new H-2B petitioner immediately and avoid a potential job loss or loss of income while the new H-2B petition is pending, provides some certainty to H-2B workers who may have found themselves in situations that warrant a change in employers.¹⁶³ This flexibility also provides an alternative to H-2B petitioners who have not been

¹⁶¹ A similar portability provision exists in DHS regulations related to H-1B nonimmigrant workers, but does not include a 15-day period. See 8 CFR 214.2(h)(2)(i)(H)(2).

¹⁶² The Joint Explanatory Statement accompanying the *Fiscal Year (FY) 2020 Department of Homeland Security (DHS) Further Consolidated Appropriations Act* (Public Law 116-94) states, “Not later than 120 days after the date of enactment of this Act, DHS, the Department of Labor, the Department of State, and the United States Digital Service are directed to report on options to improve the execution of the H-2A and H-2B visa programs, including: processing efficiencies; combatting human trafficking; protecting worker rights; and reducing employer burden, to include the disadvantages imposed on such employers due to the current semiannual distribution of H-2B visas on October 1 and April 1 of each fiscal year. USCIS is encouraged to leverage prior year materials relating to the issuance of additional H-2B visas, to include previous temporary final rules, to improve processing efficiencies.”

¹⁶³ The White House, *The National Action Plan to Combat Human Trafficking*, Priority Action 1.5.3, at p. 25 (Dec 2021); The White House, *The National Action Plan to Combat Human Trafficking*, Priority Action 1.6.3, at p. 20–21 (2020) (Stating that “[w]orkers sometimes find themselves in abusive work situations, but because their immigration status is dependent on continued employment with the employer in whose name the visa has been issued, workers may be left with few options to leave that situation.”). By providing the option of changing employers without risking job loss or a loss of income through the publication of this rule, DHS believes that H-2B workers may be more likely to leave abusive work situations, and thereby are afforded greater worker protections.

able to find U.S. workers and who have not been able to obtain H-2B workers subject to the statutory or supplemental caps who have the skills to perform the job duties. In that sense as well, it is equitable and fair.

G. DHS Petition Procedures

To petition for H-2B workers under the supplemental allocations in this rule, the petitioner must file a Form I-129 at the current filing location in accordance with applicable regulations and form instructions, along with an unexpired TLC and the attestation Form ETA-9142-B-CAA-9. Petitions filed for supplemental allocations under this rule at any location other than the current filing location will be rejected and the filing fees will be returned. For all petitions filed under this rule and the H-2B program, generally, employers must establish, among other requirements, that insufficient qualified U.S. workers are available to fill the petitioning H-2B employer's job opportunity and that the foreign worker's employment in the job opportunity will not adversely affect the wages or working conditions of similarly-employed U.S. workers. INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D); 20 CFR 655.1. To meet this standard of protection for U.S. workers and, in order to be eligible for additional visas under this rule, employers must have applied for and received a valid TLC in accordance with 8 CFR 214.2(h)(6)(iv)(A) and (D) and 20 CFR part 655, subpart A. Under DOL's H-2B regulations, TLCs are valid only for the period of employment certified by DOL and expire on the last day of authorized employment. 20 CFR 655.55(a).

In order to have a valid TLC, the employment start date on the employer's H-2B petition must not be different from the employment start date certified by DOL on the TLC. See 8 CFR 214.2(h)(6)(iv)(D). Under generally applicable DHS regulations, the only exception to this requirement applies when an employer files an amended H-2B petition, accompanied by a copy of the previously approved TLC and a copy of the initial visa petition approval notice, at a later date to substitute workers as set forth under 8 CFR 214.2(h)(6)(viii)(B). This rule also requires additional recruitment for certain petitioners, as discussed below.

All H-2B petitions must state the nationality of all the requested H-2B workers, whether named or unnamed, even if there are beneficiaries from more than one country. See 8 CFR 214.2(h)(2)(iii). If filing multiple Forms I-129 based on the same TLC (for

instance, one requesting returning workers and another requesting workers under the country-specific allocation), each H-2B petition must include a copy of the TLC and reference all previously-filed or concurrently-filed petitions associated with the same TLC. The total number of requested workers may not exceed the total number of workers indicated on the approved TLC. In addition, the USCIS Fee Schedule Final Rule, 89 FR 6194 (January 31, 2024), which took effect on April 1, 2024, imposed a limit of 25 named beneficiaries per petition.¹⁶⁴

Petitioners seeking H-2B classification for nationals under the 20,000 country-specific visa allocation that are exempt from the returning worker provision must file a separate Form I-129 for those nationals only. *See* new 8 CFR 214.2(h)(6)(xv). In this regard, a petition must be filed with a single Form ETA-9142-B-CAA-9 that clearly indicates that the petitioner is only requesting nationals from El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica who are exempt from the returning worker requirement. Specifically, if the petitioner checks the first box of Form ETA-9142-B-CAA-9, then the petition accompanying that form *must* be filed only on behalf of nationals of one or more of these and not other countries. In such a case, if the Form I-129 petition is requesting beneficiaries from countries other than one of these countries, then USCIS may reject it or issue a request for evidence, notice of intent to deny, or denial, or, in the case of a non-frivolous petition, a partial approval limiting the petition to the number of beneficiaries who are from Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. Requiring the filing of separate petitions to request returning workers and to request workers who are nationals of the specified countries is necessary to ensure the operational capability to properly calculate and manage the respective additional cap allocations and to ensure that all corresponding visa issuances are limited to qualifying applicants, particularly when such petitions request unnamed beneficiaries or are relied upon for subsequent requests to substitute beneficiaries in accordance with 8 CFR 214.2(h)(6)(viii).

The attestations must be filed on Form ETA-9142-B-CAA-9, Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118-47, as extended by

sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118-83. *See* 20 CFR 655.64. Petitioners are required to retain a copy of such attestations and all supporting evidence for 3 years from the date the associated TLC was approved, consistent with 20 CFR 655.56 and 29 CFR 503.17. *See* 20 CFR 655.68. Petitions submitted to DHS pursuant to Public Law 118-83, which extended the FY 2024 Omnibus, will be processed in the order in which they were received within the relevant supplemental allocation, and pursuant to processes parallel to those in place for when numerical limitations are reached under INA section 214(g)(1)(B) or (g)(10), 8 U.S.C. 1184(g)(1)(B) or (g)(10).

USCIS will reject petitions filed under the supplemental allocations in this rule at any location other than the current filing location and will return the filing fees for any such petition.

Immediately upon publication of the rule, but no earlier than that date, USCIS will begin accepting returning worker H-2B petitions requesting dates of need starting on or before March 31, 2025, as well as H-2B petitions for workers under the country-specific allocation with dates of need in the first half of FY 2025. Beginning no earlier than 15 days after the second half statutory cap is reached, USCIS will begin accepting returning worker H-2B petitions requesting work to begin on or after April 1, 2025, through May 14, 2025, as well as H-2B petitions for workers under the country-specific allocation with dates of need on or after April 1, 2025, through September 30, 2025. Finally, beginning no earlier than 45 days after the second half statutory cap is reached, USCIS will begin accepting returning worker H-2B petitions requesting work to begin on or after May 15 through September 30, 2025.

USCIS will reject any returning worker petition that is received after September 15, 2025, or after the applicable numerical limitation has been reached. DHS believes that 15 days from the end of the fiscal year is the minimum time needed for petitions to be adjudicated, although USCIS cannot guarantee the time period will be sufficient in all cases. Therefore, even if the country-specific allocation and second half supplemental allocations provided in this rule have not yet been reached, USCIS will stop accepting petitions under those allocations that are received after September 15, 2025. *See* new 8 CFR 214.2(h)(6)(xv)(C). Such petitions will be rejected and the filing fees will be returned. Petitioners may

choose to request premium processing of their petitions under 8 CFR 106.4, which allows for expedited processing for an additional fee.

Based on the time-limited authority granted to DHS by sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118-83, on the same terms as section 105 of the FY 2024 Omnibus, DHS is notifying the public that USCIS cannot approve petitions seeking H-2B workers under this rule on or after October 1, 2025. *See* new 8 CFR 214.2(h)(6)(xv)(C). Petitions pending with USCIS that are not approved before October 1, 2025 will be denied and any fees will not be refunded. *See* new 8 CFR 214.2(h)(6)(xv)(C).

H. DOL Procedures

As noted above, all employers are required to have an approved and valid TLC from DOL in order to file a Form I-129 petition with DHS. *See* 8 CFR 214.2(h)(6)(iv)(A) and (D). The standards and procedures governing the submission and processing of Applications for Temporary Employment Certification for employers seeking to hire H-2B workers are set forth in 20 CFR part 655, subpart A. An employer that seeks to hire H-2B workers must request a TLC in compliance with the application filing requirements set forth in 20 CFR 655.15 and meet all the requirements of 20 CFR part 655, subpart A, to obtain a valid TLC, including the criteria for certification set forth in 20 CFR 655.51. *See* 20 CFR 655.64(a) and 655.50(b). Employers with an approved TLC have conducted recruitment, as set forth in 20 CFR 655.40 through 655.48, to determine whether U.S. workers are qualified and available to perform the work for which employers sought H-2B workers.

The H-2B regulations require that, among other things, an employer seeking to hire H-2B workers in a non-emergency situation must file a completed Application for Temporary Employment Certification with the National Processing Center (NPC) designated by the OFLC Administrator no more than 90 calendar days and no fewer than 75 calendar days before the employer's date of need (*i.e.*, start date for the work). *See* 20 CFR 655.15.

Emergency Procedures

Under 20 CFR 655.17, an employer may request a waiver of the time period(s) for filing an Application for Temporary Employment Certification based on "good and substantial" cause, provided that the employer has

¹⁶⁴ *See* 8 CFR 214.2(h)(2)(ii).

sufficient time to thoroughly test the domestic labor market on an expedited basis and the OFLC certifying officer (CO) has sufficient time to make a final determination as required by the regulation. To rely on this provision, as the Departments explained in the 2015 H-2B Interim Final Rule, the employer must provide the OFLC CO with detailed information describing the “good and substantial cause” necessitating the waiver. Such cause may include the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable human-made catastrophic event that is wholly outside the employer’s control, unforeseeable changes in market conditions, or pandemic health issues. Thus, to ensure an adequate test of the domestic labor market and to protect the integrity of the H-2B program, the Departments clearly intended that use of emergency procedures must be narrowly construed and permitted in extraordinary and unforeseeable catastrophic circumstances that have a direct impact on the employer’s need for the specific services or labor to be performed. Even under the existing H-2B statutory visa cap structure, DOL considers USCIS’ announcement(s) that the statutory cap(s) on H-2B visas has been reached, which may occur with regularity every six months depending on H-2B visa need, as foreseeable, and therefore not within the meaning of “good and substantial cause” that would justify a request for emergency procedures. Accordingly, employers cannot rely solely on the supplemental H-2B visas made available through this rule as good and substantial cause to use emergency procedures under 20 CFR 655.17.

Additional Recruitment

In addition to the recruitment already conducted in connection with a valid TLC, to ensure the recruitment has not become stale, employers that wish to obtain visas for their workers under 8 CFR 214.2(h)(6)(xv), and who file an I-129 petition 30 or more days after the certified start date of work on the TLC must conduct additional recruitment for U.S. workers. As noted in the 2015 H-2B Interim Final Rule, U.S. workers seeking employment in temporary nonagricultural jobs typically do not search for work months in advance and cannot make commitments about their availability for employment far in advance of the work start date. *See* 80 FR 24041, 24061, 24071. Given that the temporary labor certification process generally begins 75 to 90 days in advance of the employer’s start date of work, employer recruitment efforts typically occur between 40 and 60 days

before that date with an obligation to provide employment to any qualified U.S. worker who applies until 21 days before the date of need. Therefore, employers with TLCs containing a start date of work on October 1, 2024, for example, likely conducted their positive recruitment beginning around late-July and ending around mid-August 2024 and continued to consider U.S. worker applicants and referrals only until September 10, 2024.

In order to provide U.S. workers a realistic opportunity to pursue jobs for which employers will be seeking foreign workers under this rule, the Departments have determined that if employers file an I-129 petition 30 or more days after their certified start dates of work, as shown on its approved Form ETA-9142B, *Final Determination: H-2B Temporary Labor Certification Approval*, they have not conducted recruitment recently enough for the DOL to reasonably conclude that there are currently an insufficient number of U.S. workers who are qualified, willing, and available to perform the work absent taking additional, positive recruitment steps. As noted in the FY 2022 second half H-2B supplemental cap TFR, the Departments determined that this 30-day requirement is consistent with provisions contained in previous TFRs and better aligns with the goal of affording workers an adequate opportunity to apply for jobs closer to when they tend to search for temporary employment. As explained in the 2015 H-2B Interim Final Rule, U.S. applicants applying for temporary positions typically offered by H-2B employers are often not seeking job opportunities, or making informed decisions about such work, several months in advance. *See* 80 FR 24041, 24071; 87 FR 30334, 30353–54. The Departments continued to use this 30-day requirement in the FY 2023 and FY 2024 H-2B supplemental cap TFRs based on the rationale provided in the FY 2022 second half H-2B supplemental cap TFR. *See* 87 FR 76816, 76842–76843; 88 FR 80394, 80426. The Departments have determined that this requirement is necessary to provide U.S. workers an opportunity to pursue jobs for which employers are seeking supplemental visas.

An employer that files an I-129 petition under 8 CFR 214.2(h)(6)(xv) fewer than 30 days after the certified start date of work on the TLC must submit the TLC and a completed Form ETA-9142B-CAA-9 but is not required to conduct additional recruitment for U.S. workers beyond the recruitment already conducted as a condition of

certification. Only those employers with still-valid TLCs with a certified start date of work that is 30 or more days before the date they file a petition will be required to conduct recruitment in addition to that conducted prior to being granted a TLC and attest that the recruitment will be conducted, as follows.

Placement of New Job Orders With State Workforce Agencies

Employers that are required to engage in additional recruitment must place a new job order for the job opportunity with the State Workforce Agency (SWA) serving the area of intended employment no later than the next business day after submitting an I-129 petition for H-2B workers to USCIS, and inform the SWA that the job order is being placed in connection with a previously submitted and certified Application for Temporary Employment Certification for H-2B workers by providing the SWA with the unique OFLC TLC case number. Under this rule, employers must also provide the OFLC NPC with the unique TLC case number concurrently with their placement of new job orders with the SWAs. This notification will allow OFLC to cross reference and repost information about the job opportunities that are provided on the employers’ certified Applications for Temporary Labor Certification and posted by OFLC on *SeasonalJobs.dol.gov*, which is DOL’s electronic job registry authorized under 20 CFR 655.34. Once posted by OFLC, information about the employer’s certified job opportunity will remain posted for a period of at least 15 calendar days, which is consistent with the period of time SWAs post job orders for intrastate and interstate clearance to recruit U.S. workers, as discussed below. The Departments continue to believe this additional notification is a reasonable and cost-efficient method of disseminating available job opportunities to a wider audience and those U.S. workers who may be interested in applying. While not meant to recreate it, this action will serve the same functional purpose as the posting on *SeasonalJobs*. To help employers who must conduct this notification requirement, DOL encourages employers to notify the OFLC NPC, at the same time notification is sent to the SWA, by sending an email to *H-2Bsupplementalvisas@dol.gov*, and including the words “H-2B TFR 2025 Recruitment” followed by the unique TLC case number in the subject line of the email.

The new job order placed with the SWA must contain the job assurances

and contents set forth in 20 CFR 655.18 for recruitment of U.S. workers at the place of employment and remain posted for at least 15 calendar days. The employer must also follow all applicable SWA instructions for posting job orders and receive applications in all forms allowed by the SWA, including online applications. The Departments have concluded that keeping the job order posted for a period of at least 15 calendar days, during the period the employer is conducting the additional recruitment steps explained below and OFLC reposts the job opportunity information, will effectively ensure U.S. workers are apprised of the job opportunity and are referred for employment, if they are willing, qualified, and available to perform the work. The minimum 15 calendar day period also is consistent with the employer-conducted recruitment activity period applicable under 20 CFR 655.40(b).

Once the SWA places the new job order on its public labor exchange system, the SWA will perform its normal employment service activities by circulating the job order for intrastate clearance, and in interstate clearance by providing a copy of the job order to other SWAs with jurisdiction over listed worksites as well as those States the OFLC CO designated in the original Notice of Acceptance issued under 20 CFR 655.33. Where the occupation or industry is traditionally or customarily unionized, the SWA will also circulate a copy of the new job order to the central office of the State Federation of Labor in the State(s) in which work will be performed, and the office(s) of local union(s) representing workers in the same or substantially equivalent job classification in the area(s) in which work will be performed, consistent with its current obligation under 20 CFR 655.33(b)(5). To facilitate an effective dissemination of these job opportunities, DOL encourages union(s) or hiring halls representing workers in occupations typically used in the H-2B program to proactively contact and establish partnerships with SWAs in order to obtain timely information on available temporary job opportunities. This will aid the SWAs' prompt and effective outreach under the rule. DOL's OFLC maintains a comprehensive directory of contact information for each SWA at <https://www.dol.gov/agencies/eta/foreign-labor/contact>.

Contact With American Job Centers

The employer also must conduct additional recruitment steps during the period of time the SWA is actively circulating the job order for intrastate

clearance. First, the employer must contact, by email or other electronic means, the nearest American Job Center(s) (AJC) serving the area of intended employment where work will commence to request staff assistance to advertise and recruit U.S. workers for the job opportunity. AJCs bring together a variety of programs providing a wide range of employment and training services for U.S. workers, including job search services and assistance for prospective workers and recruitment services for employers through the Wagner-Peyser Program. Therefore, AJCs can offer assistance to employers with recruitment of U.S. workers, and contact with local AJCs will facilitate contemporaneous and effective recruitment activities that can broaden dissemination of the employer's job opportunity through connections with other partner programs within the One-Stop System to locate qualified U.S. workers to fill the employer's labor need. For example, the local AJC, working in concert with the SWA, can coordinate efforts to contact community-based organizations in the geographic area that serve potentially qualified workers or, when a job opportunity is in an occupation or industry that is traditionally or customarily unionized, the local AJC may be better positioned to identify and circulate the job order to appropriate local union(s) or hiring hall(s), consistent with 20 CFR 655.33(b)(5). In addition, as a partner program in the One-Stop System, AJCs are connected with the State's unemployment insurance program, thus an employer's connection with the AJC will help facilitate knowledge of the job opportunity to U.S. workers actively seeking employment. When contacting the AJC(s), the employer must provide staff with the job order number or, if the job order number is unavailable, a copy of the job order.

To increase navigability and to make the process as convenient as possible, DOL offers an online service for employers to locate the nearest local AJC at <https://www.careeronestop.org/> and by selecting the "Find Local Help" feature on the main homepage. This feature will navigate the employer to a search function called "Find an American Job Center" where the city, state or zip code covering the geographic area where work will commence can be entered. Once entered and the search function is executed, the online service will return a listing of the name(s) of the AJC(s) serving that geographic area as well as a contact option(s) and an indication as to

whether the AJC is a "comprehensive" or "affiliate" center. Employers must contact the nearest "comprehensive" AJC serving the area of intended employment where work will commence or, where a "comprehensive" AJC is not available, the nearest "affiliate" AJC. A "comprehensive" AJC tends to be a large office that offers the full range of employment and business services, and an "affiliate" AJC typically is a smaller office that offers a self-service career center, conducts hiring events, and provides workshops or other select employment services for workers. Because a "comprehensive" AJC may not be available in many geographic areas, particularly among rural communities, this rule permits employers to contact the nearest "affiliate" AJC serving the area of intended employment where a "comprehensive" AJC is not available. In order to facilitate efficient access to AJC services, this rule requires that employers utilize available electronic methods to contact the nearest AJC to meet the contact and disclosure requirements in this rule.

Contact With AFL-CIO for Jobs in Traditionally or Customarily Unionized Occupation or Industry

When a job is in a traditionally or customarily unionized occupation or industry, during the time the SWA is actively circulating the job order, the employer must affirmatively contact the nearest American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) office covering the area of intended employment to provide written notice of the job opportunity and request assistance in recruiting qualified U.S. workers who may be interested in applying for the job opportunity. The employer must provide the AFL-CIO office (by mail, email, or other effective written means) a copy of the job order placed with the SWA. To determine which occupations are traditionally or customarily unionized, and to obtain information about the proper AFL-CIO office to contact,¹⁶⁵ employers should

¹⁶⁵ The Departments have determined that the requirement for employers to contact the nearest AFL-CIO office properly balances the goal of increasing U.S. worker outreach in those H-2B job opportunities that are in traditionally or customarily unionized occupations, while still providing employers with necessary guidance on recruitment requirements. The AFL-CIO is a voluntary federation of more than 60 national and international labor unions covering a substantial number of union employees. AFL-CIO, About Us, <https://aflcio.org/about-us> (last visited September 20, 2024). The H-2B job opportunities in

search the resources available on the OFLC website, under the “Customarily Unionized H–2B Occupations” tab on the lefthand side of the OFLC homepage: <https://www.dol.gov/agencies/eta/foreign-labor>.¹⁶⁶ In addition, to help employers who must conduct this additional recruitment step, employers may also contact the national AFL–CIO and request assistance in circulating the job order to the nearest AFL–CIO office covering the area of intended employment to advertise and recruit U.S. workers for the job opportunity. The most effective means of contacting the national AFL–CIO is to email the job order and request for assistance to H-2B@afclcio.org, but employers may also visit <https://afclcio.org> to obtain information on other effective means of contacting the organization for assistance. Upon receipt, the national AFL–CIO will distribute a copy of the job order, on behalf of the employer, to the most appropriate AFL–CIO office(s) serving the area of intended employment for that job opportunity.

When applicable, the employer must include information in its recruitment report confirming that either the national or nearest AFL–CIO office was contacted and notified in writing of the job opportunity or opportunities. In the recruitment report, the employer must state whether the nearest AFL–CIO office referred qualified U.S. worker(s), including the number of referrals, or indicate that it was non-responsive to

traditionally or customarily unionized occupations most frequently fall within those industries most likely to be organized or represented by AFL–CIO member unions.

Additionally, the AFL–CIO’s status as the largest federation of unions in the United States provides for comprehensive national coverage and increases the chances that a U.S. worker will be hired. See AFL–CIO Press Release, <https://afclcio.org/press/releases/afclcio-teams-wilmington-trust-and-bnymellon-expand-retirement-planning-options> (last visited September 20, 2024) (noting the AFL–CIO is “the nation’s largest federation of labor unions”). As discussed below, the SWAs circulation of relevant job orders based on their knowledge of the local labor market would provide effective outreach to other federations of unions and non-affiliated unions.

¹⁶⁶ These resources were developed based on recent information received from stakeholders indicating that collective bargaining agreements now exist in certain occupations, such as landscaping. In addition, the occupations or industries listed are ones in which the Department has typically observed substantial union presence in its program administration experience, such as occupations involved in public sector employment, construction and extraction activities, and service-related industries, where historical Bureau of Labor Statistics data has demonstrated a presence of union affiliated workers. See BLS, Economic News Release, Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry (Jan. 23, 2024), https://www.bls.gov/news.release/archives/union2_01232024.pdf.

the employer’s requests. The employer must retain all documentation establishing that it has contacted either the national or nearest AFL–CIO office and submit all such information upon request from the Departments. Documentation or evidence that would help employers establish that the appropriate AFL–CIO office was contacted, may include, but is not limited to: documentation proving the job order was shipped and delivered to the AFL–CIO office (e.g., copy of the job order along with the certificate of shipment provided by the U.S. Postal Service or other courier mail or parcel delivery services and/or any other form of delivery confirmation); evidence confirming that the job order, along with a request for assistance to recruit workers, was in fact emailed to the appropriate AFL–CIO office (e.g., copies of emails); phone records accompanied by proof of a follow-up email sending the job order to the appropriate AFL–CIO office; or copies of any correspondence exchanged (e.g., letter, email) between the employer and the AFL–CIO office regarding worker referrals.

We believe the requirement that employers contact the AFL–CIO in occupations or industries that are traditionally or customarily unionized will complement the requirement that SWAs circulate the job order to the State Federation of Labor and local unions in such situations, thereby increasing the likelihood that a U.S. worker will be recruited for the job opportunity. This is because in traditionally or customarily unionized industries and occupations, unions serve as an essential conduit for communications between U.S. workers and hiring employers and have traditionally been recognized as a reliable source of referrals of U.S. workers. Unionized applicants may additionally share information about the job opportunity with nonunionized applicants, resulting in more referrals of qualified applicants to the job opportunity. Within this context, the two requirements complement each other as the State Federations of Labor and local unions that SWAs would circulate relevant job orders to, based on their knowledge of the local labor market, are comprised of various union organizations and may not always include the AFL–CIO. Since H–2B job opportunities in traditionally or customarily unionized occupations tend to fall within those industries most likely to be organized or represented by AFL–CIO member unions, this requirement increases outreach to qualified U.S. workers. Moreover, this

requirement offers a chance for hiring employers to directly contact a potential pool of U.S. workers who are qualified and interested in the job opportunity, which can strengthen the probability that employers will locate U.S. workers suited for the job opportunity. For example, potential U.S. workers may be more inclined to contact an employer directly upon learning of the job opportunity rather than utilize the SWA as an intermediary since the application process could be quicker and demonstrates a willingness by employers to consider union workers. Direct contact between employers and unions may also initiate a dialogue between employers and unions that could lead to a future working relationship that fulfills the workforce needs of employers. Therefore, in providing timely and meaningful notice of job opportunities in traditionally or customarily unionized industries to the AFL–CIO, employers build on efforts by SWAs to circulate job orders to state and local unions, which may differ from the AFL–CIO, and thus broaden the scope of their U.S. worker outreach.

Contact With Former U.S. Workers

During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of 20 CFR 655.64 for intrastate clearance, the employer must make reasonable efforts to contact (by mail or other written effective means) its former U.S. workers that it employed in the occupation at the place of employment (except those who were dismissed for cause or who abandoned the worksite) during the period beginning January 1, 2023 until the date the I–129 petition required under 8 CFR 214.2(h)(6)(xv) is submitted. Among the employees the employer must contact are those who have been furloughed¹⁶⁷ or laid off during this period. The employer must disclose to its former employees the terms of the job order placed with the SWA and solicit their return to the job. The employer must provide the contact and disclosures required by this paragraph in a language understood by the worker, as necessary or reasonable, and in writing to ensure the recruitment effort is effective and meaningful in reaching each former U.S. worker. The Departments are requiring written communication because they believe that written contact and disclosure of the terms of the job order is more effective than oral disclosure, and

¹⁶⁷ Furloughed employees are employees the employer laid off (as the term is defined in 20 CFR 655.5 and 29 CFR 503.4), but the layoff is intended to last for a temporary period of time.

provides greater assurance that workers understand the terms and working conditions of the job opportunity and can more effectively pursue redress if they do not receive the disclosed terms and working conditions. Written communication and disclosure will also make it easier for employers to establish compliance with this requirement, if necessary.

Contact With the Bargaining Representative or Posting of the Job Order

As the employer was required to do when initially applying for its labor certification, the employer must provide a copy of the job order to the bargaining representative for its employees in the occupation and area of intended employment, consistent with 20 CFR 655.45(a), or if there is no bargaining representative, post the job order in the places and manner described in 20 CFR 655.45(b). Similar to the requirement to contact former U.S. workers, discussed above, the employer must provide the contact and disclosures required by this paragraph in a language understood by the worker, as necessary or reasonable, and in writing to ensure the recruitment effort is effective and meaningful in reaching each former U.S. worker.

Contact With Current U.S. Workers

As was required in the FY 2024 H-2B supplemental visa TFR, employers must again contact U.S. workers currently employed at the place of employment to inform them of the job opportunity and request their assistance in recruiting qualified U.S. workers who may be seeking employment. The Departments continue to believe this recruitment step is a reasonable and cost-effective method of broadening dissemination of available job opportunities and increasing the likelihood that qualified U.S. workers will apply. We believe the requirement that employers contact their current U.S. workers employed at the place(s) of employment and solicit their assistance in recruiting other qualified U.S. workers will complement the requirement that employers post the job order in the places and manner described in 20 CFR 655.45(b), enhance word-of-mouth recruiting, which is a common method of soliciting referrals of qualified U.S. workers, and increase the likelihood of locating U.S. workers suited for the job opportunity more quickly and efficiently. U.S. workers currently employed by the employer, who are more likely to be familiar with the nature of the employer's business operations and services or labor to be performed, will generally refer other U.S. workers who are qualified and may

be more inclined to contact an employer directly upon learning of the job opportunity from a family, friend, or colleague with experience working for the employer.

Accordingly, during the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of 20 CFR 655.64 for intrastate clearance, the employer must make reasonable efforts to contact (by mail or other effective written means) all U.S. workers it currently employs at the place(s) of employment under the certified TLC. The employer must disclose to each of its current U.S. workers the terms of the job order placed with the SWA, and request assistance in recruiting qualified U.S. workers who may be interested in applying for the job opportunity. The contacts, disclosures, and requests for assistance required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable, and in writing to ensure the recruitment effort is effective and meaningful in reaching each current U.S. worker.

The employer must retain all documentation establishing that it has contacted each U.S. worker it currently employs at the place(s) of employment under the certified TLC and submit all such information upon request from the Departments. Documentation or evidence that would help employers establish compliance with this regulatory requirement may include, but is not limited to the following: documentation proving the job order, along with a request for assistance to recruit workers, was shipped and delivered to each current U.S. worker's address (e.g., copy of the job order and request for assistance along with the certificate of shipment provided by the U.S. Postal Service or other courier mail or parcel delivery services and/or any other form of delivery confirmation); evidence confirming that the job order, along with a request for assistance to recruit workers, was emailed to the current U.S. worker (e.g., copies of emails); or copies of any correspondence exchanged (e.g., letter, email) between the employer and the current U.S. worker regarding referrals of other qualified U.S. workers.

The requirements to contact current and former U.S. workers and provide notice to the bargaining representative or post the job order must be conducted in a language understood by the workers, as necessary or reasonable. This requirement would apply, for example, in situations where an employer has one or more employees who do not speak English as their

primary language and who have a limited ability to read, write, speak, or understand English. This requirement would allow those workers to make informed decisions regarding the job opportunity and is a reasonable interpretation of the recruitment requirements in 20 CFR part 655, subpart A, in light of the need to ensure that the test of the U.S. labor market is as comprehensive as possible. Consistent with existing language requirements in the H-2B program under 20 CFR 655.20(l), DOL intends to broadly interpret the necessary or reasonable qualification and apply an exemption only in those situations where having the job order translated into a particular language would both place an undue burden on an employer and not significantly disadvantage the employee.

Posting of the Job Opportunity on the Employer's Website if the Employer Has a Website

Finally, as was required in the FY 2024 H-2B supplemental visa TFR, where the employer maintains a company website for its business operations, the employer must post an electronic advertisement of the job opportunity in a conspicuous location on this website.

Although the vast majority of small businesses in the United States maintain a website, the Departments acknowledge that not all employers maintain a company website.¹⁶⁸ As discussed in the prior TFR, although there is no parallel requirement for employers without a website, the Departments believe that continuing to require employers with websites to post the job announcement on their website is reasonable because this population of employers uses their websites to inform the public about their existence and/or the services they may provide. Thus, these employers' advertisement of the job opportunity, via their websites, is consistent with these employers' use of the internet/electronic means to communicate with the public. Accordingly, this recruitment requirement will continue to apply only to employers that maintain a website for business operations. For employers who must conduct this additional recruitment step, the electronic advertisement of the job opportunity on the company website must be posted in a conspicuous location. This means

¹⁶⁸ The U.S. Chamber of Commerce reports that 71% of small businesses have a website. See U.S. Chamber of Commerce, *Small Business Statistics*, available at <https://www.chamberofcommerce.org/small-business-statistics/#marketing-statistics> (accessed September 27, 2024).

access to the electronic advertisement on the company website must be clearly visible on the website's homepage or easily accessible from the website's homepage using any job search tool(s) or direct links from the homepage to a subsequent web page where other available jobs or careers are normally posted by the employer.

The Departments have concluded that keeping the electronic advertisements on company websites posted for a period of at least 15 calendar days, along with the other additional recruitment steps discussed above, will effectively ensure that U.S. workers are apprised of the job opportunity and are referred for employment, if they are willing, qualified, and available to perform the work. The minimum 15 calendar day period is also consistent with the employer-conducted recruitment activity period applicable under 20 CFR 655.40(b).

The employer must retain all documentation establishing that it has posted the electronic advertisement of the job opportunity in compliance with regulatory requirements and submit all such information upon request from the Departments. Documentation or evidence for employers to establish compliance with these regulatory requirements can include screenshots of the company website on which the advertisement appears for a period of no less than 15 days and screen shots of the web pages establishing the path that U.S. workers must follow to access the advertisement on the website.

Hiring U.S. Workers

The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until either (1) the date on which the last H-2B worker departs for the place of employment, or (2) 30 days after the last date on which the SWA job order is posted, whichever is later. Additionally, consistent with 20 CFR 655.40(a), applicants may be rejected only for lawful job-related reasons. Given that the employer, SWA, and AJC(s) will be actively engaged in conducting recruitment and broader dissemination of the job opportunity during the period of time the job order is active, this requirement provides an adequate period of time for U.S. workers to contact the employer or SWA for referral to the employer and completion of the additional recruitment steps described above. As explained above, the Departments have determined that if employers file a petition 30 or more days after their dates of need, they have not conducted recruitment recently enough for the Departments to reasonably conclude that there are

currently an insufficient number of U.S. workers qualified, willing, and available to perform the work absent additional recruitment.

Because of the abbreviated timeline for the additional recruitment required for employers whose initial recruitment has gone stale, the Departments have determined that this hiring period is necessary to approximate the hiring period under normal recruitment procedures and ensure that domestic workers have access to these job opportunities, consistent with the Departments' mandate. Additionally, given the relatively brief period during which additional recruitment will occur, additional time may be necessary for U.S. workers to have a meaningful opportunity to learn about the job opportunities and submit applications.

The Departments remind all H-2B employers that the job opportunity must be, through the recruitment period set forth in this rule, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship, as specified under 20 CFR 655.20(r). Further, employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Employers cannot provide potential H-2B workers with more favorable treatment with respect to the requirement for, and conduct of, interviews. *See* 20 CFR 655.40(d).

Any U.S. worker who applies or is referred for the job opportunity and is not considered by the employer for the job opportunity, experiences difficulty accessing or understanding the material terms and conditions of the job opportunity, or believes they have been improperly rejected by the employer may file a complaint directly with the SWA serving the area of intended employment. Each SWA maintains a complaint system for public labor exchange services, established under 20 CFR part 658, subpart E, and any complaint filed with the SWA by, or on behalf of, a U.S. worker about a specific H-2B job order will be processed under this existing complaint system.

Depending on the circumstances, the SWA may seek informal resolution by working with the complainant and the employer to resolve, for example, miscommunications with the employer to be considered for the job opportunity or other concerns or misunderstandings related to the terms and conditions of the job opportunity; or issue a formal, written determination where informal

resolution cannot be reached. In other circumstances, such as allegations involving discriminatory hiring practices or violations of other employment-related laws, the SWA will formally enter the complaint and refer the matter to an appropriate enforcement agency for prompt action. As mentioned above, DOL's OFLC maintains a comprehensive directory of contact information for each SWA that can be used to obtain more information on how to file a complaint.

Although the hiring period may require some employers to hire U.S. workers after the start of the contract period, this is not unprecedented. For example, in the H-2A program, employers have been required to hire U.S. workers through 50 percent of the contract period since at least 2010, which "enhance[s] protections for U.S. workers, to the maximum extent possible, while balancing the potential costs to employers," and is consistent with the Departments' responsibility to ensure that these job opportunities are available to U.S. workers. 74 FR 45906, 45917. The Department acknowledges that hiring workers after the start of the contract period imposes an additional cost on employers, but that cost can be lessened, in part, by the ability to discharge the H-2B worker upon hiring a U.S. worker (note, however, that an employer must pay for any discharged H-2B worker's return transportation, 20 CFR 655.20(j)(1)(ii) and 29 CFR 503.16(j)(1)(ii)). Additionally, this rule permits employers to immediately hire H-2B workers who are already present in the United States without waiting for approval of an H-2B petition, which will reduce the potential for harm to H-2B workers as a result of displacement by U.S. workers. *See* new 8 CFR 214.2(h)(31). Most importantly, a longer hiring period will ensure that available U.S. workers have a viable opportunity to apply for H-2B job opportunities. Accordingly, the Departments have determined that in affording the benefits of this temporary cap increase to businesses that are suffering irreparable harm or will suffer impending irreparable harm, it is necessary to ensure U.S. workers have sufficient time to apply for these jobs.

As in the temporary rules implementing the supplemental cap increases in prior years, employers must retain documentation demonstrating compliance with the recruitment requirements described above. Under this TFR, in accordance with 20 CFR 655.68, employers must retain documentation that demonstrates placement of a new job order with the SWA, contact with AJCs, contact with

the bargaining representative or AFL–CIO when required, contact with former U.S. workers, compliance with 20 CFR 655.45(a) or (b), contact with current U.S. workers at the place of employment, and posting of the job opportunity on the employer's website, if the employer has a website. Employers must prepare and retain a recruitment report that describes these efforts and meets the requirements set forth in 20 CFR 655.48, including the requirement to update the recruitment report throughout the recruitment and hiring period set forth in paragraph (a)(4)(viii) of 20 CFR 655.64. Employers must maintain copies of the recruitment report, attestation, and supporting documentation, as described above, for a period of 3 years from the date that the TLC was approved, consistent with the document retention requirements under 20 CFR 655.68, 20 CFR 655.56, and 29 CFR 503.17. These requirements are similar to those that apply to certain seafood employers that stagger the entry of H–2B workers under 20 CFR 655.15(f).

The Departments are committed to ensuring that all recruitment conducted in conjunction with this rule complies with the additional recruitment requirements discussed above and encourages individuals with information about that recruitment to contact DOL through the OFLC H–2B Ombudsman Program email box (*H2B.Ombudsman@dol.gov*). The H–2B Ombudsman Program facilitates the fair and equitable resolution of concerns that arise within the H–2B filing community, by conducting independent and impartial inquiries into issues related to the administration of the H–2B program. The H–2B Ombudsman Program also receives concerns and information relevant to case processing from employers, unions, and worker advocate organizations and ensures such information is appropriately referred within OFLC or to SWAs, as appropriate.

DOL actively monitors the H–2B Ombudsman Program email box, which is the best method for the public to provide information to the Department that is relevant to the processing of H–2B applications. Such information may include information about an in-process TLC application, information regarding the employer's compliance with H–2B recruitment of U.S. workers, or information bearing on an employer's irreparable harm justification. When the H–2B Ombudsman Program receives information relevant to its review of an H–2B TLC application, the information will be forwarded to the H–2B processing center. The H–2B processing

center will review the information it receives and will consider it, as appropriate.

The H–2B Ombudsman Program, however, is separate and distinct from the employment service complaint system administered by the Employment and Training Administration under regulations at 20 CFR part 658, subpart E. Any information relevant to an employment service complaint will be forwarded to the appropriate SWA. The public may also submit employment service complaints directly to the appropriate SWA; the contact information for each SWA is available at the following web page: <https://www.dol.gov/agencies/eta/foreign-labor/contact>.

Complaints regarding an employer's failure to comply with the H–2B program requirements may also be submitted to DOL's WHD. WHD has the authority to investigate the employer's attestations, as the attestations are a required part of the H–2B petition process under this rule and the attestations rely on the employer's existing, approved TLC. Where a WHD investigation determines that there has been a willful misrepresentation of a material fact or a substantial failure to meet the required terms and conditions of the attestations, WHD may institute administrative proceedings to impose sanctions and remedies, including (but not limited to) assessment of civil money penalties; recovery of wages due to workers; make-whole relief for any U.S. worker who has been improperly rejected for employment, laid off, or displaced; make-whole relief for any person who has been discriminated against; and/or debarment for 1 to 5 years. See 29 CFR 503.19, 503.20. This regulatory authority is consistent with WHD's existing enforcement authority and is not limited by the expiration date of this rule. Therefore, in accordance with the documentation retention requirements at 20 CFR 655.68, the petitioner must retain documents and records evidencing compliance with this rule, and must provide the documents and records upon request by DHS or DOL.

When conducting an investigation, WHD will generally review the employer's compliance with this rule, the H–2B program obligations in general, and any other Federal labor laws that WHD enforces (such as the Fair Labor Standards Act, which establishes minimum wage, overtime, recordkeeping and child labor obligations for most employers in the United States) and to which the employer is subject. WHD's investigations generally involve meeting

with the employer, touring the worksite, conducting confidential interviews with employees, reviewing records (including those required by 20 CFR 655.68 evidencing compliance with this rule), and, when appropriate, imposing sanctions and remedies (including back wages). For example, in the past five years (fiscal years 2019–2023), WHD collected more than \$16.7 million in H–2B back wages owed to 10,778 workers, and assessed more than \$12.4 million in H–2B civil money penalties.

Within the context of this rule, WHD's investigative tools are particularly adept for the review of alleged violations that may result in back wages and/or that require intensive fact-finding at the worksite. Additionally, WHD is well suited to investigate alleged violations that occur after the job order has closed and H–2B workers are already in the United States. For example, WHD's tools are well suited to investigate allegations that U.S. applicants were improperly rejected for the job opportunity (if supplemental recruitment was required as outlined in 20 CFR 655.64(a)(4)) after the job order has closed, as WHD may conduct employee interviews, question the employer as to why the applicant was not hired, review recruitment records, and, if a violation is substantiated, compute back wages for the improperly rejected U.S. applicant.

Additionally, WHD is well suited to investigate allegations of retaliation, as these cases involve complex fact finding and, if allegations are substantiated, may result in make-whole relief or back wages owed to the worker. An employer is prohibited from intimidating, threatening, restraining, coercing, blacklisting, discharging, or in any manner discriminating against any person who has, among other actions: filed a complaint related to H–2B rights and protections; consulted with a workers' rights center, community organization, labor union, legal assistance program, or attorney on H–2B rights or protections; or exercised or asserted H–2B rights and protections on behalf of themselves or others. 20 CFR 655.20(n) and 29 CFR 503.16(n). Examples of protected activity include making a complaint to a manager, employer, or WHD; cooperating with a WHD investigation; requesting payment of wages; refusing to return back wages to the employer; consulting with WHD or workers' rights organization; and testifying in a trial. If other laws are applicable (such as the Fair Labor Standards Act), the anti-retaliation provisions of those laws may also be applicable.

In addition to the H-2B Ombudsman Program and the employment service complaint system under 20 CFR part 658, subpart E, which are described above, workers or U.S. applicants for job opportunities who believe their rights under the H-2B program have been violated may file complaints with WHD by telephone at 1-866-487-9243 or may access the telephone number via TTY by calling 1-877-889-5627 or visit <https://www.dol.gov/agencies/whd> to locate the nearest WHD office for assistance. Complainants should be prepared to provide their name and contact information; name, address, and contact information for the employer; and details about the alleged violation. WHD maintains all complaints as confidential unless the complainant provides WHD with permission to use their name when speaking to the employer.

DHS has the authority to verify any information submitted to establish H-2B eligibility at any time before or after the petition has been adjudicated by USCIS. See, e.g., INA sections 103, 214, and 235(d) (8 U.S.C. 1103, 1184, and 1225(d)); see also 8 CFR part 103 and section 214.2(h). DHS' verification methods may include, but are not limited to, review of public records and information, contact via written correspondence or telephone, unannounced physical site inspections, and interviews. USCIS will use information obtained through verification to determine H-2B eligibility and assess compliance with the requirements of the H-2B program. USCIS will also review information received from individuals who suspect H-2B benefit fraud and abuse and reported their suspicions via the ICE Tip Form, available online at <https://www.ice.gov/webform/ice-tip-form> (last visited July 29, 2024) or via the toll-free ICE Tip Line, (866) 347-2423. Subject to the exceptions described in 8 CFR 103.2(b)(16), USCIS will provide petitioners with an opportunity to address adverse information that may result from a USCIS compliance review, verification, or site visit that occurs after a formal decision is made on a petition or after the agency has initiated an adverse action that may result in revocation or termination of an approval.

DOL's OFLC already has the authority under 20 CFR 655.70 to conduct audit examinations on adjudicated Applications for Temporary Employment Certification, including all appropriate appendices, and verify any information supporting the employer's attestations. OFLC uses audits of adjudicated Applications for Temporary Employment Certification, as authorized

by 20 CFR 655.70, to ensure employer compliance with attestations made in its Application for Temporary Employment Certification and to ensure the employer has met all statutory and regulatory criteria and satisfied all program requirements. The OFLC CO has sole discretion to choose which Applications for Temporary Employment Certification will be audited. See 20 CFR 655.70(a). Post-adjudication audits can be used to establish a record of employer compliance or non-compliance with program requirements and the information gathered during the audit assists DOL in determining whether it needs to further investigate or debar an employer or its agent or attorney from future labor certifications.

Under this rule, an employer may submit a petition to USCIS, including a valid TLC and Form ETA-9142B-CAA-9, in which the employer attests to compliance with requirements for access to the supplemental H-2B visas allocated through 8 CFR 214.2(h)(6)(xv), including that its business is suffering irreparable harm or will suffer impending irreparable harm, and that it will conduct additional recruitment, if necessary to refresh the TLC's labor market test. DHS and DOL consider Form ETA-9142B-CAA-9 to be an appendix to the Application for Temporary Employment Certification and the attestations contained on the Form ETA-9142B-CAA-9 and documentation supporting the attestations to be evidence that is incorporated into and a part of the approved TLC. Therefore, DOL's audit authority includes the authority to audit the veracity of any attestations made on Form ETA-9142B-CAA-9 and documentation supporting the attestations. In order to make certain that the supplemental visa allocation is not subject to fraud or abuse, DHS will continue to share information regarding Forms ETA-9142B-CAA-9 with DOL, consistent with existing authorities. This information sharing between DHS and DOL, along with relevant information that may be obtained from the SWA and WHD, are expected to support DOL's identification of TLCs used to access the supplemental visa allocation for closer examination of TLCs through the audit process.

In accordance with the documentation retention requirements in this rule, the petitioner must retain documents and records proving compliance with this rule, and must provide the documents and records upon request by DHS or DOL. Under this rule, DOL intends to audit a significant number of TLCs used to access the supplemental visa allocation

to ensure employer compliance with attestations, including those regarding the irreparable harm standard and additional employer conducted recruitment, required under this rule. In the event of an audit, the OFLC CO will send a letter to the employer and, if appropriate, a copy of the letter to the employer's attorney or agent, listing the documentation the employer must submit and the date by which the documentation must be sent to the CO. During audits under this rule, the CO will request documentation necessary to demonstrate the employer conducted all recruitment steps required under this rule and truthfully attested to the irreparable harm the employer was suffering or would suffer in the near future without the ability to employ all of the H-2B workers requested under the cap increase, including documentation the employer is required to retain under this rule. If necessary to complete the audit, the CO may request supplemental information and/or documentation from the employer during the course of the audit process. 20 CFR 655.70(c).

DOL relies on the employer to adhere to the H-2B regulations and fulfill its attestations as a condition of receiving a temporary labor certification, including attestations to fully cooperate with any audit, investigation, compliance review, evaluation, verification or inspection conducted by DOL. Failure to comply in the audit process may result in the revocation of the employer's certification or in debarment, under 20 CFR 655.72 and 655.73, respectively, or require the employer to undergo assisted recruitment in future filings of an Application for Temporary Employment Certification, under 20 CFR 655.71. Specifically, when an employer fails to respond to Departmental correspondence issued under 20 CFR 655.70 it may be considered to have failed to comply with the audit process or impeded the audit under 20 CFR 655.73. Where an audit examination or review of information from DHS or other appropriate agencies determines that there has been fraud or willful misrepresentation of a material fact or a substantial failure to meet the required terms and conditions of the attestations or failure to comply with the audit examination process, OFLC may institute appropriate administrative proceedings to impose sanctions on the employer. Those sanctions may result in revocation of an approved TLC, the requirement that the employer undergo assisted recruitment in future filings of an Application for Temporary

Employment Certification for a period of up to 2 years, and/or debarment from the H–2B program and any other foreign labor certification program administered by DOL for 1 to 5 years. See 20 CFR 655.71, 655.72, 655.73. Additionally, OFLC has the authority to provide any finding made or documents received during the course of conducting an audit examination to DHS, WHD, IER, or other enforcement agencies. OFLC's existing audit authority is independently authorized and is not limited by the expiration date of this rule. Therefore, in accordance with the documentation retention requirements at 20 CFR 655.68, the petitioner must retain documents and records proving compliance with this rule, and must provide the documents and records upon request by DHS or DOL.

Petitioners must also comply with any other applicable laws, such as avoiding unlawful discrimination against U.S. workers based on their citizenship status or national origin. Specifically, the failure to recruit and hire qualified and available U.S. workers on account of such individuals' national origin or citizenship status may violate INA section 274B, 8 U.S.C. 1324b.

IV. Statutory and Regulatory Requirements

A. Administrative Procedure Act

This rule is issued without prior notice and opportunity to comment and with an immediate effective date pursuant to the Administrative Procedure Act (APA). 5 U.S.C. 553(b) and (d).

1. Good Cause To Forgo Notice and Comment Rulemaking

The APA, 5 U.S.C. 553(b)(B), authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency, for good cause, finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Among other things, the good cause exception for forgoing notice and comment rulemaking “excuses notice and comment in emergency situations, or where delay could result in serious harm.” *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). Courts have found “good cause” under the APA in similar situations when an agency is moving expeditiously to avoid significant economic harm to a program, program users, or an industry. See, e.g., *Nat'l Fed'n of Fed. Emps. v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982) (holding that an agency may use the good cause exception to address “a serious threat to the financial stability of [a government]

benefit program”); *Am. Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (finding good cause when an agency bypassed notice and comment to avoid “economic harm and disruption” to a given industry, which would likely result in higher consumer prices).

Although the good-cause exception is “narrowly construed and only reluctantly countenanced,” *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992), the Departments have appropriately invoked the exception in this case due to the time exigencies resulting from the unique procedural history of the Department's authority for this action and the ongoing economic need for this rulemaking, as described further below. Overall, the Departments are bypassing notice and comment to prevent “serious economic harm to the H–2B community,” including U.S. employers, associated U.S. workers, and related professional associations, that could result from the failure to provide supplemental visas as authorized by Congress. See *Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1285 & n.12 (N.D. Fla. 2016). The Departments note that this action is temporary in nature, see *id.*,¹⁶⁹ and limits eligibility for H–2B supplemental visas to only those businesses most in need, and also protects H–2B and U.S. workers.

With respect to the supplemental allocations provisions in 8 CFR 214.2 and 20 CFR part 655, subpart A, as explained above, the Departments are acting pursuant to the extension of supplemental cap authority in Section 105 of the FY 2024 Omnibus by sections 101(6) and 106 Division A, Title I of Public Law 118–83 (Sept. 26, 2024) to FY 2025. The deadline for exercising the FY 2025 supplemental cap authority under the Continuing Appropriations and Extensions Act, 2025, is December 20, 2024 the date on which the FY 2025 continuing resolution expires. This timing concern is critical since the Departments are bypassing advance notice and comment in order to urgently address increased labor demand.¹⁷⁰

¹⁶⁹ Because the Departments have issued this rule as a temporary final rule, the supplemental cap portion of this rule—with the sole exception of the document retention requirements—will be of no effect after September 30, 2025. The ability to initiate employment with a new employer pursuant to the portability provisions of this rule expires at the end of on January 24, 2026.

¹⁷⁰ See Lydia DePillis, *Immigration Rebound Eases Shortage of Workers, Up to a Point*, The NY Times, <https://www.nytimes.com/2023/02/06/business/economy/immigration-labor.html> (Feb. 6, 2023), (“The path of immigration policy will have a substantial bearing on the nation's supply of workers, which has been expanding more slowly as native-born workers have fewer children.”).

Acting expeditiously is intended to prevent economic harm resulting from American businesses suffering irreparable harm due to a lack of a sufficient labor force. This harm would ensue if the Departments do not exercise the authority provided by the extension of supplemental cap authority. USCIS received more than enough petitions to meet the H–2B visa statutory cap for the first half of FY 2025 on September 18, 2024.¹⁷¹ Based on past years' experience, DHS anticipates that it will also receive sufficient petitions to meet the semiannual cap for the second half of the FY 2025; last year on March 7, 2024, USCIS received sufficient petitions to meet the H–2B visa statutory cap for the second half of FY 2024.¹⁷² Given the continued high demand of American businesses for H–2B workers (as discussed in this preamble), rapidly evolving economic conditions and historically high labor demand, and the limited time remaining until the expiration of the continuing resolution authorizing supplemental cap authority to help prevent further irreparable harm currently experienced by some U.S. employers or avoid impending economic harm for others, a decision to undertake notice and comment rulemaking, which would delay final action on this matter by months, would greatly complicate and potentially preclude the Departments from successfully exercising the authority created by section 105, Public Law 118–47 as extended to FY 2025 by secs. 101(6) and 106 of Public Law 118–83. If the Departments are precluded from exercising this authority, substantial economic harm will result for the reasons stated above.

The temporary portability and change of employer provisions in 8 CFR 214.2 and 274a.12 are also supported by labor market demands. Courts have found “good cause” under the APA when an agency is moving expeditiously to avoid significant economic harm to a program, program users, or an industry. Courts have held that an agency may use the good cause exception to address “a serious threat to the financial stability of [a government] benefit program,” *Nat'l Fed'n of Fed. Emps. v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982), or to avoid “economic harm and disruption” to a

¹⁷¹ See USCIS, *USCIS Reaches H–2B Cap for First Half of Fiscal Year 2025*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025> (Sept. 19, 2024).

¹⁷² See USCIS, *USCIS Reaches H–2B Cap for Second Half of FY 2024 and Announces Filing Dates for the Second Half of FY 2024 Supplemental Visas*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-second-half-of-fy-2024-and-announces-filing-dates-for-the-second-half-of> (Mar. 8, 2024).

given industry, which would likely result in higher consumer prices, *Am. Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

Finally, taking public comments on this year's temporary final rule before implementation may have limited utility given that the Departments took post-promulgation public comments during a 60-day comment period on the FY 2023 nearly identical TFR, and discussed those comments in detail in the preamble of the FY 2024 TFR. In addition, DHS is separately pursuing broader programmatic improvements in the H-2B and H-2A programs through a separate notice and comment rulemaking which includes a proposal to make portability permanent for all H-2 workers.¹⁷³

2. Good Cause To Proceed With an Immediate Effective Date

The APA also authorizes agencies to make a rule effective immediately, upon a showing of good cause, instead of imposing a 30-day delay. 5 U.S.C. 553(d)(3). The good cause exception to the 30-day effective date requirement is easier to meet than the good cause exception for foregoing notice and comment rulemaking. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992); *Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289–90 (7th Cir. 1979). An agency can show good cause for eliminating the 30-day delayed effective date when it demonstrates urgent conditions the rule seeks to correct or unavoidable time limitations. *U.S. Steel Corp.*, 605 F.2d at 290; *United States v. Gavrilovic*, 511 F.2d 1099, 1104 (8th Cir. 1977). For the same reasons set forth above expressing the need for immediate action, we also conclude that the Departments have good cause to dispense with the 30-day effective date requirement.

B. Executive Order 12866: Regulatory Planning and Review; Executive Order 14094: Modernizing Regulatory Review; and Executive Order 13563: Improving Regulation and Regulatory Review

Under E.O. 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866, as amended

by E.O. 14094, 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 \$200 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; (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. 88 FR 21879.

The Office of Management and Budget (OMB) has designated this temporary final rule a significant regulatory action under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094, because its annual effects on the economy exceed \$200 million in any year of the analysis. Accordingly, OMB has reviewed this rule.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Summary

With this temporary final rule (TFR), DHS is authorizing the release of up to an additional 64,716 total H-2B visas to be allocated throughout FY 2025. In accordance with the FY 2025 continuing resolution extending the authority provided in section 105 of the FY 2024 Omnibus, DHS is allocating the supplemental visas in the following manner:

TABLE 1—ALLOCATION OF SUPPLEMENTAL VISAS

Supplement	Number of visas
FY25 First Half Returning Worker Allocation	20,716

TABLE 1—ALLOCATION OF SUPPLEMENTAL VISAS—Continued

Supplement	Number of visas
FY25 Second Half Returning Worker Allocation	19,000
FY25 Second Half Returning Worker Allocation #2— (Late season Filers)	5,000
FY25 Country-specific Allocation (available whole FY)	20,000
FY25 Total Supplemental Visas	64,716

As with previous H-2B visa supplements, these visas will be available to businesses that: (1) show that there are an insufficient number of U.S. workers to meet their needs throughout FY 2025; (2) attest that their businesses are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on their petition; and (3) petition for returning workers who were issued an H-2B visa or were otherwise granted H-2B status in FY 2022, 2023, or 2024, unless the H-2B worker is a national of one of the countries included in the country-specific allocation. Additionally, up to 20,000 visas may be granted to workers from countries included in the country-specific allocation who are exempt from the returning worker requirement. This TFR aims to prevent irreparable harm to certain U.S. businesses by allowing them to hire additional H-2B workers within FY 2025.

The estimated total costs to petitioners range from \$8,798,321 to \$11,964,750. The estimated total cost to the Federal Government is \$270,960. Therefore, DHS estimates that the total cost of this rule ranges from \$9,069,281 to \$12,235,710. Total transfers from filing fees made by petitioners to the Government are \$12,088,515. The benefits of this rule are diverse, though some of them are difficult to quantify. Some of these benefits include:

- Employers benefit from this rule significantly through increased access to H-2B workers;
- Customers and others benefit directly or indirectly from increased access;
- Some American workers may benefit to the extent that they do not lose jobs through the reduced or closed business activity that might occur if fewer H-2B workers were available;
- Some American workers may benefit from the additional recruitment activities that the rule requires certain petitioners to complete, to the extent

¹⁷³ On September 20, 2023, DHS issued *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*, Notice of Proposed Rulemaking (NPRM), 88 FR 65040, 65066. In that NPRM, DHS proposed to extend portability to H-2A and H-2B workers on a permanent basis.

that these activities could result in some U.S. workers being hired.

- The existence of a lawful pathway for up to 20,000 temporary workers from countries included in the country-

specific allocation is likely to provide multiple benefits in terms of U.S. policy with respect to those countries; and

- The Federal Government benefits from increased evidence regarding

attestations. Table 2 provides a summary of the provisions in this rule and some of their impacts.

TABLE 2—SUMMARY OF THE TFR’S PROVISIONS AND ECONOMIC IMPACT

Current provision	Changes resulting from the provisions of the TFR	Expected costs of the provisions of the TFR	Expected benefits of the provisions of the TFR
—The current statutory cap limits H–2B visa allocations to 66,000 workers a year.	—The amended provisions will allow for an additional 64,716 H–2B temporary workers. Up to 20,000 of the 64,716 additional visas will be reserved for workers who are nationals of the countries included in the country-specific allocation and will be exempt from the returning worker requirement.	—The total estimated opportunity cost of time to file Form I–129 (Petition for a Nonimmigrant Worker) by human resource specialists is approximately \$552,801. The total estimated opportunity cost of time to file Form I–129 and Form G–28 will range from approximately \$1,383,848 if filed by in-house lawyers to approximately \$2,385,900 if filed by outsourced lawyers. The total estimated opportunity cost of time associated with filing additional petitions ranges from \$1,936,649 to \$2,938,701 depending on the filer. —The total estimated opportunity cost of time associated with filing Form I–907 (Request for Premium Processing Service) if it is filed with Form I–129 is \$40,908 if filed by human resource specialists. The total estimated costs associated with filing Form I–907 would range from approximately \$86,625 if filed by an in-house lawyer to approximately \$149,347 if filed by an outsourced lawyer. The total estimated opportunity cost of time associated with requesting premium processing ranges from approximately \$127,533 to approximately \$190,255. —The total estimated costs of this provision to petitioners range from \$2,064,183 to \$3,128,957, depending on the filer.	—Form I–129 petitioners would be able to hire temporary workers needed to prevent their businesses from suffering irreparable harm. —Businesses that are dependent on the success of other businesses that are dependent on H–2B workers would be protected from the repercussions of local business failures. —Some American workers may benefit to the extent that they do not lose jobs through the reduced or closed business activity that might occur if additional H–2B workers were not available. —Additional recruitment activities may result in some U.S. workers being hired.
n/a	—Petitioners will be required to fill out Form ETA–9142B in order to utilize the 5,000 late season H–2B visas allocated under the rule.	—The estimated cost for late season petitioners to file Form ETA–9142B ranges from \$63,347 to \$94,469 depending on the filer.	—An approved Form ETA–9142B is required before filing a Form I–129 to request H–2B workers.
n/a	—Petitioners will be required to fill out the newly created Form ETA–9142–B–CAA–9, Attestation for Employers Seeking to Employ H–2B Nonimmigrant Workers Under Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47, as extended by sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83.	—The total estimated cost to petitioners to complete and file Form ETA–9142–B–CAA–9 is approximately \$1,992,995.	—Form ETA–9142–B–CAA–9 will serve as initial evidence to DHS that the petitioner meets the irreparable harm standard and returning worker requirements.

TABLE 2—SUMMARY OF THE TFR'S PROVISIONS AND ECONOMIC IMPACT—Continued

Current provision	Changes resulting from the provisions of the TFR	Expected costs of the provisions of the TFR	Expected benefits of the provisions of the TFR
n/a	—Certain Petitioners will be required to conduct an additional round of recruitment.	—The total estimated cost to petitioners to conduct an additional round of recruitment is approximately \$296,968.	—The additional round of recruitment will ensure that a U.S. worker who is willing and able to fill the position is not replaced by a non-immigrant worker. Furthermore, additional recruitment activities may result in some U.S. workers being hired.
Temporary Portability	—An H-2B nonimmigrant who is physically present in the United States may port to another employer.	—The total estimated opportunity cost of time to file Form I-129 by human resource specialists is approximately \$45,462. The total estimated opportunity cost of time to file Form I-129 and Form G-28 will range from approximately \$113,387 if filed by in-house lawyers to approximately \$195,491 if filed by outsourced lawyers. —The total estimated costs associated with filing Form I-907 if it is filed with Form I-129 is \$3,355 if filed by human resource specialists. The total estimated costs associated with filing Form I-907 would range from approximately \$7,101 if filed by an in-house lawyer to approximately \$12,243 if filed by an outsourced lawyer. —The total estimated costs associated with the portability provision ranges from \$169,305 to \$256,551, depending on the filer. —DHS may incur some additional adjudication costs as more petitioners file Form I-129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form, which have been accounted for in costs to petitioners.	—H-2B workers present in the United States will be able to port to another employer and potentially extend their stay and, therefore, earn additional wages. —An H-2B worker with an employer that is not complying with H-2B program requirements would have additional flexibility in porting to another employer's certified position. —This provision would ensure employers will be able to hire the H-2B workers they need.
n/a	—DHS and DOL intend to conduct several audits during the period of temporary need to verify compliance with H-2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule.	—Employers will have to comply with audits for an estimated total opportunity cost of time of \$159,090. —It is expected both DHS and DOL will be able to shift resources to be able to conduct these audits without incurring additional costs. However, the Departments will incur opportunity costs of time. The audits are expected to take a total of approximately 3,000 hours and cost approximately \$270,960.	—DOL and DHS audits will yield evidence of the efficacy of attestations in enforcing compliance with H-2B supplemental cap requirements. —Conducting a significant number of audits will discourage uncorroborated attestations. —Conducting a significant number of audits will ensure that increasing the number of H-2B employers through the supplemental cap does not undermine the integrity of the H-2B program.
Additional Scrutiny	—Some petitioners will provide additional evidence.	—Some employers will need to print and ship additional evidence to USCIS. Opportunity costs of time associated with compiling such evidence are unavailable due to the unique fact pattern in each instance and a lack of data regarding the time to comply. The estimated cost to submit additional evidentiary requirements is \$20,740.	—Additional scrutiny of employers with past H-2B program violations are aimed at ensuring compliance with program requirements, reducing harms to both U.S. workers and H-2B workers.
Familiarization Cost	—Petitioners or their representatives will familiarize themselves with the rule.	—Petitioners or their representatives will need to read and understand the rule at an estimated total opportunity cost of time that ranges from \$4,031,694 to \$6,014,981.	—Petitioners will have the necessary information to take advantage of and comply with the provisions of this rule.

TABLE 2—SUMMARY OF THE TFR'S PROVISIONS AND ECONOMIC IMPACT—Continued

Current provision	Changes resulting from the provisions of the TFR	Expected costs of the provisions of the TFR	Expected benefits of the provisions of the TFR
Total Costs		Total cost of the rule to petitioners ranges from \$8,798,321 to \$11,964,750 depending on the filer. Total costs of the rule to government are \$270,960. Total costs of the rule range from \$9,069,281 to \$12,235,710.	

Source: USCIS and DOL analysis.

Background and Purpose of the Temporary Rule

The H–2B visa classification program was designed to serve U.S. businesses that are unable to find enough U.S. workers to perform nonagricultural work of a temporary nature. For a nonimmigrant worker to be admitted into the United States under this visa classification, the hiring employer is required to: (1) receive a temporary labor certification (TLC) from the Department of Labor (DOL); and (2) file Form I–129 with DHS. The temporary nature of the services or labor described on the approved TLC is subject to DHS review during adjudication of Form I–129.¹⁷⁴ The INA sets the annual number of H–2B visas for workers performing temporary nonagricultural work at 66,000 to be distributed semiannually beginning in October (33,000) and in April (33,000).¹⁷⁵ Any unused H–2B visas from the first half of the fiscal year are available for employers seeking to hire H–2B workers during the second half of the fiscal year. However, any unused H–2B visas from one fiscal year do not carry over into the next and

would therefore not be made available.¹⁷⁶ Once the statutory H–2B visa cap limit has been reached, petitioners must wait until the next half of the fiscal year, or the beginning of the next fiscal year, for additional visas to become available.

On September 25, 2024, the President signed the Continuing Appropriations and Extensions Act, 2025. Sections 101(6) and 106 reauthorize section 105 of Div. G, Title I of the Further Consolidated Appropriations Act, 2024, permitting the Secretary of Homeland Security, under certain circumstances, to increase the number of H–2B visas available to U.S. employers, notwithstanding the established statutory numerical limitation. After consulting with the Secretary of Labor, the Secretary of the Homeland Security has determined it is appropriate to exercise his discretion and raise the H–2B cap by up to a total of 64,716 visas for FY 2025. The total supplemental allocation will be divided into four separate allocations: one for the first half of FY 2025, two for the second half of FY 2025 (a first one for employment from April 1 through May 14, 2025, and

a second one for those with start dates on or after May 15, 2025), and a full fiscal year allocation for workers from the countries included in the country-specific allocation. As with previous supplemental allocations, USCIS will make these supplemental visas available only to businesses that qualify and meet the requirements for the supplemental visas. These businesses must attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H–2B workers requested on their petition.

This TFR will cover the entirety of FY 2025. While the Departments cannot predict with certainty what labor market conditions will be during the second half of FY 2025, they believe that the structure of this TFR is reasonable because: (1) the availability of the second half FY supplemental visas is contingent on the exhaustion of the second half FY statutory cap, (2) strong historical demand for H–2B workers, and (3) mainstream estimates of labor market conditions for FY 2025 indicate a continuation of labor market tightness from a historical perspective.¹⁷⁷

TABLE 3—DOL CERTIFIED WORKER DEMAND *

Fiscal year	Number of certifications	Number of DOL certified workers requested	DOL certified workers with requested start dates April 1 or later
2020	5,903	115,116	88,466
2021	7,772	159,081	100,522
2022	10,674	205,037	127,654
2023	12,126	220,552	128,115
2024	13,143	227,226	127,324
5-year Average **	9,924	185,402	114,416

Source: USCIS analysis.

Note:

¹⁷⁴ Revised effective 1/18/2009; *Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers; Correction*, 73 FR 78104 (Jan. 19, 2009); *Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers; Correction*, 74 FR 2837 (Jan 18, 2009).

¹⁷⁵ See INA 214(g)(1)(B), 8 U.S.C. 1184(g)(1)(B) and INA 214(g)(4), 8 U.S.C. 1184(g)(4).

¹⁷⁶ A temporary labor certification (TLC) approved by the Department of Labor must accompany an H–2B petition. The employment start date stated on the petition must match the start date listed on the TLC. See 8 CFR 214.2(h)(6)(iv)(A) and (D).

¹⁷⁷ September 2023 Federal Open Market Committee (FOMC) projections for unemployment

rate in 2024 ranged from 4.2 to 4.5% with central tendency more tightly clustered between 4.3 and 4.4%. See <https://www.federalreserve.gov/monetarypolicy/fomcprojtab120240918.htm> (last accessed Sept. 25, 2024).

* USCIS analysis of OFLC Performance data. All data are for applications listed as having a case status of “Certification”, “Partial Certification”, “Determination—Certification”, or “Determination—Partial Certification.” Furthermore, data have been adjusted to a fiscal year using the employment begin date provided on the TLC application. As such, counts differ from counts based on the Disclosure Files of OFLC H–2B Performance data. This adjustment was made so that the OFLC data more closely align to USCIS I–129 data. Data for FY 2024 include data through the end of quarter 3.

** Averages are rounded to the nearest whole number.

With respect to historical demand for H–2B workers, Table 3 makes two important points supporting the Departments’ decision to structure this rule in a manner that covers the entire fiscal year. First, Table 3 shows that H–2B demand, as represented by the number of workers requested on certified TLCs, has outpaced the statutorily capped allotment of H–2B visas, which demonstrates that, in aggregate, sufficient demand exists for the entire supplemental allocation that the Departments are making available. To that end, the 5-year average of workers requested on certified TLCs, 185,402, would still completely exhaust the total supplemental allocation made available by the TFR. Second, Table 3 demonstrates that within a given fiscal year, demand for H–2B workers is particularly strong in the second half of the fiscal year. On average over the last 5 fiscal years, H–2B employers have requested 114,416 employees with start dates on April 1 or later, which would completely exhaust the 24,000 total supplemental H–2B visas¹⁷⁸ explicitly set aside for workers with employment start dates in the second half of FY 2025. Given these conditions, the Departments believe that the decision to authorize a second half supplement is reasonable.

For the visas being made available by the rule, the Departments have determined that up to 44,716 of the 64,716 supplemental visas will be limited to returning H–2B returning workers for nationals of any country. These individuals must be workers who were issued H–2B visas or were otherwise granted H–2B status in fiscal

years 2022, 2023, or 2024. The 44,716 visas for returning workers will be divided into three separate allocations that will be available to petitioners over the fiscal year. The first allocation is comprised of 20,716 visas for returning workers with requested start dates between October 1, 2024, and March 31, 2025. These visas will be available to petitioners immediately upon the publication of the rule. The second allocation is comprised of 19,000 visas for returning workers with requested start dates between April 1, 2025, and May 14, 2025. These visas will be available to petitioners 15 calendar days after the second half statutory cap of 33,000 visas is reached. The third allocation is comprised of 5,000 visas for returning workers with requested start dates between May 15, 2025, and September 30, 2025. These visas will be available to petitioners 45 calendar days after the second half statutory cap of 33,000 visas is reached.

The inclusion of an allocation of visas starting on or after May 15 specifically for those petitioners with employment needs is in response to trends in TLC data and conclusions gleaned from the two years that a late season filer allocation has been available to petitioners with late season employment needs. As stated in the FY 2023 H–2B TFR, the relative demand in FY 2016 for workers with start dates later in the fiscal year was higher relative to recent years. More specifically, data for FY 2016 show that approximately 45.51 percent of certified TLCs requested workers with start dates in April while 17.93 percent of certified TLCs requested workers with start dates after

April.¹⁷⁹ Table 4 and Table 5 demonstrate that the 5-year average for these values has moved away from April start dates after the implementation of a late season filer allocation. The decrease in the relative prevalence of April 1 start dates since the implementation of a late season filer allocation supports the rationale for providing such an allocation in response to concerns that, absent such an allocation, employers with late season employment needs could be effectively shut out of the H–2B program. Under DOL regulations, employers must apply for a TLC 75 to 90 days before the start date of work.¹⁸⁰ Employers must have a DOL-approved TLC before filing their Form I–129 request for H–2B workers with USCIS. Because the availability of H–2B visas is limited by statute and regulation, USCIS generally announces to the public when it has received a sufficient number of I–129 petitions, and by extension H–2B beneficiaries, to exhaust the respective H–2B visa allocation.¹⁸¹ USCIS rejects H–2B I–129 petitions that are received after USCIS has determined that a given allocation has been fully utilized. Functionally, this means a subset of petitioners who would employ H–2B workers, given the chance, may not be able to do so because the available visas have already been allocated before they can petition USCIS for the necessary workers.

Using OFLC TLC data, Table 4 illustrates that relative to previous fiscal years that did *not* include a late-season filer allocation, requested H–2B employment start dates have become less concentrated in April.¹⁸²

TABLE 4—DOL CERTIFIED WORKER DEMAND FOR APRIL START DATES

Fiscal year	Certified DOL workers requested	DOL certified workers with requested start dates in April	Percentage of DOL certified workers with requested start dates in April
2020	115,116	82,757	71.89
2021	159,081	94,656	59.50
2022	205,037	118,381	57.74
2023	220,552	112,639	51.07

¹⁷⁹ See Table 4 and Table 5, <https://www.federalregister.gov/documents/2022/12/15/2022-27236/exercise-of-time-limited-authority-to-increase-the-numerical-limitation-for-fy-2023-for-the-h-2b> (accessed September 20, 2024).

¹⁸⁰ See 20 CFR 655.15(b).

¹⁸¹ See USCIS, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-early-second-half-of-fy-2024>, for example (accessed October 25, 2024).

¹⁸² Tables 4 and 5 contain USCIS analysis of OFLC Performance data. All data are for applications listed as having a case status of “Certification”, “Partial Certification”, “Determination—Certification”, or “Determination—Partial Certification.”

Furthermore, data have been adjusted to a fiscal year using the employment begin date provided on the TLC application. As such, counts differ from counts based on the Disclosure Files of OFLC H–2B Performance data. This adjustment was made so that the OFLC data more closely align to USCIS I–129 data.

TABLE 4—DOL CERTIFIED WORKER DEMAND FOR APRIL START DATES—Continued

Fiscal year	Certified DOL workers requested	DOL certified workers with requested start dates <i>in</i> April	Percentage of DOL certified workers with requested start dates in April
2024	227,226	113,760	50.06

TABLE 5—DOL CERTIFIED WORKER DEMAND FOR POST-APRIL START DATES

Fiscal year	Certified DOL workers requested	DOL certified workers with requested start dates <i>after</i> April	Percentage of DOL certified workers with requested start dates after April
2020	115,116	5,709	4.96
2021	159,081	5,866	3.69
2022	205,037	9,273	4.52
2023	220,552	15,476	7.02
2024	227,226	13,564	5.97

As part of the FY 2023 and FY 2024 H–2B TFRs, USCIS made 10,000 and 5,000 visas available to petitioners with start dates later in the season (on or after May 15), respectively. The goal for having a separate allocation was to address this potentially inequitable situation and to take steps towards collecting information through that rule to determine whether such a structural barrier exists. Approximately 72% of the late season filer allocation for FY 2023 was utilized (as defined by the number of beneficiaries of Form I–129 petitions approved for this allocation relative to the total allocation of 10,000 visas).¹⁸³ However, visa issuance data shows that only slightly more than 5,000 visas were actually issued under the FY 2023 late season filer allocation. This compares to the late season filer allocation for FY 2024, for which USCIS approved more beneficiaries of Form I–129 petitions than the total number of visas available, although, as of October 2024, still has not received a sufficient number of petitions to achieve issuance of 5,000 visas according to its projections.¹⁸⁴ In sum, the data from the last two H–2B TFRs indicate that including another late-season filer allocation of 5,000 visas for FY 2025 is reasonable.

The Secretaries have determined that up to 20,000 of the 64,716 additional visas will be reserved for workers who are nationals of the countries included in the country-specific allocation and

that these 20,000 workers will be exempt from the returning worker requirement. These visas will be available for the entirety of the fiscal year and do not have limitations regarding the requested start date of the H–2B beneficiaries' employment within the fiscal year. If the 20,000-visa limit has been reached, a petitioner may request H–2B visas for workers who are nationals of the countries included in the country-specific allocation but these workers must be returning workers.

The Departments note that they are committed to analyzing the results and impacts of this and future H–2B supplemental visa TFRs in a holistic manner and have attempted to fully quantify the potential impacts of the FY 2025 TFR, where time and data allow.

Population

This rule will affect those employers that file Form I–129 on behalf of nonimmigrant workers they seek to hire under the H–2B visa program. More specifically, this rule will affect those employers that can establish that their business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H–2B workers requested on their petition and without the exercise of authority that is the subject of this rule. Due to historical trends and strong demand for the H–2B program (see Table 3), the Departments believe it is reasonable to assume that the population of eligible

petitioners for these additional 64,716 visas will generally be the same population as those employers that would already complete the steps to receive an approved TLC irrespective of this rule. One exception is the population of late season employers, described below.

This rule will also have additional impacts on the population of H–2B employers and workers presently in the United States by permitting some H–2B workers to port to another certified H–2B employer. These H–2B workers will continue to earn wages and gaining employers will continue to obtain necessary workers.

a. Population That Will File a Form I–129, Petition for a Nonimmigrant Worker

As discussed above, the population that will file a Form I–129 is necessarily limited to those business that have already established that their business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H–2B workers requested on their petition and without the exercise of authority that is the subject of this rule. Because the number of supplementary visas available is finite, USCIS has generally informed the public when the number of submitted Form I–129 petitions and, by extension, the number of respective beneficiaries is enough to exhaust the supply of supplemental visas.¹⁸⁵

¹⁸³ USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 09/2023, TRK 12921.

Calculation: 7,198 beneficiaries approved under the late-season filer allocation/10,000 visas allocated = 71.98% utilization.

¹⁸⁴ Under the late season allocation for FY 2024, USCIS approved 6,314 beneficiaries, while DOS issued 3,906 visas. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, ELIS,

CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221.

¹⁸⁵ See, e.g., <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-second-half-of-fy-2024-and-announces-filing-dates-for-the-second-half-of>.

TABLE 6—FORM I-129 PETITIONS PER SUPPLEMENTAL H-2B VISA ALLOCATION

Supplement	Supplement amount	Total form I-129 petitions received	Total form I-129 beneficiaries	Beneficiaries per form I-129 petition
2019 Supplement	30,000	2,700	33,239	12.31
2021 Supplement *	22,000	2,180	31,274	14.35
2022 Supplement **	55,000	4,045	61,868	15.29
2023 Supplement	64,716	4,902	79,057	16.13
2024 Supplement	64,716	5,399	86,036	15.94
Average				14.80

Source: USCIS Analysis.

Notes:

* In Fiscal Year 2021, the Departments authorized a single supplemental allocation which was divided between returning workers and workers from specific countries. See <https://www.federalregister.gov/documents/2021/05/25/2021-11048/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2021-numerical-limitation-for-the> (accessed September 25, 2024).

** In Fiscal Year 2022, the Departments authorized two separate supplemental allocations of H-2B Visas, with each being further divided between returning workers and workers from specific countries. See <https://www.federalregister.gov/documents/2022/01/28/2022-01866/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2022-numerical-limitation-for-the>; <https://www.federalregister.gov/documents/2022/05/18/2022-10631/exercise-of-time-limited-authority-to-increase-the-numerical-limitation-for-second-half-of-fy-2022>.

Table 6 shows the total supplemental H-2B visa allocations issued by the Departments in each fiscal year since FY 2019,¹⁸⁶ including the total number of petitions and the total number of beneficiaries submitted under a supplement in each fiscal year. Using the historical average of 14.80 beneficiaries per petition for supplemental visas derived in Table 6, USCIS anticipates that 4,373 Forms I-129 will be submitted as a result of this temporary final rule.¹⁸⁷

Using the estimates in Table 6, the Departments further estimate that the allocation of 5,000 visas for late season filers made by this TFR, addressing the disadvantage these employers face in accessing scarce H-2B visas, will result in 338 additional Form ETA-9142B requests¹⁸⁸ to DOL, assuming each late season visa requestor submits a TLC and Form I-129 for the historic average of 14.80 beneficiaries. The number of additional Form ETA-9142B requests

could be lower if some petitioners that would have filed for April 1 start dates in the absence of this TFR change their behavior to request late season workers as a result of this allocation. Alternatively, this number could be higher if late season filers are at a larger disadvantage in accessing H-2B workers than recent data suggests. The Departments commit to monitoring the utilization of these late season FY25 visas to determine if this carve-out promotes access, as anticipated, to employers with needs for workers later in the second half of the fiscal year but that have faced obstacles to accessing H-2B workers in the past.

DHS recognizes that some employers will be required to submit two Form I-129 petitions if they choose to request H-2B workers under both the returning worker and country-specific caps. At this time, DHS cannot predict how many employers will choose to take advantage of more than one allocation,

and therefore recognizes that the number of petitions may be underestimated.

b. Population That Files Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative

If a lawyer or accredited representative submits Form I-129 on behalf of the petitioner, Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, must accompany the Form I-129 submission.¹⁸⁹ Using data from FY 2020 to FY 2024, we estimate that a lawyer or accredited representative will file 47.73 percent of Form I-129 petitions. Table 7 shows the percentage of Form I-129 H-2B petitions that were accompanied by a Form G-28. Therefore, we estimate that in-house or outsourced lawyers will file 2,087 Forms I-129 and Forms G-28, and that human resources (HR) specialists will file 2,286 Forms I-129.¹⁹⁰

TABLE 7—FORM I-129 H-2B PETITION RECEIPTS THAT WERE ACCOMPANIED BY FORM G-28, FY 2020–2024

Fiscal year	Number of Form I-129 H-2B petitions accompanied by a Form G-28	Total number of Form I-129 H-2B petitions received	Percent of Form I-129 H-2B petitions accompanied by a Form G-28
2020	2,434	5,422	44.89%
2021	4,228	9,160	46.16
2022	5,984	12,392	48.29
2023	6,837	13,744	49.75
2024	6,048	12,773	47.35

¹⁸⁶ FY 2020 was not included due to the suspension of additional H-2B visas to be released in 2020. DHS also noted that the Department of State had suspended routine visa services.

¹⁸⁷ Calculation for expected petitions. If each Form I-129 petition requests 14.80 workers, we'd expect to see 4,373 petitioners exhausting the

64,716 supplement allocated this year: 64,716/14.80 = 4,373 (rounded)

¹⁸⁸ Calculation for expected late season TLCs: 5,000 visas/14.80 beneficiaries per petition = 338 TLCs (rounded).

¹⁸⁹ USCIS, *Filing Your Form G-28*, <https://www.uscis.gov/forms/filing-your-form-g-28>.

¹⁹⁰ Calculation: 4,373 estimated additional petitions * 47.73 percent of petitions filed by a lawyer = 2,087 (rounded) petitions filed by a lawyer.

Calculation: 4,373 estimated additional petitions—2,087 petitions filed by a lawyer = 2,286 petitions filed by an HR specialist.

TABLE 7—FORM I-129 H-2B PETITION RECEIPTS THAT WERE ACCOMPANIED BY FORM G-28, FY 2020–2024—
Continued

Fiscal year	Number of Form I-129 H-2B petitions accompanied by a Form G-28	Total number of Form I-129 H-2B petitions received	Percent of Form I-129 H-2B petitions accompanied by a Form G-28
Total	25,531	53,491	47.73

Source: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 08/2024, TRK 15749.

c. Population That Files Form I-907, Request for Premium Processing Service

Employers may use Form I-907, Request for Premium Processing Service, to request faster processing of their Form I-129 petitions for H-2B visas. Table 8 shows the percentage of

Form I-129 H-2B petitions that were filed with a Form I-907. Using data from FY 2020 to FY 2024, DHS estimates that approximately 91.19 percent of Form I-129 H-2B petitioners will file a Form I-907 requesting premium processing. Based on this historical data, DHS estimates that 3,988

Forms I-907 will be filed with the Forms I-129 as a result of this rule.¹⁹¹ Of these 3,988 premium processing requests, we estimate that in-house or outsourced lawyers will file 1,903 Forms I-907 and HR specialists or an equivalent occupation will file 2,085.¹⁹²

TABLE 8—FORM I-129 H-2B PETITION RECEIPTS THAT WERE ACCOMPANIED BY FORM I-907, FY 2020–2024

Fiscal year	Number of Form I-129 H-2B petitions accompanied by Form I-907	Total number of Form I-129 H-2B petitions received	Percent of Form I-129 H-2B petitions accompanied by Form I-907
2020	4,341	5,422	80.06%
2021	8,650	9,160	94.43
2022	11,773	12,392	95.00
2023	12,078	13,744	87.88
2024	11,936	12,773	93.45
5-Year Total	48,778	53,491	91.19

Source: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 08/2024, TRK 15749.

d. Population That Files Form ETA-9142-B-CAA-9, Attestation for Employers Seeking To Employ H-2B Nonimmigrant Workers Under Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118-47, as extended by sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118-83

Petitioners seeking to take advantage of this FY 2025 H-2B supplemental visa cap will need to file a Form ETA-9142-B-CAA-9 attesting that their business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H-2B workers requested on the petition, comply with third-party notification, and maintain required records, among other requirements. DOL estimates that each of the 4,373 petitions will need to be

accompanied by Form ETA-9142-B-CAA-9 and petitioners filing these petitions and attestations will incur burdens complying with the evidentiary requirements.

e. Population of Late Season Employers That File Form ETA-9142B, Application for Temporary Employment Certification

As Table 3 above demonstrated, historical data strongly indicate that there will be sufficient demand such that only those petitioners that utilize the late season allocation of supplemental visas will need to file an additional Form ETA-9142B. Assuming that the historical average of 14.80 beneficiaries per I-129 petition holds, 338 petitioners¹⁹³ will need to file Form ETA-9142B as a direct result of the provision reserving 5,000 visas for beneficiaries of these employers. Given estimates from Table 7 of the percentage

of Form I-129 H-2B petitions accompanied by a Form G-28, we estimate that the number of Form ETA-9142B in-house or outsourced lawyers will file is 161 and that the number of Form ETA-9142B human resources (HR) specialists will file is 177.¹⁹⁴

f. Population That Must Undergo Additional Recruitment Activities

An employer that files Form ETA-9142B-CAA-9 and the I-129 petition 30 or more days after the certified start date of work must conduct additional recruitment of U.S. workers. This consists of placing a new job order with the State Workforce Agency (SWA), contacting the relevant American Job Center (AJC), contacting former U.S. workers, contacting the bargaining representative or posting the job order in the places and manner described in 20 CFR 655.45(b) if there is no bargaining representative, contacting

¹⁹¹ Calculation: 4,373 estimated additional petitions * 91.19 percent premium processing filing rate = 3,988 (rounded) additional Form I-907.

¹⁹² Calculation: 3,988 additional Form I-907 * 47.73 percent of petitioners represented by a lawyer = 1,903 (rounded) additional Form I-907 filed by a lawyer.

Calculation: 3,988 additional Form I-907—1,903 additional Form I-907 filed by a lawyer = 2,085 additional Form I-907 filed by an HR specialist.

¹⁹³ Calculation for expected late season TLCs: 5,000 late season visas/14.80 beneficiaries per petition = 338 TLCs (rounded).

¹⁹⁴ Calculation: 338 estimated additional requests * 47.73 percent of petitions filed by a lawyer (see) = 161 (rounded) ETA-9142-B requests filed by a lawyer.

Calculation: 338 estimated additional requests—161 requests filed by a lawyer = 177 requests filed by an HR specialist.

current U.S. workers, posting the job to the company’s website if it maintains one and, if applicable, contacting the AFL–CIO.

The Departments assume that, due to the timing of the publication of the rule, only petitioners that file for H–2B workers under the first half supplemental allocation of 20,716 workers will incur burdens associated with this additional recruitment. Using the average number of beneficiaries per Form I–129 petition established in Table 6, the Departments estimate that the population of petitioners that would need to fulfill the additional recruitment requirements would be 1,400.¹⁹⁵

g. Population Affected by the Portability Provision

The population affected by this provision are nonimmigrants in H–2B status who are present in the United States and the employers with valid TLCs seeking to hire H–2B workers. We use the population of 66,000 H–2B workers authorized by statute and the 64,716 additional H–2B workers authorized by this rule as a proxy for the H–2B population that could be currently present in the United States.¹⁹⁶ DHS uses the number of Forms I–129 filed for extension of stay due to change of employer relative to the Forms I–129

filed for new employment from FY 2016 to FY 2020, the five years prior to the implementation of the first portability provision in a H–2B supplemental cap TFR, to estimate the baseline rate. We compare the average rate from FY 2016–FY 2020 to the average rate from FY 2021–FY 2024. Table 9 presents the number of Forms I–129 filed for extensions of stay due to change of employer and Forms I–129 filed for new employment for Fiscal year 2016 FY through FY 2020. The average rate of extension of stay due to change of employer compared to new employment is approximately 12.6 percent.

TABLE 9—NUMBERS OF FORM I–129 H–2B PETITIONS FILED FOR EXTENSION OF STAY DUE TO CHANGE OF EMPLOYER AND FORM I–129 H–2B PETITIONS FILED FOR NEW EMPLOYMENT, FY 2016–FY 2020

Fiscal year	Form I–129 H–2B petitions filed for extension of stay due to change of employer	Form I–129 H–2B petitions filed for new employment	Rate of extension to stay due to change of employer filings relative to new employment filings (%)
2016	427	5,750	7.4
2017	556	5,298	10.5
2018	744	5,136	14.5
2019	812	6,252	13.0
2020	804	3,997	20.1
Total	3,343	26,433	12.6

Source: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 08/2024, TRK 15749.

In FY 2021, the first year an H–2B supplemental cap included a portability provision, 1,113 Forms I–129 were filed for extension of stay due to change of employer compared to 7,206 Forms I–129 filed for new employment.¹⁹⁷ In FY 2022, 1,795 Forms I–129 were filed for extension of stay due to change of employer compared to 9,231 Forms I–129 filed for new employment.¹⁹⁸ In FY 2023, 2,277 Forms I–129 were filed for extension of stay due to change of employer compared to 9,895 Forms I–

129 filed for new employment.¹⁹⁹ In FY 2024, 2,181 Forms I–129 were filed for extension of stay due to change of employer compared to 9,097 Forms I–129 filed for new employment.²⁰⁰ Over the period when a portability provision was in place for H–2B workers, the rate of Form I–129 for extension of stay due to change of employer relative to new employment is 20.8 percent.²⁰¹ This is above the 12.6 percent rate expected without a portability provision. We estimate that 20.8 percent is the

expected rate in periods with a portability provision in the supplemental visa allocation. Using 4,373 as our estimate for the number of Forms I–129 filed for H–2B new employment in FY 2024, we estimate that 551 Forms I–129 would be filed for extension of stay due to change of employer in absence of this provision.²⁰² With this portability

¹⁹⁵ Calculation: 20,716 workers in the 1st half returning working supplemental allocation/14.80 workers per petitioner = 1,400 (rounded) petitioners required to undertake additional recruitment.
¹⁹⁶ H–2B workers may have varying lengths in time approved on their H–2B visas. This number may overestimate H–2B workers who have already completed employment and departed and may underestimate H–2B workers not reflected in the current cap and long-term H–2B workers. In FY 2023, USCIS approved 407 requests for change of status to H–2B, and Customs and Border Protection (CBP) processed 1,053 crossings of visa-exempt H–2B workers. See *Characteristics of H–2B Nonagricultural Temporary Workers FY2023 Report to Congress*, <https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY23-Characteristics-Report.pdf> (accessed September 25, 2024). DHS assumes some of these workers, along with current workers with a valid H–2B visa under the cap,

could be eligible to port under this new provision. DHS does not know the exact number of H–2B workers who would be eligible to port at this time but uses the cap and supplemental cap allocations as a possible proxy for this population.
¹⁹⁷ USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 08/2024, TRK 15749.
¹⁹⁸ See *Id.*
¹⁹⁹ See *Id.*
²⁰⁰ See *Id.*
²⁰¹ Calculation, Step 1: 1,113 Form I–129 petitions for extension of stay due to change of employer FY 2021 + 1,795 Form I–129 petitions for extension of stay due to change of employer in FY 2022 + 2,277 Form I–129 petitions for extension of stay due to change of employer FY 2023 + 2,181 Form I–129 petitions for extension of stay due to change of employer FY 2024 = 7,366 Form I–129

petitions filed extension of stay due to change of employer in portability provision years.
Calculation, Step 2: 7,206 Form I–129 petitions filed for new employment in FY 2021 + 9,231 Form I–129 petitions filed for new employment in FY 2022 + 9,895 Form I–129 petitions filed for new employment in FY 2023 + 9,097 Form I–129 petitions filed for new employment in FY 2024 = 35,429 Form I–129 petitions filed for new employment in portability provision years
Calculation, Step 3: 7,366 extension of stay due to change of employment petitions/35,429 new employment petitions = 20.8 percent rate of extension of stay due to change of employment to new employment (rounded).
²⁰² Calculation: 4,373 Form I–129 H–2B petitions filed for new employment * 12.6 percent = 551 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, no portability provision.

provision, we estimate that 910 Forms I-129 would be filed for extension of stay due to change of employer,²⁰³ which results in a difference of 359 additional Forms I-129 as a result of this provision.²⁰⁴ As previously estimated, we expect that about 47.73 percent of Form I-129 petitions will be filed by an in-house or outsourced lawyer. Therefore, we expect that a lawyer will file 171 of these petitions and an HR specialist or equivalent occupation will file the remaining 188.²⁰⁵ Previously in this analysis, we estimated that about 91.19 percent of Form I-129 H-2B petitions are filed with Form I-907 for premium processing. As a result of this portability provision, we expect that an additional 327 Forms I-907 will be filed.²⁰⁶ We expect a lawyer to file 156 of those Forms I-907 and an HR specialist to file the remaining 171.²⁰⁷

h. Population Affected by the Audits

Under this time-limited FY 2025 H-2B supplemental cap rule, DHS intends to conduct a minimum of 150 audits of employers hiring H-2B workers under this TFR. While this number of TFR-related audits is lower than previous years' TFR-related audits, DHS has increased the number of targeted site visits it conducts on H-2B petitioners under the regular H-2B program. Specifically, in addition to the 150 audits DHS will perform under this TFR, DHS will also routinely conduct at least 150 targeted site visits annually to H-2B petitioners to determine compliance with H-2B program

requirements overall. During site visits, FDNS officers visit the work location, conduct in-person interviews, and review documents. These targeted H-2B site visits are conducted outside of the supplemental cap program, but overlap may exist between petitioners who file under the regular cap and the TFR. These increased targeted site visits, taken together with the audits conducted under this TFR, will increase oversight into the integrity of the H-2B program overall. Separately, DOL intends to conduct 100 audits of employers hiring H-2B workers under this TFR. The determination of which employers will be audited will be done at the discretion of the Departments, though the agencies will coordinate so that no employer is audited by both DOL and DHS. Therefore, the Federal Government expects to conduct a total of 250 audits on employers that petition for H-2B workers under this TFR.²⁰⁸

i. Population Sffected by Additional Scrutiny

DHS expects that petitioners that have been cited by WHD for H-2B program violations will undergo additional scrutiny from USCIS. To estimate the number of firms expected to undergo increased scrutiny, we utilize DOL's Wage and Hour Compliance Action Data.²⁰⁹ The data available is for concluded cases. Table 10 presents the number of employers that were cited for H-2B violations that have a worker protection violation end date in FY 2019–2023. The worker protection violation end date is established based on the “findings end date,” which represents the date that the last worker protection violation occurred in the concluded case. During FY 2019–2023, an average of 72 (rounded) employers were cited for H-2B violations with a worker protection violation by the end date each year. USCIS intends to request evidence from employers cited for H-2B violations with a worker protection violation end date in the last two years. Therefore, for purposes of this analysis, we expect 144 petitioners will undergo additional scrutiny from USCIS.²¹⁰

²⁰⁸ These 250 audits are separate and distinct from WHD's investigations pursuant to its existing enforcement authority.

²⁰⁹ Available at https://enforcedata.dol.gov/views/data_catalogs.php (accessed September 5, 2024).

²¹⁰ It is possible not every employer that has been cited for an H-2B violation in the last two years will petition for H-2B employees under this supplemental cap authority. DHS considers an upper limit of 144 to be a reasonable estimate of the number of petitioners that will undergo additional scrutiny.

TABLE 10—EMPLOYERS WITH H-2B VIOLATIONS WITH WORKER PROTECTION VIOLATION END DATE IN FY 2019–2023

Fiscal year	Employers cited for H-2B violations with worker protection violation end date in fiscal year
2019	124
2020	89
2021	55
2022	70
2023	22
5-year Average (rounded)	72

Source: USCIS analysis of DOL Wage and Hour Compliance Action Data.

j. Population Expected To Familiarize Themselves With This Rule

DHS expects employers that have filed for TLCs to familiarize themselves with this rule. Table 3 shows that the average number of certifications over the last five fiscal years is 9,924. We use the TLC population, rather than the estimated 4,373 expected to file a Form I-129 petition, because employers that have applied for TLCs would need to familiarize themselves with the rule in order to determine whether or not to subsequently file a Form I-129 petition.

We expect a HR specialist, in-house lawyer, or outsourced lawyer will perform familiarization with the rule at the same rate as petitioners that file a Form G-28. As discussed above, an estimated 47.73 percent of petitioners are submitted by lawyers. Therefore, we estimate that 4,737 lawyers and 5,187 HR specialists will incur familiarization costs.²¹¹

Cost-Benefit Analysis

The provisions of this rule require the submission of a Form I-129 H-2B petition. The costs for this form include the opportunity cost of time to complete and submit the form.²¹² The estimated time to complete and file Form I-129 for H-2B classification is 4.56 hours.²¹³ A U.S. employer, a U.S. agent, or a foreign employer filing through the U.S. agent

²¹¹ Calculation for lawyers: 9,924 estimated applicants * 47.73 percent represents by a lawyer = 4,737 (rounded) represented by a lawyer.

Calculation for HR specialists: 9,924 approved, pending, and projected applicants—4,737 represented by a lawyer = 5,187 represented by an HR specialist.

²¹² Filing fees are not considered costs to society. These fees have been accounted for as a transfer from petitioners to USCIS.

²¹³ The public reporting burden for this form is 2.487 hours for Form I-129 and an additional 2.07 hours for H Classification Supplement, totaling 4.56 hours (rounded). See Form I-129 instructions at <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf> (accessed August 13, 2024).

²⁰³ Calculation: 4,373 Form I-129 H-2B petitions filed for new employment * 20.8 percent = 910 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, with a portability provision.

²⁰⁴ Calculation: 910 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, with a portability provision—551 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, no portability provision = 359 Form I-129 H-2B petition increase as a result of portability provision.

²⁰⁵ Calculation, Lawyers: 359 additional Form I-129 due to portability provision * 47.73 percent of Form I-129 for H-2B positions filed by an attorney or accredited representative = 171 (rounded) estimated Form I-129 filed by a lawyer.

Calculation, HR specialist: 359 additional Form I-129 due to portability provision—171 estimated Form I-129 filed by a lawyer = 188 estimated Form I-129 filed by an HR specialist.

²⁰⁶ Calculation: 359 Form I-129 H-2B petitions * 91.19 percent premium processing filing rate = 327 (rounded) Forms I-907.

²⁰⁷ Calculation, Lawyers: 327 Forms I-907 * 47.73 percent filed by an attorney or accredited representative = 156 (rounded) Forms I-907 filed by a lawyer.

Calculation, HR specialists: 327 Forms I-907—156 Forms I-907 filed by a lawyer = 171 Forms I-907 filed by an HR specialist.

must file the petition. DHS estimates that an in-house or outsourced lawyer will file 47.73 percent of Form I–129 H–2B petitions, and an HR specialist or equivalent occupation will file the remainder (52.27 percent). DHS presents estimated costs for HR specialists filing Form I–129 petitions and an estimated range of costs for in-house lawyers or outsourced lawyers filing Form I–129 petitions.

To estimate the total opportunity cost of time to HR specialists who complete and file Form I–129, DHS uses the mean hourly wage rate of HR specialists of \$36.57 as the base wage rate.²¹⁴ If petitioners hire an in-house or outsourced lawyer to file Form I–129 on their behalf, DHS uses the mean hourly wage rate \$84.84 as the base wage rate.²¹⁵ Using the most recent BLS data, DHS calculated a benefits-to-wage multiplier of 1.45 to estimate the full wages to include benefits such as paid leave, insurance, and retirement.²¹⁶ DHS multiplied the average hourly U.S. wage rate for HR specialists and for in-house lawyers by the benefits-to-wage multiplier of 1.45 to estimate total compensation to employees. The total compensation for an HR specialist is \$53.03 per hour, and the total compensation for an in-house lawyer is \$123.02 per hour.²¹⁷ In addition, DHS

recognizes that an entity may not have an in-house lawyer and may seek outside counsel to complete and file Form I–129 on behalf of the petitioner. Therefore, DHS presents a second wage rate for lawyers labeled as outsourced lawyers. DHS recognizes that the wages for outsourced lawyers may be much higher than in-house lawyers and therefore uses a higher compensation-to-wage multiplier of 2.5 for outsourced lawyers.²¹⁸ DHS estimates the total compensation for an outsourced lawyer is \$212.10 per hour.²¹⁹ If a lawyer submits Form I–129 on behalf of the petitioner, Form G–28 must accompany the Form I–129 petition.²²⁰ DHS estimates the time burden to complete and submit Form G–28 for a lawyer is 50 minutes (0.83 hour, rounded).²²¹ For this analysis, DHS adds the time to complete Form G–28 to the opportunity cost of time to lawyers for filing Form I–129 on behalf of a petitioner. This results in a time burden of 5.39 hours for in-house lawyers and outsourced lawyers to complete Form G–28 and Form I–129.²²² Therefore, the total opportunity cost of time per petition for an HR specialist to complete and file Form I–129 is approximately \$241.82, for an in-house lawyer to complete and file Forms I–129 and G–28 is about \$663.08, and for an outsourced lawyer

to complete and file is approximately \$1,143.22.²²³

a. Transfers

i. Transfers From Petitioners to the Government

The provisions of this rule require the submission of a Form I–129 H–2B petition. The transfers for this form include the filing costs to submit the form. In previous years, all filers of the Form I–129 paid a standard fee. As of April 1, 2024, the fee structure for I–129 H–2B petitions has changed, and now takes into account whether petitioners are named or unnamed, as well as the characteristics of the petitioner based on size. Additionally, petitioners pay a variable Asylum Processing Fee based on the identity of the petitioner based on entity type. All petitioners pay an additional Fraud Prevention and Detection Fee of \$150.²²⁴ The new fee structure is summarized in Table 11 below. These filing fees are not a cost to society or an expenditure of new resources but a transfer from the petitioner to USCIS in exchange for agency services. DHS anticipates that petitioners will file 4,373 Forms I–129 due to the rule's supplemental visa allocation and an additional 359 Forms I–129 due to the rule's portability provision.

TABLE 11—FORM I–129 FILING FEES BY PETITIONER TYPE

Petitioner type	Base fee	Fraud prevention and detection fee	Asylum processing fee	Total fee
H–2B Named Non-Small Employer or Nonprofit	\$1,080	\$150	\$600	\$1,830
H–2B Named Small Employer	540	150	300	990

²¹⁴ U.S. Department of Labor, Bureau of Labor Statistics, “May 2023 National Occupational Employment and Wage Statistics” Human Resources Specialist (13–1071), Mean Hourly Wage, available at https://www.bls.gov/news.release/archives/ocwage_04032024.pdf (accessed October 25, 2024).

²¹⁵ U.S. Department of Labor, Bureau of Labor Statistics, “May 2023 National Occupational Employment and Wage Estimates” Lawyers (23–1011), Mean Hourly Wage, available at https://www.bls.gov/news.release/archives/ocwage_04032024.pdf (accessed October 25, 2024).

²¹⁶ Calculation: \$46.21 mean Total Employee Compensation per hour for civilian workers/\$31.80 mean Wages and Salaries per hour for civilian workers = 1.45 benefits-to-wage multiplier. See Economic News Release, Bureau of Labor Statistics, U.S. Department of Labor, Employer Costs for Employee Compensation—June 2024 Table 1. Employer Costs for Employee Compensation by ownership, Civilian workers, available at https://www.bls.gov/news.release/archives/eecc_09102024.pdf (accessed October 25, 2024).

²¹⁷ Calculation, HR specialist: \$36.57 mean hourly wage * 1.45 benefits-to-wage multiplier = \$53.03 hourly total compensation (hourly opportunity cost of time).

Calculation, In-house Lawyer: \$84.84 mean hourly wage * 1.45 benefits-to-wage multiplier =

\$123.02 hourly total compensation (hourly opportunity cost of time).

²¹⁸ The DHS ICE “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter” acknowledges that “the cost of hiring services provided by an outside vendor or contractor is two to three times more expensive than the wages paid by the employer for that service produced by an in-house employee,” based on information received in public comment to that rule. We believe the explanation and methodology used in the Final Small Entity Impact Analysis (SEIA) remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule: *Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis*, 73 FR 63843 (Oct. 28, 2008), available at <https://www.regulations.gov/document/ICEB-2006-0004-0921> (accessed September 25, 2024). See also *Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 87 FR 4722 (Jan. 28, 2022), available at <https://www.regulations.gov/document/DHS-2022-0010-0001> (accessed September 25, 2024).

²¹⁹ Calculation, Outsourced Lawyer: \$84.84 mean hourly wage * 2.5 benefits-to-wage multiplier =

\$212.10 hourly total compensation (hourly opportunity cost of time).

²²⁰ USCIS, Filing Your Form G–28, <https://www.uscis.gov/forms/filing-your-form-g-28> (accessed September 25, 2024).

²²¹ USCIS, G–28, Instructions for Notice of Entry of Appearance as Attorney or Accredited Representative, <https://www.uscis.gov/sites/default/files/document/forms/g-28instr.pdf>.

Calculation: 50 minutes/60 minutes per hour = 0.83 hour (rounded).

²²² Calculation: 0.83 hour to file Form G–28 + 4.56 hours to file Form I–129 = 5.39 hours to file both forms.

²²³ Calculation, HR specialist files Form I–129: \$53.03 hourly opportunity cost of time * 4.56 hours = \$241.82 opportunity cost of time per petition.

Calculation, In-house Lawyer files Form I–129 and Form G–28: \$123.02 hourly opportunity cost of time * 5.39 hours = \$663.08 opportunity cost of time per petition.

Calculation, Outsourced Lawyer files Form I–129 and Form G–28: \$212.10 hourly opportunity cost of time * 5.39 hours = \$1,143.22 opportunity cost of time per petition.

²²⁴ See Form I–129 instructions at <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf> (accessed September 4, 2024). See also 8 U.S.C. 1184(c)(13).

TABLE 11—FORM I-129 FILING FEES BY PETITIONER TYPE—Continued

Petitioner type	Base fee	Fraud prevention and detection fee	Asylum processing fee	Total fee
H-2B Named Nonprofit	540	150	0	690
H-2B Unnamed Non-Small Employer or Nonprofit	580	150	600	1,330
H-2B Unnamed Small Employer	460	150	300	910
H-2B Unnamed Nonprofit	460	150	0	610

Source: USCIS, Form I-129 instructions at <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf> (accessed September 4, 2024). See also 8 USC 1184(c)(13).

Using a historical average of petitioners requesting named versus unnamed beneficiaries from FY 2021–FY2024, DHS estimates that 6 percent will request named beneficiaries and 94 percent will request unnamed beneficiaries. Based on analysis conducted as part of the USCIS 2024 Fee Rule, DHS assumes that 30 percent of I-129 H-2B petitioners have 26 or more employees, 55 percent have 25 or fewer employees, and 15 percent have non-profit status.²²⁵ This equates to 1,312 petitioners with 26 or more employees,²²⁶ 2,405 petitioners with 25 or fewer employees,²²⁷ and 656 non-profit petitioners filing Forms I-129 as part of the supplemental allocation.²²⁸ USCIS assumes that the percentage of named versus unnamed beneficiaries does not vary by employer size or nonprofit status. Thus, by multiplying the percentages of requests of named versus unnamed beneficiaries by the number of petitioners by characteristic, this equates to 79 petitioners with 26 or more employees requesting named beneficiaries,²²⁹ 1,233 petitioners with 26 or more employees requesting unnamed beneficiaries,²³⁰ 144 petitioners with 25 or fewer employees requesting named beneficiaries,²³¹ 2,261 petitioners with 25 or fewer employees

requesting unnamed beneficiaries,²³² 39 non-profit petitioners requesting named beneficiaries,²³³ and 617 non-profit petitioners requesting unnamed beneficiaries as part of the supplemental allocation.²³⁴ Additionally, DHS estimates that 359 additional Forms I-129 will be filed due to the portability provision of this rule. Petitions filed under the portability provision must request named beneficiaries. Thus, DHS estimates that this population will consist of 108 petitioners with 26 or more employees requesting named beneficiaries,²³⁵ 197 petitioners with 25 or fewer employees requesting named beneficiaries,²³⁶ and 54 non-profit petitioners requesting named beneficiaries.²³⁷

The total transfers from petitioners to the government for filing Forms I-129 H-2B petitioners are \$4,817,740.²³⁸ Transfers from petitioners to the Government related to the filing of Forms I-907 as a result of the rule are \$7,270,775.²³⁹ Total transfers from petitioners to the Government are \$12,088,515.²⁴⁰

²²⁵ Calculation: 2,405 petitioners with 25 or fewer employees * 94 percent unnamed beneficiaries = 2,261 (rounded).

²²⁶ Calculation: 656 non-profit petitioners * 6 percent unnamed beneficiaries = 39 (rounded).

²²⁷ Calculation: 656 non-profit petitioners * 94 percent unnamed beneficiaries = 617 (rounded).

²²⁸ Calculation: 359 expected additional Forms I-129 * 30 percent petitioners with 26 or more employees = 108 (rounded).

²²⁹ Calculation: 359 expected additional Forms I-129 * 55 percent petitioners with 25 or fewer employees = 197 (rounded).

²³⁰ Calculation: 359 expected additional Forms I-129 * 15 percent non-profit petitioners = 54 (rounded).

²³¹ Calculation: 187 petitioners with 26 or more employees requesting named beneficiaries * \$1,830 + 1,233 petitioners with 26 or more employees requesting unnamed beneficiaries * \$1,330 + 341 petitioners with 25 or fewer employees requesting named beneficiaries * \$990 + 2,261 petitioners with 25 or fewer employees requesting unnamed beneficiaries * \$910 + 93 non-profits requesting named beneficiaries * \$690 + 617 non-profits requesting unnamed beneficiaries * \$610 = \$4,817,740

²³² Calculation: \$1,685 per petition * 4,315 Forms I-907 = \$7,270,775

²³³ Calculation: \$4,817,740 + \$7,270,775 = \$12,088,515.

b. Cost to Petitioners

As mentioned in *Section 3*, the estimated population impacted by this rule is 4,373 eligible petitioners that are projected to apply for the additional 64,716 H-2B visas, with 20,000 of those additional visas reserved for employers that will petition for workers who are nationals of the countries included in the country-specific allocation, who are exempt from the returning worker requirement.

i. Costs to Petitioners To File Form I-129 and Form G-28

As discussed above, DHS estimates that HR specialists will file an additional 2,286 petitions using Form I-129 and lawyers will file an additional 2,087 petitions using Form I-129 and Form G-28. DHS estimates the total cost to file Form I-129 petitions if filed by HR specialists is \$552,801 (rounded).²⁴¹ DHS estimates the total cost to file Form I-129 petitions and Form G-28 if filed by lawyers will range from \$1,383,848 (rounded) if only in-house lawyers file these forms, to \$2,385,900 (rounded) if only outsourced lawyers file them.²⁴² Therefore, the estimated total cost to file Form I-129 and Form G-28 range from \$1,936,649 and \$2,938,701.²⁴³

ii. Costs To File Form I-907

Employers may use Form I-907 to request premium processing of Form I-129 petitions for H-2B visas. The filing fee for Form I-907 for H-2B petitions is

²⁴¹ Calculation, HR specialist: \$241.82 cost per petition * 2,286 Form I-129 = \$552,801 (rounded) total cost.

²⁴² Calculation, In-house Lawyer: \$663.08 cost per petition * 2,087 Form I-129 and Form G-28 = \$1,383,848 (rounded) total cost.

Calculation, Outsourced Lawyer: \$1,143.22 cost per petition * 2,087 Form I-129 and Form G-28 = \$2,385,900 (rounded) total cost.

²⁴³ Calculation: \$552,801 total cost of Form I-129 filed by HR specialists + \$1,383,848 total cost of Form I-129 and Form G-28 filed by in-house lawyers = \$1,936,649 estimated total costs to file Form I-129 and G-28.

Calculation: \$552,801 total cost of Form I-129 filed by HR specialists + \$2,385,900 total cost of Form I-129 and G-28 filed by outsourced lawyers = \$2,938,701 estimated total costs to file Form I-129 and G-28.

²²⁵ See Table 25 of the Fee Rule Regulatory Impact Analysis at <https://www.regulations.gov/document/USCIS-2021-0010-8179> (accessed October 28, 2024).

²²⁶ Calculation: 4,373 expected additional Forms I-129 * 30 percent petitioners with 26 or more employees = 1,312 (rounded).

²²⁷ Calculation: 4,373 expected additional Forms I-129 * 55 percent petitioners with 25 or fewer employees = 2,405 (rounded).

²²⁸ Calculation: 4,373 expected additional Forms I-129 * 15 percent non-profit petitioners = 656 (rounded).

²²⁹ Calculation: 1,312 petitioners with 26 or more employees * 6 percent unnamed beneficiaries = 79 (rounded).

²³⁰ Calculation: 1,312 petitioners with 26 or more employees * 94 percent unnamed beneficiaries = 1,233 (rounded).

²³¹ Calculation: 2,405 petitioners with 25 or fewer employees * 6 percent unnamed beneficiaries = 144 (rounded).

\$1,685, and the time burden for completing the form is 22 minutes (0.35 hour).²⁴⁴ Using the wage rates established previously, the opportunity cost of time to file Form I-907 is approximately \$19.62 for an HR specialist, \$45.52 for an in-house lawyer, and \$78.48 for an outsourced lawyer.²⁴⁶

As discussed above, DHS estimates that HR specialists will file an additional 2,085 Form I-907 and lawyers will file an additional 1,903 Form I-907. DHS estimates the total cost of Form I-907 filed by HR specialists is about \$40,908 (rounded).²⁴⁷ DHS estimates the total cost to file Form I-907 filed by lawyers range from about \$86,625 (rounded) for only in-house lawyers, to \$149,347 (rounded) for only outsourced lawyers.²⁴⁸ The estimated total cost to file Form I-907 range from \$127,533 and \$190,255.²⁴⁹

iii. Cost to Late Season Employers Filing Form ETA-9142B

In addition to the costs for employers projected to request TLCs irrespective of this rule, the population of 338 late season employers that would not otherwise request H-2B workers will file Form ETA-9142B as a precondition to utilizing the late season allocation of H-2B visas made available by the rule. There is no filing fee for Form ETA-9142B, and the time burden for completing the form, including Appendix A, Appendix B, Appendix C, Appendix D, and record keeping, is 2

hours and 10 minutes (2.17 hours).²⁵⁰ DHS estimates the total cost of Form ETA-9142B filed by HR specialists is about \$20,368 (rounded).²⁵¹ DHS estimates the total cost to file Form ETA-9142B by lawyers range from about \$42,979 (rounded) for only in-house lawyers, to \$74,101 (rounded) for only outsourced lawyers.²⁵² The estimated total cost to file Form ETA-9142B range from \$63,347 and \$94,469.²⁵³

iv. Cost To File Form ETA-9142-B-CAA-9

Form ETA-9142-B-CAA-9 is an attestation form that includes recruiting requirements, the irreparable harm standard, and document retention obligations. DOL estimates the time burden for completing and signing the form is 0.25 hours, 0.25 hours for retaining records, and 0.50 hours to comply with the returning workers' attestation, for a total time burden of 1 hour. Using the \$53.03 hourly total compensation for an HR specialist, the opportunity cost of time for an HR specialist to complete the attestation form, notify third parties, and retain records relating to the returning worker requirements is approximately \$53.03.²⁵⁴ Employers are also required to send OFLC and AFL-CIO the ETA case number when filing a petition with DHS. DOL estimates the time burden for this task is 10 minutes (0.17 hours) for an HR specialist. The opportunity cost of time for an HR specialist to send OFLC and AFL the ETA case number is

approximately \$9.02.²⁵⁵ The total opportunity cost of time for filing Form ETA-9142-B-CAA-9 and emailing the ETA case number to both OFLC and the AFL-CIO is \$74.256.

Additionally, the form requires that petitioners assess, prepare a detailed written statement, and document supporting evidence for meeting the irreparable harm standard, and retain those documents and records, which we assume will require the resources of a financial analyst (or another equivalent occupation). Using the same methodology previously described for wages, the mean hourly wage for a financial analyst is \$54.30,²⁵⁷ and the estimated hourly total compensation for a financial analyst is \$78.74.²⁵⁸ DOL estimates the time burden for these tasks is at least 4 hours, and 1 hour for gathering and retaining documents and records, for a total time burden of 5 hours. Therefore, the total opportunity cost of time for a financial analyst to assess, document, and retain supporting evidence is approximately \$393.70.²⁵⁹

As discussed previously, DHS believes that the 4,373 Form I-129 petitions required to exhaust the number of supplemental visas made available in this rule represents the number of potential employers that will request to employ H-2B workers under this rule. This number of petitions is a reasonable proxy for the number of employers that may need to review and sign the attestation. Using this estimate for the total number of certifications, we estimate the opportunity cost of time for completing the attestation and sending the ETA case number to OFLC and AFL-CIO for HR specialists is approximately \$271,345 (rounded) and for financial analysts is about \$1,721,650 (rounded).²⁶⁰

²⁴⁴ The filing fee is a transfer from the petitioner requesting premium processing and proxy for the total costs to USCIS.

²⁴⁵ See Form I-907 instructions at <https://www.uscis.gov/sites/default/files/document/forms/i-907instr.pdf> (accessed September 25, 2024).

Calculation: 22 minutes/60 minutes per hour = 0.37 (rounded) hour.

²⁴⁶ Calculation, HR specialist Form I-907: \$53.03 hourly opportunity cost of time * 0.37 hour = \$19.62 opportunity cost of time per request.

Calculation, In-house Lawyer Form I-907: \$123.02 hourly opportunity cost of time * 0.37 hour = \$45.52 opportunity cost of time per request.

Calculation, Outsourced Lawyer Form I-907: \$212.10 hourly opportunity cost of time * 0.37 hour = \$78.48 opportunity cost of time per request.

²⁴⁷ Calculation, HR specialist: \$19.62 opportunity cost of time per request * 2,085 Form I-907 = \$40,908 (rounded) total cost of Form I-907 filed by HR specialists.

²⁴⁸ Calculation, In-house Lawyer Form I-907: \$45.52 hourly opportunity cost of time * 1,903 applications = \$86,625.

Calculation, Outsourced Lawyer Form I-907: \$78.48 hourly opportunity cost of time * 1,903 applications = \$149,347.

²⁴⁹ Calculation: \$40,908 total cost of Form I-907 filed by HR specialists + \$86,625 total cost of Form I-907 filed by in-house lawyers = \$127,533 estimated total costs to file Form I-907.

Calculation: \$40,908 total cost of Form I-129 filed by HR specialists + \$149,347 total cost of Form I-907 filed by outsourced lawyers = \$190,255 estimated total costs to file Form I-907.

²⁵⁰ The time burden estimate of 130 minutes is as follows: 9142-B—55 minutes, Appendix A—15 minutes, Appendix B—15 minutes, Appendix C—20 minutes, Appendix D—10 minutes, Record Keeping—15 minutes. See Form ETA-9142-B at <https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Form-ETA-9142B-Instructions-1205-0509.pdf> (accessed August 22, 2024).

²⁵¹ Calculation, HR specialist: \$53.03 per hour * 2.17 hours * 177 Form ETA-9142-B = \$20,368 (rounded) total cost of Form ETA-9142-B filed by HR specialists.

²⁵² Calculation, In-house Lawyer Form ETA-9142-B: \$123.02 per hour * 2.17 hours * 161 applications = \$42,979 (rounded). Calculation, Outsourced Lawyer Form ETA-9142-B: \$212.10 per hour * 2.17 hours * 161 applications = \$74,101 (rounded).

²⁵³ Calculation: \$20,368 total cost of Form ETA-9142-B filed by HR specialist + \$42,979 total cost of Form ETA-9142-B filed by In-house Lawyer = \$63,347 estimated total costs to file Form ETA-9142-B.

Calculation: \$20,368 total cost of Form ETA-9142-B filed by HR specialist + \$74,101 total cost of Form ETA-9142-B filed by Outsourced Lawyer = \$94,469 estimated total costs to file Form ETA-9142-B.

²⁵⁴ Calculation: \$53.03 hourly opportunity cost of time * 1-hour time burden for the new attestation form and notifying third parties and retaining records related to the returning worker requirements = \$53.03.

²⁵⁵ Calculation: \$53.03 hourly opportunity cost of time * 0.17 hours to send OFLC and AFL-CIO the ETA case number = \$9.02 (rounded).

²⁵⁶ Calculation: \$53.03 + \$9.02 = \$62.05.

²⁵⁷ See U.S. Department of Labor, Bureau of Labor Statistics, "May 2023 National Occupational Employment and Wage Statistics" Financial and Investment Analysts (13-2051), https://www.bls.gov/news.release/archives/ocwage_04032024.pdf (accessed October 25, 2024).

²⁵⁸ Calculation: \$54.30 mean hourly wage for a financial analyst * 1.45 benefits-to-wage multiplier = \$78.74 (rounded).

²⁵⁹ Calculation: \$78.74 estimated total compensation for a financial analyst * 5 hours to meet the requirements of the irreparable harm standard = \$393.70.

²⁶⁰ Calculations, HR specialists: \$62.05 opportunity cost of time to comply with attestation requirements and to send the ETA case number to OFLC and AFL-CIO * 4,373 estimated additional petitions = \$271,345 (rounded) total cost to comply with attestation requirements.

Calculation, Financial Analysts: \$393.70 opportunity cost of time to comply with attestation requirements * 4,373 estimated additional petitions

The estimated total cost to file Form ETA-9142B-CAA-9 and comply with the attestation is approximately \$1,992,995.²⁶¹

v. Cost To Conduct Recruitment

An employer that files Form ETA-9142B-CAA-99 and the I-129 petition 30 or more days after the certified start date of work must conduct additional recruitment of U.S. workers. This consists of: (1) placing a new job order with the State Workforce Agency (SWA), (2) contacting the relevant American Job Center (AJC), (3) contacting the AFL-CIO if applicable, (4) contacting former U.S. workers, (5) recruiting U.S. workers as provided in § 655.45(a) and (b), (6) contacting current employees for referrals, and (7) placing the available job opportunity on the employer's website if the employer maintains a website for its business.

Specifically, the employer must place a new job order for the job opportunity with the SWA serving the area of intended employment. During the period the SWA is actively circulating the job order, employers must also contact, by email or other available electronic means, the nearest local AJC to request staff assistance advertising and recruiting qualified U.S. workers for the job opportunity, and to provide to the AJC the unique identification number associated with the job order placed with the SWA.

If the occupation is traditionally or customarily unionized, employers must provide written notification of the job opportunity to the nearest American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) office covering the area of intended employment, by providing a copy of the job order, and request assistance in recruiting qualified U.S. workers for the job opportunity.

Employers are required to make reasonable efforts to contact, by mail or other effective means, their former U.S. workers, including those workers who were furloughed and laid off, beginning January 1, 2023. Employers must disclose the terms of the job order to these workers as required by the rule.

The employer must provide a copy of the job order to the bargaining representative for its employees in the occupation and area of intended

employment, consistent with 20 CFR 655.45(a), or if there is no bargaining representative, post the job order in the places and manner described in 20 CFR 655.45(b).

Employers are also required to contact current employees regarding available job opportunities for referrals.

Finally, employers are required to post the available job opportunity on the employer's website if the employer maintains a website for its business.

DOL estimates the average expected time burden for activities related to conducting recruitment is 4 hours.²⁶² Assuming this work will be done by an HR specialist or an equivalent occupation, the estimated cost to each petitioner is approximately \$212.12.²⁶³ Using 1,400 as the estimated number of petitioners required to undergo additional recruitment activities, the estimated total cost of this provision is approximately \$296,968 (rounded).²⁶⁴

It is possible that if U.S. employees apply for these positions, H-2B employers may incur some costs associated with reviewing applications, interviewing, vetting, and hiring applicants who are referred to H-2B employers by the recruiting activities required by this rule. However, DOL is unable to quantify the impact.

vi. Cost of the Portability Provision

Petitioners seeking to hire H-2B nonimmigrants who are currently present in the United States with a valid H-2B visa would need to file a Form I-129, which includes paying the associated fee as discussed above. Also previously discussed, we estimate that approximately 359 additional Form I-129 H-2B petitions will be filed as a result of this provision.

As discussed previously, if a petitioner is represented by a lawyer,

²⁶² This is the average expected time burden across all employers; not all employers will need to notify the AFL-CIO, because not all occupations are traditionally or customarily unionized. DOL estimates the time burden for placing a new job order for the job opportunity with SWA is 1 hour, 0.5 hours for contacting the nearest AJC, 1 hour for contacting former U.S. workers, 0.5 hours for contacting current employees for referrals, 0.5 hours for placing the available job opportunity on the employer's website, and 0.5 hours to provide a copy of job order to the bargaining representative and written notification of job opportunity to nearest AFL-CIO if the occupation is traditionally or customarily unionized, for a total time burden of 4 hours.

²⁶³ Calculation: \$53.03 hourly opportunity cost of time for an HR specialist * 4 hours to conduct additional recruitment = \$212.12 per petitioner cost to conduct additional recruitment.

²⁶⁴ Calculation: 1,400 estimated number of petitioners subject to additional recruitment requirements * \$212.12 per petitioner cost to conduct additional recruitment = \$296,968 (rounded) total cost to conduct additional recruitment.

the lawyer must file Form G-28. In addition, if a petitioner desires premium processing, the petitioner must file Form I-907 and pay the associated fee. We expect an HR specialist, in-house lawyer, or an outsourced lawyer will perform these actions. Moreover, as previously estimated, we expect that an in-house or outsourced lawyer will file about 47.73 percent of these Form I-129 petitions. Therefore, we expect that a lawyer will file 171 of these petitions and an HR specialist or equivalent occupation will file the remaining 188. As previously discussed, the opportunity cost of time to file a Form I-129 H-2B petition is \$241.82 for an HR specialist; and the opportunity cost of time to file a Form I-129 H-2B petition with accompanying Form G-28 is \$663.08 for an in-house lawyer and \$1,143.22 for an outsourced lawyer. Therefore, we estimate the cost of the additional Forms I-129 from the portability provision for HR specialists is \$45,462.²⁶⁵ The estimated cost of the additional Forms I-129 accompanied by Forms G-28 from the portability provision for lawyers is \$113,387 if filed by in-house lawyers and \$195,491 if filed by outsourced lawyers.²⁶⁶

Previously in this analysis, we estimated that about 91.19 percent of Form I-129 H-2B petitions are filed with Form I-907 for premium processing. As a result of this provision, we expect that an additional 327 Forms I-907 will be filed.²⁶⁷ We expect a lawyer will file 156 of those Forms I-907 and an HR specialist or equivalent occupation will file the remaining 171.²⁶⁸ As previously discussed, the estimated opportunity cost of time to file a Form I-907 is \$19.62 for an HR specialist; and the estimated opportunity cost of time to file a Form I-907 is approximately \$45.52 for an in-house lawyer and \$78.48 for an outsourced lawyer. The estimated total cost of the additional Forms I-907 if HR

²⁶⁵ Calculation, HR specialist: \$241.82 estimated cost to file a Form I-129 H-2B petition * 188 petitions = \$45,462 (rounded).

²⁶⁶ Calculation, In-house Lawyer: \$663.08 estimated cost to file a Form I-129 H-2B petition and accompanying Form G-28 * 171 petitions = \$113,387 (rounded).

Calculation, Outsourced Lawyer: \$1,143.22 estimated cost to file a Form I-129 H-2B petition and accompanying Form G-28 * 171 petitions = \$195,491 (rounded).

²⁶⁷ Calculation: 359 estimated additional Form I-129 H-2B petitions * 91.19 percent accompanied by Form I-907 = 327 (rounded) additional Form I-907.

²⁶⁸ Calculation, Lawyers: 327 additional Form I-907 * 47.73 percent = 156 (rounded) Form I-907 filed by a lawyer. Calculation, HR specialists: 327 Form I-907—156 Form I-907 filed by a lawyer = 171 Form I-907 filed by an HR specialist.

= \$1,721,650 (rounded) to comply with attestation requirements.

²⁶¹ Calculation: \$271,345 total cost for HR specialist to comply with attestation requirement and to send the ETA case number to OFLC and AFL-CIO + \$1,721,650 total cost for financial analysts to comply with attestation requirements = \$1,992,995 total cost to comply with attestation requirements.

specialists file is \$3,355.²⁶⁹ The estimated total cost of the additional Forms I-907 is \$7,101 if filed by in-house lawyers and \$12,243 if filed by outsourced lawyers.²⁷⁰

The estimated total cost of this provision ranges from \$169,305 to \$256,551 depending on what share of the forms are filed by in-house or outsourced lawyers.²⁷¹

vii. Cost of Audits to Petitioners

As discussed above, DHS intends to conduct 150 audits of employers hiring H-2B workers under this TFR,²⁷² and DOL intends to conduct 100 audits of employers hiring H-2B workers under this TFR, for a total of 250 employers. Employers will need to provide requested information to comply with the audit. We estimate that the expected time burden to comply with audits conducted by DHS and DOL's Office of Foreign Labor Certification is 12 hours.²⁷³ We expect that an HR specialist or equivalent occupation will provide these documents. Given an hourly opportunity cost of time of \$53.03, the estimated cost of complying with audits is \$636.36 per audited employer.²⁷⁴ Therefore, the total estimated cost to employers to comply with audits is \$159,090.²⁷⁵

viii. Cost of Additional Scrutiny

The Departments expect that petitioners undergoing additional scrutiny will need to submit additional evidence to USCIS. The costs associated

with additional scrutiny include the opportunity cost of time to assess, document, and compile evidence and the costs (both explicit costs and opportunity costs of time) of submitting the compiled evidence.

The opportunity costs of time associated with compiling such evidence are unavailable due to the unique fact pattern in each instance and a lack of data at this time regarding the time to comply. To estimate the explicit costs of additional scrutiny, we assume 144 petitioners will need to print 500 pages of documents and mail this to USCIS. We expect these documents to be able to fit in a Priority Mail Medium Flat Rate box, which costs \$16.00.²⁷⁶ We estimate the costs of printing at \$0.15 per page and the cost of printing 500 at \$75.00.²⁷⁷ The estimated cost for an employer to print and ship evidence to USCIS is \$91.00.²⁷⁸ With an estimated 144 petitioners expected to print and ship evidence, the total estimated costs for printing and shipping evidence is \$13,104.²⁷⁹

We also expect petitioners to incur a time burden associated with printing and shipping evidence to USCIS. We estimate it will take an HR specialist or equivalent employee 1 hour to print and ship evidence. Using the \$53.03 hourly opportunity cost of time for HR specialist, we estimate the opportunity cost of time for each petitioner is \$53.03.²⁸⁰ With an estimated 144 petitioners expected to print and ship evidence, the total estimated opportunity cost of time to print and ship evidence is \$7,636.²⁸¹

We do not expect this provision to impose new costs on to USCIS. The costs to request and review evidence from petitioners is included in the fees paid to the agency.

The total estimated cost of additional scrutiny is \$20,740.²⁸²

²⁷⁶ USPS, Priority Mail, <https://www.usps.com/ship/priority-mail.htm> (accessed August 22, 2024).

²⁷⁷ See <https://www.montgomerycountymd.gov/Library/services/computerhelp.html> (accessed August 22, 2024). Cost to make black and white copies. Calculation: 500 pages * \$0.15 per page = \$75.00 in printing costs.

²⁷⁸ Calculation: \$75.00 in printing costs + \$16.00 in shipping costs = \$91.00 to print and ship evidence.

²⁷⁹ Calculation: 144 petitioners * \$91.00 to print and ship evidence = \$13,104 total printing and shipping costs.

²⁸⁰ Calculation: \$53.03 hourly opportunity cost of time for HR specialist * 1 hour to print and ship evidence = \$53.03 opportunity cost of time per petitioner.

²⁸¹ Calculation: 144 petitioners * \$53.03 opportunity cost of time per petitioner = \$7,636 total estimated opportunity cost of time to print and ship evidence.

²⁸² Calculation: \$13,104 total printing and shipping costs + \$7,636 total opportunity cost of

ix. Familiarization Costs

We expect that petitioners or their representatives will need to read and understand this rule if they seek to take advantage of the supplemental cap. As a result, we expect this rule will impose one-time familiarization costs associated with reading and understanding this rule. As shown previously, we estimate that approximately 9,924 petitioners may take advantage of the provisions of this rule, and that a lawyer will represent 4,737 of these petitioners and an HR specialist or equivalent occupation will represent 5,187.

To estimate the costs of rule familiarization, we estimate the time it will take to read and understand the rule by assuming a reading speed of 238 words per minute.²⁸³ This rule has approximately 67,000 words.²⁸⁴ Using a reading speed of 238 words per minute, DHS estimates it will take approximately 4.7 hours to read and understand this rule.²⁸⁵

The estimated hourly total compensation for a HR specialist, in-house lawyer, and outsourced lawyer are \$53.03, \$123.02, and \$212.10, respectively. The estimated opportunity cost of time for each of these filers to read and understand the rule are \$249.24, \$578.19, and \$996.87, respectively.²⁸⁶ The estimated total opportunity cost of time for 5,187 HR specialists to familiarize themselves with this rule is approximately \$1,292,808.²⁸⁷ The estimated total

time = \$20,740 total estimated cost of additional scrutiny.

²⁸³ Brysbaert, Marc (2019, April 12). 'How many words do we read per minute? A review and meta-analysis of reading rate.' <https://doi.org/10.31234/osf.io/xynwg> (accessed September 25, 2024). We use the average speed for silent reading of English nonfiction by adults.

²⁸⁴ Please note that this number represents that Departments' best estimate of the final word count, given that the actual word may change during the promulgation of the Rule.

²⁸⁵ Calculation, Step 1: roughly 67,000 words/238 words per minute = 282 (rounded) minutes.

Calculation, Step 2: 282 minutes/60 minutes per hour = 4.7 (rounded) hours.

²⁸⁶ Calculation, HR Specialists: \$53.03 estimated hourly total compensation for an HR specialist * 4.7 hours to read and become familiar with the rule = \$249.24 opportunity cost of time for an HR specialist to read and understand the rule.

Calculation, In-house lawyer: \$123.02 estimated hourly total compensation for an in-house lawyer * 4.7 hours to read and become familiar with the rule = \$578.19 (rounded) opportunity cost of time for an in-house lawyer to read and understand the rule.

Calculation, Outsourced lawyer: \$212.10 estimated hourly total compensation for an outsourced lawyer * 4.7 hours to read and become familiar with the rule = \$996.87 (rounded) opportunity cost of time for an outsourced lawyer to read and understand the rule.

²⁸⁷ Calculation, HR specialists: \$249.24 opportunity cost of time * 5,187 = \$1,292,808 (rounded).

²⁶⁹ Calculation, HR specialist: \$19.62 to file a Form I-907 * 171 forms = \$3,355 (rounded).

²⁷⁰ Calculation, In-house lawyer: \$45.52 to file a Form I-907 * 156 forms = \$7,101 (rounded).

Calculation for an outsourced lawyer: \$78.48 to file a Form I-907 * 156 forms = \$12,243 (rounded).

²⁷¹ Calculation for HR specialists and in-house lawyers: \$45,462 for HR specialists to file Form I-129 H-2B petitions + \$113,387 for in-house lawyers to file Form I-129 and the accompanying Form G-28 + \$3,355 for HR specialists to file Form I-907 + \$7,101 for in-house lawyers to file Form I-907 = \$169,305.

Calculation for HR specialists and outsourced lawyers: \$45,462 for HR specialists to file Form I-129 H-2B petitions + \$195,491 for outsourced lawyers to file Form I-129 and the accompanying Form G-28 + \$3,355 for HR specialists to file Form I-907 + \$12,243 for outsourced lawyers to file Form I-907 = \$256,551.

²⁷² As noted above, in addition to these TFR-specific audits, DHS will also be conducting at least 150 targeted site visits annually related to other H-2B petitions to determine compliance with H-2B program requirements and provide increased oversight into the integrity of the H-2B program overall.

²⁷³ The number in hours for audits was provided by the USCIS, Service Center Operations.

²⁷⁴ Calculation: \$53.03 hourly opportunity cost of time for an HR specialist * 12 hours to comply with an audit = \$636.36 per audited employer.

²⁷⁵ Calculation: 250 audited employers * \$636.36 opportunity cost of time to comply with an audit = \$159,090.

opportunity cost of time for 4,737 lawyers to familiarize themselves with this rule is approximately \$2,738,886 if they are all in-house lawyers and \$4,722,173 if they are all outsourced lawyers.²⁸⁸ Accordingly, the estimated total opportunity costs of time for petitioners' representatives to familiarize themselves with this rule ranges from \$4,031,694 to \$6,014,981.²⁸⁹

x. Estimated Total Costs to Petitioners

In sum, the monetized costs of this rule come from time spent filing and complying with Form I-129, Form G-28, Form I-907, and Form ETA-9142-B-CAA-9, as well as contacting and refreshing recruitment efforts, posting notifications, time spent filing to obtain a porting worker, and complying with audits. The estimated total cost to file Form I-129 and an accompanying Form G-28 ranges from \$1,936,649 to \$2,938,701, depending on the filer. The estimated total cost of filing Form I-907 ranges from \$127,533 to \$190,255, depending on the filer. The estimated cost for late season employers to file Form ETA-9142B ranges from \$63,347 to \$94,469 depending on the filer. The estimated total cost of filing and complying with Form ETA-9142-B-CAA-9 is \$1,992,995. The estimated total cost of conducting additional recruitment is \$296,968. The estimated cost of the portability provision ranges from \$169,305 to \$256,551, depending on the filer. The estimated total cost for employers to comply with audits is \$159,090. The estimated total costs for petitioners or their representatives to familiarize themselves with this rule ranges from \$4,031,694 to \$6,014,981, depending on the filer. The estimated total cost of additional scrutiny is \$20,740. The total estimated cost to petitioners ranges from \$8,798,321 to \$11,964,750, depending on the filer.²⁹⁰

c. Cost to the Federal Government

USCIS will incur costs related to the adjudication of petitions as a result of this TFR. DHS expects USCIS to recover

these costs by the fees associated with the forms, which have been accounted for as a transfer from petitioners to USCIS and serve as a proxy for the costs to the agency. The total filing fees associated with Form I-129 H-2B petitions are \$4,817,740, and the total filing fees associated with premium processing are \$7,270,775.²⁹¹ Total transfers from petitioners to the Government are \$12,088,515.²⁹²

The INA provides USCIS with the authority to collect fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including administrative costs, and services provided without charge to certain applicants and petitioners.²⁹³ DHS notes USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. USCIS establishes fees at an amount that is necessary to recover these assigned costs, such as clerical, officers, and managerial salaries and benefits, plus an amount to recover unassigned overhead (for example, facility rent, IT equipment and systems among other expenses) and immigration benefits provided without a fee charged. Consequently, since USCIS immigration fees are primarily based on resource expenditures related to the benefit in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. DHS anticipates some additional costs in adjudicating the additional petitions submitted because of the increase in cap limitation for H-2B visas.

Both DOL and DHS intend to conduct a significant number of audits during the period of temporary need to verify compliance with H-2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule.²⁹⁴ While fees fund most USCIS activities and appropriations fund DOL, we expect both agencies will be able to shift resources to conduct these audits without incurring additional costs. As previously mentioned, the agencies intend to conduct a total of 250 audits, and we expect each audit to take 12 hours. This results in a total time

burden of 3,000 hours.²⁹⁵ USCIS anticipates that a Federal employee at a GS-13 Step 5 salary will typically conduct these audits for each agency. The base hourly pay for a GS-13 Step 5 in the Washington, DC locality area is \$64.06.²⁹⁶ To estimate the total hourly compensation for these positions, we multiply the hourly wage (\$64.06) by the Federal benefits to wage multiplier of 1.41.²⁹⁷ This results in an hourly opportunity cost of time of \$90.32 for GS-13 Step 5 Federal employees in the Washington, DC locality pay area.²⁹⁸ The total opportunity costs of time for Federal workers to conduct audits is estimated to be \$270,960.²⁹⁹

This final rule implements changes to the DOL's mechanisms to receive complaints from advocates, unions, and other stakeholders about jobs posted on seasonaljobs.gov. DOL expects that the changes to the DOL's mechanisms to receive complaints may result in some additional costs to DOL. However, DOL is unable to quantify such costs due to lack of data.

d. Benefits to Petitioners

The Departments assume that employers will incur the costs of this rule and other costs associated with hiring H-2B workers if the expected benefits of those workers exceed the expected costs. We assume that employers expect some level of net benefit from being able to hire additional H-2B workers. However, the Departments do not collect or require data from H-2B employers on the profits from hiring these additional workers to estimate this increase in net benefits.

The inability to access H-2B workers for some entities is currently causing irreparable harm or will cause their

²⁹⁵ Calculation: 12 hours to conduct an audit * 250 audits = 3,000 total hours to conduct audits.

²⁹⁶ See U.S. Office of Personnel Management, Pay and Leave, Salaries and Wages, For the Locality Pay area of Washington-Baltimore-Arlington, DC-MD-VA-WV-PA, 2024, Hourly Basic Rate, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2024/DCB_h.pdf (accessed August 22, 2024).

²⁹⁷ Calculation, Step 1: \$2,382,167 Full-time Permanent Salaries + \$983,370 Civilian Personnel Benefits = \$3,365,537 Compensation.

Calculation, Step 2: \$3,365,537 Compensation / \$2,382,167 Full-time Permanent Salaries = 1.41 (rounded) Federal employee benefits to wage ratio. See https://www.dhs.gov/sites/default/files/2024-04/2024_0325_us_citizenship_and_immigration_services.pdf (accessed August 22, 2024).

²⁹⁸ Calculation: \$64.06 hourly wage for a GS 13-5 in the Washington, DC locality area * 1.41 Federal employee benefits to wage ratio = \$90.32 hourly opportunity cost of time for a GS 13-5 federal employee in the Washington, DC locality area.

²⁹⁹ Calculation: 3,000 hours to conduct audits * \$90.32 hourly opportunity cost of time = \$270,960 total opportunity costs of time for Federal employees to conduct audits.

²⁸⁸ Calculation for in-house lawyers: \$578.19 opportunity cost of * 4,737 = \$2,738,886 (rounded).

Calculation for outsourced lawyers: \$996.87 opportunity cost of time * 4,737 = \$4,722,173 (rounded).

²⁸⁹ Calculation: \$1,292,808 + \$2,738,886 = \$4,031,694.

Calculation: \$1,292,808 + \$4,722,173 = \$6,014,981.

²⁹⁰ Calculation of lower range: \$1,936,649 + \$127,533 + \$63,347 + \$1,992,995 + \$296,968 + \$169,305 + \$159,090 + \$4,031,694 + \$20,740 = \$8,798,321.

Calculation of upper range: \$2,938,701 + \$190,255 + \$94,469 + \$1,992,995 + \$296,968 + \$256,551 + \$159,090 + \$6,014,981 + \$20,740 = \$11,964,750.

²⁹¹ Calculation: (3,988 + 327 Forms I-907) * \$1,685 per form = \$7,270,775.

²⁹² Calculation: \$4,817,740 + \$7,270,775 = \$12,088,515.

²⁹³ See INA section 286(m), 8 U.S.C. 1356(m).

²⁹⁴ These audits are distinct from the WHD's authority to perform investigations regarding employers' compliance with the requirements of the H-2B program.

businesses to suffer irreparable harm in the near future. Temporarily increasing the number of available H–2B visas for this fiscal year may result in a benefit, because it will allow some businesses to hire the additional labor resources necessary to avoid such harm. Preventing such harm may also result in cost savings by ultimately preserve the jobs of other employees (including U.S. workers) at that establishment. Additionally, returning workers are likely to be very familiar with the H–2B process and requirements, and may be positioned to begin work more expeditiously with these employers. Moreover, employers may already be familiar with returning workers as they have trained, vetted, and worked with some of these returning workers in past years. As such, limiting the supplemental visas to returning workers will assist employers that are suffering irreparable harm or will suffer impending irreparable harm.

e. Benefits to Workers

The Departments assume that workers will only incur the costs of this rule and other costs associated with obtaining a H–2B position if the expected benefits of that position exceed the expected costs. We assume that H–2B workers expect some level of net benefit from being able to work for H–2B employers. However, the Departments do not have sufficient data to estimate this increase in net benefits and lack the necessary resources to investigate this in a timely manner. This rule is not expected to impact wages because DOL prevailing wage regulations apply to all H–2B workers covered by this rule. Additionally, this analysis shows that employers incur costs in conducting additional recruitment of U.S. workers and attesting to irreparable harm from current labor shortfall. These costs suggest employers are not taking advantage of a large supply of foreign labor at the expense of domestic workers.

The existence of this rule will benefit the workers who receive H–2B visas. According to Brodbeck et al. (2018):

Participation in the H–2B guest worker program has become a vital part of the livelihood strategies of rural Guatemalan families and has had a positive impact on the quality of life in the communities where they live. Migrant workers who were landless, lived in isolated rural areas, had few economic opportunities, and who had limited access to education or adequate health care, now are investing in small trucks, building roads, schools, and homes, and providing employment for others in their

home communities. . . . The impact has been transformative and positive.³⁰⁰

Some provisions of this rule will benefit such workers in particular ways. The portability provision of this rule will allow nonimmigrants with valid H–2B visas who are present in the United States to transfer to a new employer more quickly and potentially extend their stay in the United States and, therefore, earn additional wages.

DHS recognizes that some of the effects of these provisions may occur beyond the borders of the United States. The current analysis does not seek to quantify or monetize costs or benefits that occur outside of the United States.

U.S. workers will also benefit from this rule in multiple ways. For example, the additional round of recruitment and U.S. worker referrals required by the provisions of this rule will ensure that a nonimmigrant worker does not displace a U.S. worker who is willing and able to fill the position and may result in some U.S. workers being hired. As noted, the avoidance of current or impending irreparable harm made possible through the granting of supplemental visas in this rule could ensure that U.S. workers—who otherwise may be vulnerable if H–2B workers were not given visas—do not lose their jobs.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements of the APA. *See* 5 U.S.C. 603(a), 604(a). This temporary final rule is exempt from notice and comment requirements for the reasons stated above. Therefore, the requirements of the RFA applicable to final rules, 5 U.S.C. 604, do not apply to this temporary final rule. Accordingly, the Departments are not required to either certify that the temporary final rule would not have a significant economic impact on a substantial number of small entities nor conduct a regulatory flexibility analysis.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement

³⁰⁰ *See* Arnold Brodbeck et al. (2018), Seasonal Migrant Labor in the Forest Industry of the United States: The Impact of H–2B Employment on Guatemalan Livelihoods, 31 Society & Natural Resources 1012.

assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule that includes any Federal mandate that may result in \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector.³⁰¹ This rule is exempt from the written statement requirement because DHS did not publish a notice of proposed rulemaking for this rule.

In addition, this rule does not exceed the \$100 million in 1995 expenditure in any 1 year when adjusted for inflation (\$200 million in 2023 dollars based on the Consumer Price Index for All Urban Consumers (CPI–U)),³⁰² and this rulemaking does not contain such a Federal mandate as the term is defined under UMRA.³⁰³ The requirements of Title II of the Act, therefore, do not apply, and the Departments have not prepared a statement under the Act.

E. Executive Order 13132 (Federalism)

This 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. Therefore, in accordance with section 6 of Executive Order 13132, 64 FR 43255 (Aug. 4, 1999), this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, 61 FR 4729 (Feb. 5, 1996).

³⁰¹ *See* 2 U.S.C. 1532(a).

³⁰² *See* U.S. Department of Labor, BLS, “Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, by month,” available at <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202402.pdf>, last accessed September 3, 2024). Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2022); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2022 – Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(304.702 – 152.4)/152.4] * 100 = (152.302/152.4) * 100 = 0.9994 (rounded) * 100 = 99.94 percent = 100 percent (rounded). Calculation of inflation-adjusted value: \$100 million in 1995 dollars * 2.00 = \$200 million in 2023 dollars.

³⁰³ The term “Federal mandate” means a Federal intergovernmental mandate or a Federal private sector mandate. *See* 2 U.S.C. 1502(1), 658(6).

G. National Environmental Policy Act

DHS and its components analyze their proposed actions to determine whether the National Environmental Policy Act (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive (Dir) 023–01 Rev. 01 and Instruction Manual 023–01–001–01 Rev. 01 (Instruction Manual) establish the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

NEPA and the CEQ regulations allow Federal agencies to establish categories of actions (“categorical exclusions”) that normally do not significantly affect the quality of the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 42 U.S.C. 4336e(1), 42 U.S.C. 4336(a)(2); 40 CFR 1501.4, 40 CFR 1508.1(d). The Instruction Manual, Appendix A, Table 1 lists Categorical Exclusions that DHS has found to have no such effect. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual, section V.B.2(a–c).

This rule temporarily amends the regulations implementing the H–2B nonimmigrant visa program to increase the numerical limitation on H–2B nonimmigrant visas for FY 2025, based on the Secretary of Homeland Security’s determination, in consultation with the Secretary of Labor, consistent with the FY 2024 Omnibus and Public Law 118–83. It also allows H–2B beneficiaries who are in the United States to change employers upon the filing of a new H–2B petition and begin to work for the new employer for a period generally not to exceed 60 days before the H–2B petition is approved by USCIS.

DHS has considered in accordance with its NEPA implementing procedures and has determined that this temporary final rule clearly fits within categorical exclusion A3(d) because it interprets or amends a regulation without changing its environmental effect. The amendments to 8 CFR part 214 would authorize up to an additional 64,716 visas for noncitizens who may receive H–2B nonimmigrant visas, of which 44,716 are for returning workers

(persons issued H–2B visas or were otherwise granted H–2B status in Fiscal Years 2022, 2023, or 2024). The proposed amendments would also facilitate H–2B nonimmigrants to move to new employment faster than they could if they had to wait for a petition to be approved. The amendment’s operative provisions approving H–2B petitions under the supplemental allocation would effectively terminate after September 30, 2025 for the cap increase, and at the end of January 24, 2026 for the portability provision. DHS believes amending applicable regulations to authorize up to an additional 64,716 H–2B nonimmigrant visas will not result in reasonably foreseeable effects that would necessitate an environmental assessment or environmental impact statement with respect to the current H–2B limit or in the context of a current U.S. population exceeding 334,914,895 (maximum temporary increase of 0.0193 percent).³⁰⁴ DHS has also considered and determined that this action would not have extraordinary circumstances that would require the preparation of an environmental assessment or environmental impact statement.

The amendment to applicable regulations is a stand-alone temporary authorization and not a part of any larger action, and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this action is categorically excluded and no further NEPA analysis is required.

H. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this temporary final rule is a “major rule” as defined by the Congressional Review Act (“CRA”) in 5 U.S.C. 804(2)(a) and is subject to both the CRA’s reporting requirement and the delayed effective date requirement, pursuant to 5 U.S.C. 801. However, as stated in section IV.A of this rule, the Departments have good cause to forgo APA’s requirements for notice and public comment (and a delayed effective date), pursuant to 5 U.S.C. 553. Therefore, the Departments also have good cause to forgo the CRA’s 60-day delayed effective date requirement, pursuant to 5 U.S.C. 808(2). This rule is effective upon publication. DHS has complied with the CRA’s reporting

requirements and has sent this rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

I. Paperwork Reduction Act

Attestation for Employers Seeking to Employ H–2B Nonimmigrants Workers Under Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47, as extended by sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83, Form ETA–9142–B–CAA–9

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. DOL has submitted the Information Collection Request (ICR) contained in this rule to OMB and obtained approval of a new form, Form ETA–9142B–CAA–9, using emergency clearance procedures outlined at 5 CFR 1320.13. The Departments note that while DOL submitted the ICR, both DHS and DOL will use the information provided by employers in response to this information collection.

Petitioners will use the new Form ETA–9142B–CAA–9 to make attestations regarding, for example, irreparable harm and the returning worker requirement (unless exempt because the H–2B worker is a national of one of the countries included in the country-specific allocation who is counted against the 20,000 returning worker exemption cap) described above. Petitioners will need to file the attestation with DHS until it announces that the supplemental H–2B cap has been reached. In addition, the petitioner will need to retain all documentation demonstrating compliance with this implementing rule, and must provide it to DHS or DOL in the event of an audit or investigation.

In addition to obtaining immediate emergency approval pursuant to 5 CFR 1320.13, DOL is seeking comments on this information collection pursuant to 44 U.S.C. 3506(c)(2)(A). Comments on the information collection must be received by January 31, 2025. This process of engaging the public and other

³⁰⁴ *See* U.S. Census Bureau Quick Facts, available at <https://www.census.gov/quickfacts/US> (accessed September 9, 2024).

Calculation: 64,716 additional visas/334,914,895 million people in the United States = 0.0193 (rounded) percent temporary increase in the population.

Federal agencies helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The PRA provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. *See* 44 U.S.C. 3501 *et seq.* In addition, notwithstanding any other provisions of law, no person must generally be subject to a penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

In accordance with the PRA, DOL is affording the public with notice and an opportunity to comment on the new information collection, which is necessary to implement the requirements of this rule. The information collection activities covered under a newly granted OMB Control Number 1205-NEW are required under section 105 of Division G of the FY 2024 Omnibus as extended by Public Law 118-83, which provides that “the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of American businesses cannot be satisfied . . . with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor,” may increase the total number of noncitizens who may receive an H-2B visa by not more than the highest number of H-2B nonimmigrants who participated in the H-2B returning worker program in any fiscal year in which returning workers were exempt from the H-2B numerical limitation. As previously discussed in the preamble of this rule, the Secretary of Homeland Security, in consultation with the Secretary of Labor, has decided to increase the numerical limitation on H-2B nonimmigrant visas to authorize the issuance of up to, but not more than, an additional 64,716 visas for FY 2025 for certain H-2B workers, for U.S. businesses that attest that they are suffering irreparable harm or will suffer impending irreparable harm. As with the previous supplemental rules, the Secretary has determined that the additional visas will only be available for returning workers, that is workers who were issued H-2B visas or otherwise granted H-2B status in FY

2022, 2023, or 2024, unless the worker is one of the 20,000 nationals of one of the countries included in the country-specific allocation who are exempt from the returning worker requirement.

Commenters are encouraged to discuss the following:

- 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;
- 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;
- The quality, utility, and clarity of the information to be collected; and
- 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, for example, permitting electronic submission of responses.

The aforementioned information collection requirements are summarized as follows:

Agency: DOL-ETA.

Type of Information Collection:

Extension of an existing information collection.

Title of the Collection: Attestation for Employers Seeking to Employ H-2B Nonimmigrants Workers Under Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118-47, as extended by sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118-83.

Agency Form Number: Form ETA-9142-B-CAA-9.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 4,373.

Average Responses per Year per Respondent: 1.

Total Estimated Number of Responses: 4,373.

Average Time per Response: 10.17 hours per application.

Total Estimated Annual Time Burden: 32,581 hours.

Total Estimated Other Costs Burden: \$2,289,811.

Request for Premium Processing Service, Form I-907

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally

not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. Form I-907, Request for Premium Processing Service, has been approved by OMB and assigned OMB control number 1615-0048. DHS is making no changes to the Form I-907 in connection with this temporary rule implementing the time-limited authority pursuant to Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118-47, as extended by Public Law 118-83 (which expires on December 20, 2024). However, DHS estimates that this temporary rule may result in approximately 4,325 additional filings of Form I-907 in fiscal year 2025. The current OMB-approved estimate of the number of annual respondents filing a Form I-907 is 815,773. DHS has determined that the OMB-approved estimate is sufficient to fully encompass the additional respondents who will be filing Form I-907 in connection with this temporary rule, which represents a small fraction of the overall Form I-907 population. Therefore, DHS is not changing the collection instrument or increasing its burden estimates in connection with this temporary rule and is not publishing a notice under the PRA or making revisions to the currently approved burden for OMB control number 1615-0048.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Penalties, Reporting and recordkeeping requirements, Students.

20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant workers, Passports and visas, Penalties,

Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

For the reasons discussed in the joint preamble, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

DEPARTMENT OF HOMELAND SECURITY

PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1357, and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

■ 2. Effective December 2, 2024, through December 2, 2027, amend § 214.2 by:

- a. In table 3 to paragraph (h), adding an entry for “32”; and
- b. Adding paragraphs (h)(6)(xv) and (h)(32).

The additions read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(h) * * *

TABLE 3 TO PARAGRAPH (h)—PARAGRAPH CONTENTS

(32) Change of employers and portability for H–2B workers (January 25, 2025 through January 24, 2026).

* * * * *

(6) * * *

(xv) *Special requirements for additional cap allocations under Public Laws 118–47 and 118–83—(A) Public Law 118–47 and sections 101(6) and 106, Division A, Title I of Public Law 118–83—(1) Supplemental allocation for returning workers.* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2025 only, the Secretary has authorized up to an additional 64,716 visas for aliens who may receive H–2B nonimmigrant visas pursuant to section 105 of Division G, Title I of Public Law 118–47, the Further Consolidated Appropriations Act, 2024, and sections 101(6) and 106, Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83. An alien may be eligible to receive an H–2B nonimmigrant visa under this paragraph (h)(6)(xv)(A)(1) if she or he is a returning worker. The term “returning worker” under this paragraph (h)(6)(xv)(A)(1) means a person who was issued an H–2B visa or was otherwise granted H–2B status in fiscal year 2022, 2023, or 2024. Notwithstanding § 248.2 of this chapter, an alien may not change status to H–2B nonimmigrant under this paragraph (h)(6)(xv)(A)(1). The additional H–2B visas authorized under this paragraph will be made available to returning workers as follows:

(i) Up to an additional 20,716 visas for aliens who may receive H–2B nonimmigrant visas based on petitions requesting FY 2025 employment start dates on or before March 31, 2025.

(ii) Up to an additional 19,000 visas for aliens who may receive H–2B nonimmigrant visas based on petitions requesting FY 2025 employment start

dates from April 1, 2025 to May 14, 2025.

(iii) Up to an additional 5,000 visas available for aliens with employment start dates from May 15, 2025 to September 30, 2025.

(2) *Supplemental allocation for nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica.* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2025 only, and in addition to the allocation described in paragraph (h)(6)(xv)(A)(1) of this section, the Secretary has authorized up to an additional 20,000 visas for aliens who are nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica, who may receive H–2B nonimmigrant visas pursuant to section 105 of Division G, Title I of Public Law 118–47, the Further Consolidated Appropriations Act, 2024, and sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83, based on petitions with FY 2025 employment start dates. Such workers are not subject to the returning worker requirement in paragraph (h)(6)(xv)(A)(1). Petitioners must request such workers in an H–2B petition that is separate from H–2B petitions that request returning workers under paragraph (h)(6)(xv)(A)(1) and must declare that they are requesting these workers in the attestation Form ETA–9142–B–CAA–9 required under 20 CFR 655.68(a)(1). A petition requesting returning workers under paragraph (h)(6)(xv)(A)(1), which is accompanied by an attestation indicating that the petitioner is requesting nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica,

will be rejected, denied or, in the case of a non-frivolous petition, approved solely for the number of beneficiaries that are from Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. Notwithstanding § 248.2 of this chapter, an alien may not change status to H–2B nonimmigrant under this paragraph (h)(6)(xv)(A)(2).

(B) *Eligibility.* In order to file a petition with USCIS under this paragraph (h)(6)(xv), the petitioner must: (1) Comply with all other statutory and regulatory requirements for H–2B classification, including, but not limited to, requirements in this section, under part 103 of this chapter, and under 20 CFR part 655 and 29 CFR part 503; and (2) Submit to USCIS, at the time the employer files its petition, a U.S. Department of Labor attestation, in compliance with this section and 20 CFR 655.64, evidencing that:

(i) Its business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H–2B workers requested on the petition filed pursuant to this paragraph (h)(6)(xv);

(ii) All workers requested and/or instructed to apply for a visa have been issued an H–2B visa or otherwise granted H–2B status in fiscal year 2022, 2023, or 2024, unless the H–2B worker is a national of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica who is counted towards the 20,000 cap described in paragraph (h)(6)(xv)(A)(2) of this section;

(iii) The employer will comply with obligations and additional recruitment requirements outlined in 20 CFR 655.64(a)(3) through (5);

(iv) The employer will provide documentary evidence of the facts in paragraphs (h)(6)(xv)(B)(2)(i) through

(iii) of this section to DHS and/or DOL upon request; and

(v) The employer will agree to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by DHS, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with immigration laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2025 supplemental allocations outlined in paragraph (h)(6)(xv)(B) of this section, as a condition for the approval of the petition.

(vi) The employer will fully cooperate with any audit, investigation, compliance review, evaluation, verification or inspection conducted by DOL, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with applicable laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2025 supplemental allocations outlined in 20 CFR 655.64(a) and 655.68(a), as a condition for the approval of the H-2B petition. The employer must attest to this on Form ETA-9142-B-CAA-9 and must further attest on Form ETA-9142-B-CAA-9 that it will not impede, interfere, or refuse to cooperate with an employee of the Secretary of the U.S. Department of Labor who is exercising or attempting to exercise DOL's audit or investigative authority pursuant to 20 CFR part 655, subpart A, and 29 CFR 503.25.

(C) *Processing*—(1) *Petitions filed pursuant to paragraph (h)(6)(xv)(A)(1)(i) of this section requesting FY 2025 employment start dates on or before March 31, 2025.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(1)(i) of this section requesting employment start dates on or before March 31, 2025 that are received after the applicable numerical limitation has been reached or after September 15, 2025.

(2) *Petitions filed pursuant to paragraph (h)(6)(xv)(A)(1)(ii) of this section requesting FY 2025 employment start dates from April 1, 2025 to May 14, 2025.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(1)(ii) of this section requesting employment start dates from April 1, 2025 to May 14, 2025 that are received earlier than 15 days after the INA section 214(g) cap for

the second half FY 2024 has been met, or after the applicable numerical limitation has been reached or after September 15, 2025.

(3) *Petitions filed pursuant to paragraph (h)(6)(xv)(A)(1)(iii) of this section requesting FY 2025 employment start dates from May 15, 2025 and September 30, 2025.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(1)(iii) of this section requesting employment start dates from May 15, 2025 to September 30, 2025 that are received earlier than 45 days after the INA section 214(g) cap for the second half FY 2025 has been met, or after the applicable numerical limitation has been reached or after September 15, 2025.

(4) *Petitions filed pursuant to paragraph (h)(6)(xv)(A)(2) requesting nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica with FY 2025 employment start dates.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(2) of this section that have a date of need on or after April 1, 2025, and are received earlier than 15 days after the INA section 214(g) cap for the second half of FY 2025 is met, or after the applicable numerical limitation has been reached or after September 15, 2025.

(5) USCIS will not approve a petition filed pursuant to this paragraph (h)(6)(xv) on or after October 1, 2025.

(D) *Numerical limitations under paragraphs (h)(6)(xv)(A)(1) and (2) of this section.* When calculating the numerical limitations under paragraphs (h)(6)(xv)(A)(1) and (2) of this section as authorized under section 105 of Division G, Title I of Public Law 118–47, the Further Consolidated Appropriations Act, 2024, and sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83, USCIS will make numbers for each allocation available to petitions in the order in which the petitions subject to the respective limitation are received. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions received (including the number of workers requested when necessary) and will notify the public of the dates that USCIS has received the necessary number of petitions (the “final receipt dates”) under paragraph (h)(6)(xv)(A)(1) or (2). The day the public is notified will not control the final receipt dates. When necessary to

ensure the fair and orderly allocation of numbers subject to the numerical limitations in paragraphs (h)(6)(xv)(A)(1) and (2), USCIS may randomly select from among the petitions received on the final receipt dates the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection. Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt dates that may be applicable under paragraph (h)(6)(xv)(A)(1) or (2) will be rejected. If the final receipt date is any of the first 5 business days on which petitions subject to the applicable numerical limits described in paragraph (h)(6)(xv)(A)(1) or (2) may be received (in other words, if either of the numerical limits described in paragraph (h)(6)(xv)(A)(1) or (2) is reached on any one of the first 5 business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those 5 business days.

(E) *Sunset.* This paragraph (h)(6)(xv) expires on October 1, 2025.

(F) *Non-severability.* The requirement to file an attestation under paragraph (h)(6)(xv)(B)(2) of this section is intended to be non-severable from the remainder of this paragraph (h)(6)(xv), including, but not limited to, the entirety of the numerical allocation provisions at paragraphs (h)(6)(xv)(A)(1) and (2) of this section. In the event that any part of this paragraph (h)(6)(xv) is enjoined or held to be invalid by any court of competent jurisdiction, the remainder of this paragraph (h)(6)(xv) is also intended to be enjoined or held to be invalid in such jurisdiction, without prejudice to workers already present in the United States under this paragraph (h)(6)(xv), as consistent with law.

* * * * *

(32) *Change of employers and portability for H-2B workers.* (i) This paragraph (h)(32) relates to H-2B workers seeking to change employers during the time period specified in paragraph (h)(32)(iv) of this section. Notwithstanding paragraph (h)(2)(i)(D) of this section:

(A) An alien in valid H-2B nonimmigrant status whose new petitioner files a non-frivolous H-2B petition requesting an extension of the alien's stay on or after January 25, 2025, is authorized to begin employment with the new petitioner after the petition described in this paragraph (h)(32) is received by USCIS and before the new H-2B petition is approved, but no

earlier than the start date indicated in the new H-2B petition; or

(B) An alien whose new petitioner filed a non-frivolous H-2B petition requesting an extension of the alien's stay before January 25, 2025, that remains pending on January 25, 2025, is authorized to begin employment with the new petitioner before the new H-2B petition is approved, but no earlier than the start date of employment indicated on the new H-2B petition.

(ii)(A) With respect to a new petition described in paragraph (h)(32)(i)(A) of this section, and subject to the requirements of 8 CFR 274a.12(b)(35), the new period of employment described in paragraph (h)(32)(i) of this section may last for up to 60 days beginning on the Received Date on Form I-797 (Notice of Action) or, if the start date of employment occurs after the I-797 Received Date, for a period of up to 60 days beginning on the start date of employment indicated in the H-2B petition.

(B) With respect to a new petition described in paragraph (h)(32)(i)(B) of this section, the new period of employment described in paragraph (h)(32)(i) of this section may last for up to 60 days beginning on the later of either January 25, 2025, or the start date of employment indicated in the H-2B petition.

(C) With respect to either type of new petition, if USCIS adjudicates the new petition before the expiration of this 60-day period and denies the petition, or if the new petition is withdrawn by the petitioner before the expiration of the 60-day period, the employment authorization associated with the filing of that petition under 8 CFR 274a.12(b)(35) will automatically terminate 15 days after the date of the denial decision or 15 days after the date on which the new petition is withdrawn. Nothing in this paragraph (h)(32) is intended to alter the availability of employment authorization related to professional H-2B athletes who are traded between organizations pursuant to paragraph (h)(6)(vii) of this section and 8 CFR 274a.12(b)(9).

(iii) In addition to meeting all other requirements in paragraph (h)(6) of this section for the H-2B classification, to commence employment under this paragraph (h)(32):

(A) The alien must either:

(1) Have been in valid H-2B nonimmigrant status on or after January 25, 2025 and be the beneficiary of a non-frivolous H-2B petition requesting an extension of the alien's stay that is received on or after January 25, 2025, but no later than January 24, 2026; or

(2) Be the beneficiary of a non-frivolous H-2B petition requesting an extension of the alien's stay that is pending as of January 25, 2025; and

(B) The petitioner may not impede, interfere, or refuse to cooperate with an employee of the Secretary of the U.S. Department of Labor who is exercising or attempting to exercise DOL's audit or investigative authority under 20 CFR part 655, subpart A, and 29 CFR 503.25.

(iv) Authorization to initiate employment changes pursuant to this paragraph (h)(32) begins at 12 a.m. on January 25, 2025, and ends at the end of January 24, 2026.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 3. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 114-74, 129 Stat. 599.

■ 4. Effective December 2, 2024, through December 2, 2027, amend § 274a.12 by adding paragraph (b)(35) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(35)(i) Pursuant to 8 CFR 214.2(h)(32) and notwithstanding 8 CFR 214.2(h)(2)(i)(D), an alien is authorized to be employed no earlier than the start date of employment indicated in the H-2B petition and no earlier than January 25, 2025, by a new employer that has filed an H-2B petition naming the alien as a beneficiary and requesting an extension of stay for the alien, for a period not to exceed 60 days beginning on:

(A) The later of the "Received Date" on Form I-797 (Notice of Action) acknowledging receipt of the petition, or the start date of employment indicated on the new H-2B petition, for petitions filed on or after January 25, 2025; or

(B) The later of January 25, 2025, or the start date of employment indicated on the new H-2B petition, for petitions that are pending as of January 25, 2025.

(ii) If USCIS adjudicates the new petition prior to the expiration of the 60-day period in paragraph (b)(35)(i) of this section and denies the new petition for extension of stay, or if the petitioner withdraws the new petition before the expiration of the 60-day period, the employment authorization under this paragraph (b)(35) will automatically terminate upon 15 days after the date of the denial decision or the date on which

the new petition is withdrawn. Nothing in this section is intended to alter the availability of employment authorization related to professional H-2B athletes who are traded between organizations pursuant to paragraph (b)(9) of this section and 8 CFR 214.2(h)(6)(vii).

(iii) Authorization to initiate employment changes pursuant to 8 CFR 214.2(h)(32) and paragraph (b)(35)(i) of this section begins at 12 a.m. on January 25, 2025, and ends at the end of January 24, 2026.

* * * * *

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Chapter V

Accordingly, for the reasons stated in the joint preamble, 20 CFR part 655 is amended as follows:

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 5. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; sec. 412(e), Pub. L. 105-277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107-296, 116 Stat. 2135, as amended; Pub. L. 109-423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115-218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105-277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109-423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 6. Effective December 2, 2024, through September 30, 2025, add § 655.64 to read as follows:

§ 655.64 Special application filing and eligibility provisions for Fiscal Year 2025 under the December 2, 2024, supplemental cap increase.

(a) An employer filing a petition with USCIS under 8 CFR 214.2(h)(6)(xv) to request H-2B workers with FY 2025 employment start dates on or before September 30, 2025, must meet the following requirements:

(1) The employer must attest on the Form ETA-9142-B-CAA-9 that its business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H-2B workers requested on the petition filed pursuant to 8 CFR 214.2(h)(6)(xv). The employer's attestation must identify the types of evidence the employer is relying on and will retain to meet the irreparable harm standard. The employer must attest that it has created a detailed written statement describing how it is suffering irreparable harm or will suffer impending irreparable harm and describing how such evidence demonstrates irreparable harm. In addition, the employer must attest that it will provide to DHS and/or DOL upon request all of the documentation it relied upon and retained as evidence that it meets the irreparable harm standard, including all of the supporting documentation the employer committed to retain at the time of filing on the employer's attestation form by selecting a checkbox next to the applicable type of documentation in section C, and the written statement describing how such evidence demonstrates irreparable harm.

(2) The employer must attest on Form ETA-9142-B-CAA-9 that each of the workers requested and/or instructed to apply for a visa, whether named or unnamed, on a petition filed pursuant to 8 CFR 214.2(h)(6)(xv), have been issued an H-2B visa or otherwise granted H-2B status during one of the last three (3) fiscal years (fiscal year 2022, 2023, or 2024), unless the H-2B worker is a national of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica and is counted towards the 20,000 cap described in 8 CFR 214.2(h)(6)(xv)(A)(2).

(3) The employer must attest on Form ETA-9142-B-CAA-9 that the employer will comply with all the assurances, obligations, and conditions of employment set forth on its approved *Application for Temporary Employment Certification*.

(4) An employer that submits Form ETA-9142B-CAA-9 and the I-129 petition 30 or more days after the certified start date of work, as shown on

its approved Form ETA-9142B, *Final Determination: H-2B Temporary Labor Certification Approval*, must conduct additional recruitment of U.S. workers as follows:

(i) Not later than the next business day after submitting the I-129 petition for H-2B worker(s), the employer must place a new job order for the job opportunity with the State Workforce Agency (SWA), serving the area of intended employment. The employer must follow all applicable SWA instructions for posting job orders, concurrently inform the SWA and NPC that the job order is being placed in connection with a previously certified *Application for Temporary Employment Certification* for H-2B workers by providing the unique temporary labor certification (TLC) identification number, and receive applications in all forms allowed by the SWA, including online applications (sometimes known as "self-referrals"). The job order must contain the job assurances and contents set forth in § 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 15 calendar days;

(ii) During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must contact, by email or other available electronic means, the nearest comprehensive American Job Center (AJC) serving the area of intended employment where work will commence, request staff assistance advertising and recruiting qualified U.S. workers for the job opportunity, and provide the AJC with the unique identification number associated with the job order placed with the SWA or, if unavailable, a copy of the job order. If a comprehensive AJC is not available, the employer must contact the nearest affiliate AJC serving the area of intended employment where work will commence to satisfy the requirements of this paragraph (a)(4)(ii);

(iii) Where the occupation or industry is traditionally or customarily unionized, during the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must contact (by mail, email or other effective means) the nearest American Federation of Labor and Congress of Industrial Organizations office covering the area of intended employment and provide written notice of the job opportunity, by providing a copy of the job order placed pursuant to (a)(4)(i) of this section, and request assistance in recruiting qualified U.S. workers for the job;

(iv) During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must contact (by mail or other effective means) its former U.S. workers, including those who have been furloughed or laid off, during the period beginning January 1, 2023, until the date the I-129 petition required under 8 CFR 214.2(h)(6)(xv) is submitted, who were employed by the employer in the occupation at the place of employment (except those who were dismissed for cause or who abandoned the worksite), disclose the terms of the job order placed pursuant to (a)(4)(i) of this section, and solicit their return to the job. The contact and disclosures required by this paragraph (a)(4)(iv) must be provided in a language understood by the worker, as necessary or reasonable, and in writing;

(v) During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must engage in the recruitment of U.S. workers as provided in § 655.45(a) and (b). The contact and disclosures required by this paragraph (a)(4)(v) must be provided in a language understood by the worker, as necessary or reasonable, in writing; and

(vi) During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must contact (by mail or other effective written means) all U.S. workers currently employed at the place of employment, disclose the terms of the job order placed pursuant to (a)(4)(i) of this section, and request assistance in recruiting qualified U.S. workers for the job. The contact, disclosure, and request for assistance required by this paragraph (a)(4)(vi) must be provided in a language understood by the worker, as necessary or reasonable, and in writing;

(vii) Where the employer maintains a website for its business operations, during the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must post the job opportunity in a conspicuous location on the website. The job opportunity posted on the website must disclose the terms of the job order placed pursuant to (a)(4)(i) of this section, and remain posted for at least 15 calendar days;

(viii) The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until the date on which the last H-2B worker departs for the place of employment, or 30 days after the last date on which the

SWA job order is posted, whichever is later. Consistent with § 655.40(a), applicants can be rejected only for lawful job-related reasons.

(5) The employer must attest on Form ETA-9142-B-CAA-9 that it will fully cooperate with any audit, investigation, compliance review, evaluation, verification, or inspection conducted by DOL, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with applicable laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2025 supplemental allocations outlined in this paragraph (a) and § 655.68(a), as a condition for the approval of the H-2B petition. Pursuant to this subpart A at § 655.73 and 29 CFR 503.25, the employer will not impede, interfere, or refuse to cooperate with an employee of the Secretary who is exercising or attempting to exercise DOL's audit or investigative authority. DOL may consider the failure to respond to and/or comply with an investigation or audit to be a willful misrepresentation of material fact or a substantial failure to meet the terms and conditions of the *H-2B Application for Prevailing Wage Determination*, or *Application for Temporary Employment Certification*, resulting in an adverse agency action on the employer, agent, or attorney, including assessment of a civil money penalty, revocation of the temporary labor certification, and/or program debarment for not less than 1 year or more than 5 years from the date of the final agency decision under 20 CFR 655.70, 655.72, 655.73 or 29 CFR part 503. A debarred party will be disqualified from filing any labor certification applications or labor condition applications with the

Department of Labor by, or on behalf of, the debarred party for the same period of time set forth in the final debarment decision.

(b) This section expires on October 1, 2025.

(c) The requirements under paragraph (a) of this section are intended to be non-severable from the remainder of this section; in the event that paragraph (a)(1), (2), (3), (4), or (5) of this section is enjoined or held to be invalid by any court of competent jurisdiction, the remainder of this section is also intended to be enjoined or held to be invalid in such jurisdiction, without prejudice to workers already present in the United States under this part, as consistent with law.

■ 7. Effective December 2, 2024, through September 30, 2028, add § 655.68 to read as follows:

§ 655.68 Special document retention provisions for Fiscal Years 2025 through 2028 under the Further Consolidated Appropriations Act, 2024, as extended by Public Law 118–83.

(a) An employer that files a petition with USCIS to employ H-2B workers in fiscal year 2025 under authority of the temporary increase in the numerical limitation under section 105 of Division G, Public Law 118–47, as extended by Public Law 118–83 must maintain for a period of three (3) years from the date of certification, consistent with 20 CFR 655.56 and 29 CFR 503.17, the following:

(1) A copy of the attestation filed pursuant to the regulations in 8 CFR 214.2 governing that temporary increase;

(2) Evidence establishing, at the time of filing the I-129 petition and as attested to in the attestation form, that the employer's business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the

H-2B workers requested on the petition filed pursuant to 8 CFR 214.2(h)(6)(xv), including a detailed written statement describing the irreparable harm and how such evidence shows irreparable harm;

(3) Documentary evidence establishing that each of the workers the employer requested and/or instructed to apply for a visa, whether named or unnamed on a petition filed pursuant to 8 CFR 214.2(h)(6)(xv), have been issued an H-2B visa or otherwise granted H-2B status during one of the last three (3) fiscal years (fiscal year 2022, 2023, or 2024), unless the H-2B worker(s) is a national of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica and is counted towards the 20,000 cap described in 8 CFR 214.2(h)(6)(xv)(A)(2). Alternatively, if applicable, employers must maintain documentary evidence that the workers the employer requested and/or instructed to apply for visas are eligible nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica as defined in 8 CFR 214.2(h)(6)(xv)(A)(2); and

(4) If applicable, proof of recruitment efforts set forth in § 655.64(a)(4)(i) through (vii) and a recruitment report that meets the requirements set forth in § 655.48(a)(1) through (4) and (7), and maintained throughout the recruitment period set forth in § 655.64(a)(4)(viii).

(b) DOL and/or DHS may inspect the documents in paragraphs (a)(1) through (4) of this section upon request.

(c) This section expires on October 1, 2028.

Alejandro N. Mayorkas,
Secretary, U.S. Department of Homeland Security.

Julie A. Su,
Acting Secretary, U.S. Department of Labor.

[FR Doc. 2024–28017 Filed 11–27–24; 8:45 am]

BILLING CODE 9111–97–P; 4510–FP–P



FEDERAL REGISTER

Vol. 89

Monday,

No. 231

December 2, 2024

Part VI

Environmental Protection Agency

40 CFR Part 721

Significant New Use Rules on Certain Chemical Substances (24–2.5e);
Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 721**

[EPA-HQ-OPPT-2024-0077; FRL-12348-01-OCSPP]

RIN 2070-AB27

Significant New Use Rules on Certain Chemical Substances (24-2.5e)**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

SUMMARY: EPA is proposing significant new use rules (SNURs) under the Toxic Substances Control Act (TSCA) for certain chemical substances that were the subject of premanufacture notices (PMNs) and are also subject to an Order issued by EPA pursuant to TSCA. The SNURs require persons who intend to manufacture (defined by statute to include import) or process any of these chemical substances for an activity that is proposed as a significant new use by this rulemaking to notify EPA at least 90 days before commencing that activity. The required notification initiates EPA's evaluation of the conditions of that use for that chemical substance. In addition, the manufacture or processing for the significant new use may not commence until EPA has conducted a review of the required notification, made an appropriate determination regarding that notification, and taken such actions as required by that determination.

DATES: Comments must be received on or before January 2, 2025.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA-HQ-OPPT-2024-0077 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 and visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

For technical information: Punam Tyagi, New Chemicals Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 566-1176; email address: tyagi.punam@epa.gov.

For general information on SNURs: William Wysong, New Chemicals Division (7405M), Office of Pollution Prevention and Toxics, Environmental

Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 564-4163; email address: wysong.william@epa.gov.

For general information: 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. What is the Agency's authority for taking this action?*

TSCA section 5(a)(2) (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a "significant new use." EPA must make this determination by rule after considering all relevant factors, including the factors in TSCA section 5(a)(2) (see also the discussion in Unit II.).

B. What action is the Agency taking?

EPA is proposing SNURs for chemical substances discussed in Unit III. These SNURs, if finalized as proposed, would require persons who intend to manufacture or process any of these chemical substances for an activity that is designated as a significant new use to notify EPA at least 90 days before commencing that activity.

*C. Does this action apply to me?***1. General Applicability**

This action applies to you if you manufacture, process, or use the chemical substances contained in this proposed rule. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Manufacturers or processors of one or more subject chemical substances (NAICS codes 325 and 324110), e.g., chemical manufacturing and petroleum refineries.

2. Applicability to Importers and Exporters

This action may also apply to certain entities through pre-existing import certification and export notification requirements under TSCA (<https://www.epa.gov/tsca-import-export-requirements>).

Chemical importers are subject to TSCA section 13 (15 U.S.C. 2612), the requirements promulgated at 19 CFR 12.118 through 12.127, 19 CFR 127.28, and the EPA policy in support of import certification at 40 CFR part 707, subpart

B. Chemical importers must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA, including regulations issued under TSCA sections 5, 6, 7 and Title IV.

Pursuant to 40 CFR 721.20, any persons who export or intend to export a chemical substance that is the subject of this proposed rule on or after January 2, 2025 are subject to TSCA section 12(b) (15 U.S.C. 2611(b)) and must comply with the export notification requirements in 40 CFR part 707, subpart D.

D. What are the incremental economic impacts of this action?

EPA has evaluated the potential costs of establishing SNUN reporting requirements for potential manufacturers (including importers) and processors of the chemical substances subject to these proposed SNURs. This analysis, which is available in the docket, is briefly summarized here.

1. Estimated Costs for SNUN Submissions

If a SNUN is submitted, costs are an estimated \$45,000 per SNUN submission for large business submitters and \$14,500 for small business submitters. These estimates include the cost to prepare and submit the SNUN (including registration for EPA's Central Data Exchange (CDX)), and the payment of a user fee. Businesses that submit a SNUN would be subject to either a \$37,000 user fee required by 40 CFR 700.45(c)(2)(ii) and (d), or, if they are a small business as defined at 13 CFR 121.201, a reduced user fee of \$6,480 (40 CFR 700.45(c)(1)(ii) and (d)) per fiscal year 2022. The costs of submission for SNUNs will not be incurred by any company unless a company decides to pursue a significant new use as defined in these SNURs. Additionally, these estimates reflect the costs and fees as they are known at the time of this rulemaking.

2. Estimated Costs for Export Notifications

EPA has also evaluated the potential costs associated with the export notification requirements under TSCA section 12(b) and the implementing regulations at 40 CFR part 707, subpart D. For persons exporting a substance that is the subject of a SNUR, a one-time notice to EPA must be provided for the first export or intended export to a particular country. The total costs of export notification will vary by chemical, depending on the number of required notifications (i.e., the number

of countries to which the chemical is exported). While EPA is unable to make any estimate of the likely number of export notifications for the chemical substances covered by these SNURs, as stated in the accompanying economic analysis, the estimated cost of the export notification requirement on a per unit basis is approximately \$106.

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

1. Submitting CBI

Do not submit CBI to EPA through email or <https://www.regulations.gov>. If you wish to include CBI in your comment, please follow the applicable instructions at <https://www.epa.gov/dockets/commenting-epa-dockets#rules> and clearly mark the information that you claim to be CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR parts 2 and 703.

2. Tips for Preparing Your Comments

When preparing and submitting your comments, see the commenting tips at <https://www.epa.gov/dockets/commenting-epa-dockets>.

II. Background

This unit provides general information about SNURs. For additional information about EPA's new chemical program go to <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca>.

A. Significant New Use Determination Factors

TSCA section 5(a)(2) states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors, including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In determining what would constitute a significant new use for the chemical substances that are the subject of these SNURs, EPA considered relevant information about the toxicity of the chemical substances, and potential human exposures and environmental releases that may be associated with the

substances, in the context of the four bulleted TSCA section 5(a)(2) factors listed in this unit and discussed in Unit III.

These proposed SNURs include PMN substances that are subject to orders issued under TSCA section 5(e)(1)(A), as required by the determinations made under TSCA section 5(a)(3)(B). The TSCA orders require protective measures to limit exposures or otherwise mitigate the potential unreasonable risk. The proposed SNURs identify as significant new uses any manufacturing, processing, use, distribution in commerce, or disposal that does not conform to the restrictions imposed by the underlying TSCA orders, consistent with TSCA section 5(f)(4).

B. Rationale and Objectives of the SNURs

1. Rationale

Under TSCA, no person may manufacture a new chemical substance or manufacture or process a chemical substance for a significant new use until EPA makes a determination as described in TSCA section 5(a) and takes any required action. The issuance of a SNUR is not a risk determination itself, only a notification requirement for "significant new uses," so that the Agency has the opportunity to review the SNUN for the significant new use and make a TSCA section 5(a)(3) risk determination.

During review of the PMNs submitted that are the subject to these proposed SNURs, EPA concluded that regulation was warranted under TSCA section 5(e), pending the development of information sufficient to make reasoned evaluations of the health or environmental effects of the chemical substances. Based on the findings outlined in Unit III., TSCA section 5(e) Orders requiring the use of appropriate exposure controls were negotiated with the PMN submitters. As a general matter, EPA believes it is necessary to follow the TSCA Orders with a SNUR that identifies the absence of those protective measures as significant new uses to ensure that all manufacturers and processors—not just the original submitter—are held to the same standard.

2. Objectives

EPA is proposing these SNURs because the Agency wants:

- To identify as significant new uses any manufacturing, processing, use, distribution in commerce, or disposal that does not conform to the restrictions imposed by the underlying TSCA Orders, consistent with TSCA section 5(f)(4).

- To have an opportunity to review and evaluate data submitted in a SNUN before the submitter begins manufacturing or processing a listed chemical substance for the described significant new use.

- To be obligated to make a determination under TSCA section 5(a)(3) regarding the use described in the SNUN, under the conditions of use. The Agency will either determine under TSCA section 5(a)(3)(C) that the significant new use is not likely to present an unreasonable risk, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant by the Administrator under the conditions of use, or make a determination under TSCA section 5(a)(3)(A) or (B) and take the required regulatory action associated with the determination, before manufacture or processing for the significant new use of the chemical substance can occur.

Issuance of a proposed SNUR for a chemical substance does not signify that the chemical substance is listed on the TSCA Chemical Substance Inventory (TSCA Inventory). Guidance on how to determine if a chemical substance is on the TSCA Inventory is available at <https://www.epa.gov/tsca-inventory>.

C. Significant New Uses Claimed as CBI

EPA is proposing to establish certain significant new uses which have been claimed as CBI subject to Agency confidentiality regulations at 40 CFR part 2 and 40 CFR part 720, subpart E. Absent a final determination or other disposition of the confidentiality claim under 40 CFR part 2 procedures, EPA is required to keep this information confidential. EPA promulgated a procedure at 40 CFR 721.11 to deal with the situation where a specific significant new use is CBI. Under these procedures, a manufacturer or processor may request for EPA to identify the confidential significant new use under the rule. The manufacturer or processor must show that it has a *bona fide* intent to manufacture or process the chemical substance. If EPA concludes that the person has shown a *bona fide* intent to manufacture or process the chemical substance, EPA will identify the confidential significant new use to that person. Since most of the chemical identities of the chemical substances subject to these SNURs are also CBI, manufacturers and processors can combine the *bona fide* submission under the procedure in 40 CFR 721.11 into a single step.

D. Applicability of General Provisions

General provisions for SNURs appear in 40 CFR part 721, subpart A. These provisions describe persons subject to SNURs, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the rule. Pursuant to 40 CFR 721.1(c), persons subject to SNURs must comply with the same requirements and EPA regulatory procedures as submitters of PMNs under TSCA section 5(a)(1)(A). In particular, these requirements include the information submission requirements of TSCA sections 5(b) and 5(d)(1), the exemptions authorized by TSCA sections 5(h)(1), 5(h)(2), 5(h)(3), and 5(h)(5) and the regulations at 40 CFR part 720. In addition, provisions relating to user fees appear at 40 CFR part 700.

Once EPA receives a SNUN, EPA must either determine that the significant new use is not likely to present an unreasonable risk of injury under the conditions of use for the chemical substance or take such regulatory action as is associated with an alternative determination under TSCA section 5 before the manufacture (including import) or processing for the significant new use can commence. If EPA determines that the significant new use of the chemical substance is not likely to present an unreasonable risk, EPA is required under TSCA section 5(g) to make public, and submit for publication in the **Federal Register**, a statement of EPA's findings.

As discussed in Unit I.C.2., persons who export or intend to export a chemical substance identified in a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b), and persons who import a chemical substance identified in a final SNUR are subject to the TSCA section 13 import certification requirements. See also <https://www.epa.gov/tsca-import-export-requirements>.

E. Applicability of the Proposed SNURs to Uses Occurring Before the Effective Date of the Final Rule

To establish a significant new use, EPA must determine that the use is not ongoing. The chemical substances subject to this proposed rule have undergone premanufacture review and received determinations under TSCA section 5(a)(3)(C). TSCA Orders have been issued for these chemical substances and the PMN submitters are required by the TSCA Orders to submit a SNUN before undertaking activities that would be designated as significant

new uses in these SNURs. Additionally, the identities of many of the chemical substances subject to this proposed rule have been claimed as confidential per 40 CFR 720.85, further reducing the likelihood that another party would manufacture or process the substances for an activity that would be designated as a significant new use. Based on this, the Agency believes that it is highly unlikely that any of the significant new uses identified in Unit III. are ongoing.

When the chemical substances identified in Unit III are added to the TSCA Inventory, EPA recognizes that, before the rule is effective, other persons might engage in a use that has been identified as a significant new use. Persons who begin manufacture or processing of the chemical substances for a significant new use identified on or after the designated cutoff date specified in Unit III.A. would have to cease any such activity upon the effective date of the final rule. To resume their activities, these persons would have to first comply with all applicable SNUR notification requirements and EPA would have to take action under TSCA section 5 allowing manufacture or processing to proceed.

F. Important Information About SNUN Submissions

1. SNUN Submissions

SNUNs must be submitted on EPA Form No. 7710–25, generated using e-PMN software, and submitted to the Agency in accordance with the procedures set forth in 40 CFR 720.40 and 721.25. E-PMN software is available electronically at <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca>.

2. Development and Submission of Information

EPA recognizes that TSCA section 5 does not require development of any particular new information (e.g., generating test data) before submission of a SNUN. There is an exception: If a person is required to submit information for a chemical substance pursuant to a rule, order or consent agreement under TSCA section 4, then TSCA section 5(b)(1)(A) requires such information to be submitted to EPA at the time of submission of the SNUN.

In the absence of a rule, TSCA order, or consent agreement under TSCA section 4 covering the chemical substance, persons are required only to submit information in their possession or control and to describe any other information known to or reasonably ascertainable by them (see 40 CFR

720.50). However, upon review of PMNs and SNUNs, the Agency has the authority to require appropriate testing. To assist with EPA's analysis of the SNUN, submitters are encouraged, but not required, to provide the potentially useful information identified for the chemical substance in Unit III.C.

EPA strongly encourages persons, before performing any testing, to consult with the Agency pertaining to protocol selection. Furthermore, pursuant to TSCA section 4(h), which pertains to reduction of testing in vertebrate animals, EPA encourages consultation with the Agency on the use of alternative test methods and strategies (also called New Approach Methodologies, or NAMs), if available, to generate the recommended test data. EPA encourages dialog with Agency representatives to help determine how best the submitter can meet both the data needs and the objective of TSCA section 4(h). For more information on alternative test methods and strategies to reduce vertebrate animal testing, visit <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/alternative-test-methods-and-strategies-reduce>.

The potentially useful information described in Unit III. may not be the only means of providing information to evaluate the chemical substance associated with the significant new uses. However, submitting a SNUN without any test data may increase the likelihood that EPA will take action under TSCA sections 5(e) or 5(f). EPA recommends that potential SNUN submitters contact EPA early enough so that they will be able to conduct the appropriate tests.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs that provide detailed information on the following:

- Human exposure and environmental release that may result from the significant new use of the chemical substances.

III. Chemical Substances Subject to These Proposed SNURs

A. What is the designated cutoff date for determining whether the new use is ongoing for these chemical substances?

EPA designates December 2, 2024 as the cutoff date for determining whether the new use is ongoing. This designation is explained in more detail in Unit II.E.

B. What information is provided for each chemical substance?

For each chemical substance identified in Unit III.C., EPA provides the following information:

- PMN number (the proposed CFR citation assigned in the regulatory text section of the proposed rule).
- Chemical name (generic name, if the specific name is claimed as CBI).
- Chemical Abstracts Service Registry Number (CASRN) (if assigned for non-confidential chemical identities).
- Basis for the action [Effective date of and basis for the TSCA Order].
- Potentially useful information.

The regulatory text section of the proposed rule specifies the activities designated as significant new uses. Certain new uses, including production volume limits and other uses designated in the proposed rules, may be claimed as CBI.

These proposed rules include PMN substances that are subject to orders issued under TSCA section 5(e)(1)(A), as required by the determinations made under TSCA section 5(a)(3)(B). Those TSCA Orders require protective measures to limit exposures or otherwise mitigate the potential unreasonable risk. The proposed SNURs identify as significant new uses any manufacturing, processing, use, distribution in commerce, or disposal that does not conform to the restrictions imposed by the underlying TSCA Orders, consistent with TSCA section 5(f)(4).

Where EPA determined that the PMN substance may present an unreasonable risk of injury to human health via inhalation exposure, the underlying TSCA Order usually requires that potentially exposed employees wear specified respirators unless actual measurements of the workplace air show that air-borne concentrations of the PMN substance are below a New Chemical Exposure Limit (NCEL). The comprehensive NCELS provisions in TSCA Orders include requirements addressing performance criteria for sampling and analytical methods, periodic monitoring, respiratory protection, and recordkeeping. No comparable NCEL provisions currently exist in 40 CFR part 721, subpart B, for SNURs. Therefore, for these cases, the individual SNURs in 40 CFR part 721, subpart E, will state that persons subject to the SNUR who wish to pursue NCELS as an alternative to the 40 CFR 721.63 respirator requirements may request to do so under 40 CFR 721.30. EPA expects that persons whose 40 CFR 721.30 requests to use the NCELS approach for SNURs that are approved by EPA will be required to comply with NCELS provisions that are comparable to those contained in the corresponding TSCA Order.

C. Which chemical substances are subject to this proposed rule?

The substances subject to the proposed rules in this document are as follows:

PMN Numbers (Proposed CFR Citations): P-16-377 (40 CFR 721.11960) and P-16-378 (40 CFR 721.11961)

Chemical Names: Polyester polyol (generic).

CASRN: Not available.

Effective Date of TSCA Order: August 8, 2023.

Basis for TSCA Order: The PMNs state that the generic (non-confidential) uses will be as film components. Based on meeting the criteria of the PMN substances being insoluble in water, non-reactive, respirable, and being high molecular weight polymers, EPA has identified concerns for lung effects (lung overload). The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substances may present an unreasonable risk of injury to human health.

To protect against these risks, the Order requires:

- No manufacture, processing, or use of the PMN substances in a manner that would result in respirable particle sizes below 10 microns; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of specific target organ toxicity testing may be potentially useful to characterize the health effects of the PMN substances. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P-18-346 (40 CFR 721.11962)

Chemical Name: 2,4,8,10-Tetraoxa-3,9-diphosphaspiro[5.5]undecane, 3,9-bis-[2-(1-methyl-1-phenylethyl)-4-(1,1,3,3-tetramethylbutyl)phenoxy]-.

CASRN: 1507339-21-0.

Effective Date of TSCA Order: July 25, 2023.

Basis for TSCA Order: The PMN states that the use will be as an antioxidant compounded into various polymers to be used in extrusion processes to fabricate articles. Based on submitted test data on the PMN substance, EPA has identified concerns for eye irritation and skin sensitization. Based on comparison to analogous chemical substances, EPA has also identified concerns for neurotoxicity, liver, spleen, reproductive, and developmental effects. Based on comparison to analogous neutral organic chemicals, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 18 parts per billion (ppb). The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health and the environment. To protect against these risks, the Order requires:

- No release of the PMN substance, or any waste stream containing the PMN substance, in surface water concentrations that exceed 18 ppb;
- Use of personal protective equipment where there is a potential for dermal exposure;
- Use of a NIOSH-certified respirator with an APF of at least 50 where there is a potential for inhalation exposure; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of neurotoxicity, specific target organ toxicity, reproductive toxicity, developmental toxicity, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P-20-44 (40 CFR 721.11963)

Chemical Name: 1-Propanamine, 3-methoxy-N,N-dimethyl-.

CASRN: 20650-07-1.

Effective Date of Modified TSCA Order: June 14, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use will be as a curing additive for automotive paint, an additive for industrial polyurethane dispersions, a solubilizer for high acid value styrene acrylic polymers for use in ink applications, for neutralization, solubilization, and stability in commercial waterborne and solvent borne coatings and varnishes used for wood, metal, composites, and other substrates. Based on submitted test data on the new chemical substance, EPA has identified concerns for skin and respiratory irritation and serious eye damage. Based on comparison to structurally analogous chemical substances, EPA has also identified concerns for systemic toxicity, respiratory tract effects, and reproductive/developmental toxicity. Based on comparison to analogous aliphatic amines, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 1000 ppb. EPA issued an Order under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health or the environment. The Order was also issued under TSCA sections 5(a)(3)(B)(ii)(II) and 5(e)(1)(A)(ii)(II), based on a finding that the substance is or will be produced in substantial quantities and that the substance either enters or may reasonably be anticipated to enter the environment in substantial quantities, or there is or may be significant (or substantial) human exposure to the substance. The Order, effective October 1, 2020, required the submitter of P-20-44 to submit to EPA the results of certain toxicity testing before any manufacturing (which includes import), processing, or use of the PMN substance. On May 25, 2021, the PMN submitter provided the results of three environmental toxicity studies in accordance with the requirements of the Order. EPA reviewed those studies and determined the studies to be valid. EPA subsequently modified the terms of the Order to mitigate any unreasonable risks to human health and the environment and issued a modified Order, effective June 14, 2023. To protect against these

potential risks, the modified Order requires:

- No use of the PMN substance in consumer products;
- No release of the PMN substance, or any waste stream containing the PMN substance, in surface water concentrations that exceed 1000 ppb;
- Use of a NIOSH-certified gas/vapor particulate respirator with an APF of at least 1000 where there is a potential for inhalation exposure or compliance with a NCEL of 1.1388mg/m³ as an 8-hour time-weighted average to prevent inhalation exposure;
- Use of personal protective equipment where there is a potential for dermal exposure; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of skin irritation, serious eye damage, reproductive toxicity, and specific target organ toxicity testing may be potentially useful to characterize the health effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P-21-21 (40 CFR 721.11964)

Chemical Name: Soybean oil, mixed esters with diethylene glycol, phthalic acid and terephthalic acid.

CASRN: Not available.

Effective Date of TSCA Order: July 5, 2023.

Basis for TSCA Order: The PMN states that use will be as a raw material to be blended into R-side components of the polyurethane and polyisocyanurate industry (specifically used in slabstock/bunstock processing of foam). Based on the acid groups, EPA has identified concerns for irritation to the skin, eyes, and respiratory tract. Based on test data for a feedstock and potential metabolite, diethylene glycol, EPA has also identified concerns for systemic (body weight, bladder, kidney) and developmental effects. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I),

based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health. To protect against these risks, the Order requires:

- No use of the PMN substance in consumer products;
- No manufacture, processing, or use of the PMN substance in any manner that results in inhalation exposure;
- No release of the PMN substance, or any waste stream containing the PMN substance, in surface water concentrations that exceed 3000 ppb;
- Use of personal protective equipment where there is a potential for dermal exposure; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of reproductive toxicity, skin irritation, eye damage, and specific target organ toxicity testing may be potentially useful to characterize the health effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P-21-151 (40 CFR 721.11965)

Chemical Name: Soybean oil, epoxidized, polymer with bisphenol A, alkyl glycidyl ether, epichlorohydrin, polyethylene glycol and trihydroxyalkane (generic).

CASRN: Not available.

Effective Date of TSCA Order: August 16, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use will be in polyurethane applications. Based on the surfactant properties of the PMN substance, EPA has identified concerns for lung effects (surfactancy) if inhaled. Based on the potential protein crosslinking of multifunctional reactive groups and epoxides present in the feedstocks, EPA has also identified concerns for dermal and respiratory sensitization. Based on comparison to analogous nonionic surfactants, EPA predicts toxicity to aquatic organisms

may occur at concentrations that exceed 140 ppb. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health and the environment. To protect against these risks, the Order requires:

- No use of the PMN substance for use in a consumer product;
- No release of the PMN substance, or any waste stream containing the PMN substance, in surface water concentrations that exceed 140 ppb;
- No processing or use of the PMN substance in a spray application;
- Use of personal protective equipment where there is a potential for dermal exposure;
- Use of a NIOSH-certified respirator with an APF of at least 1,000 where there is a potential for inhalation exposure; and

- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of pulmonary effects, specific target organ toxicity, skin sensitization, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–21–168 (40 CFR 721.11966)

Chemical Name: Metal, [heteropoly cyclic]-, [[(hydroxyalkyl)amino]sulfonyl]alkyl)sulfonyl (sulfoalkyl)sulfonyl derivs., ammonium sodium salts (generic).

CASRN: Not available.

Effective Date of TSCA Order: September 22, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use will be as a colorant. Based on submitted test data on the PMN substance, EPA predicts toxicity to aquatic organisms may occur at

concentrations that exceed 178 ppb. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to the environment. To protect against these risks, the Order requires:

- No release of the PMN substance, or any waste stream containing the PMN substance, in surface water concentrations that exceed 178 ppb; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of chronic aquatic toxicity testing may be potentially useful to characterize the environmental effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–21–173 (40 CFR 721.11967)

Chemical Name: Siloxanes and silicones polyether, polymer with aliphatic isocyanate, 2-dimethylaminoethanol and polyglycol ether (generic).

CASRN: Not available.

Effective Date of TSCA Order: June 29, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use will be as an additive for finishing of textiles/fabrics. Based on structure, EPA has identified concerns for lung effects due to surfactancy. Based on comparison to analogous chemical substances, EPA has also identified concerns for developmental and systemic effects. Based on comparison to analogous polycationic polymers, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 1 ppb. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health and the

environment. To protect against these risks, the Order requires:

- No processing for use or use of the PMN substance in a consumer product;
- No manufacture, processing, or use of the PMN substance in any manner that results in inhalation exposure;
- Use of personal protective equipment where there is a potential for dermal exposure;
- No release of the PMN substance, or any waste stream containing the PMN substance, in surface water concentrations that exceed 1 ppb; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of developmental toxicity, specific target organ toxicity, pulmonary effects, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–21–194 (40 CFR 721.11968)

Chemical Name: Siloxanes and Silicones, di-Me, [gluconoylamino]alkyl] dialkylammonio]- hydroxyalkoxy]alkyl group-terminated, (salts) (generic).

CASRN: Not available.

Effective Date of TSCA Order: September 15, 2023.

Basis for TSCA Order: The PMN states that the use will be as a textile softening agent. Based on the siloxane moieties, EPA has identified concerns for lung waterproofing. Based on comparison to analogous chemical substances, EPA has also identified concerns for irritation to skin and eyes. Based on comparison to analogous polycationic polymers, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 210 ppb. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable

risk of injury to human health and the environment. To protect against these risks, the Order requires:

- No processing for use or use of the PMN substance as a consumer product;
- No release of the PMN substance, or any waste stream containing the PMN substance, in surface water concentrations that exceed 210 ppb;
- No manufacture, processing, or use of the PMN substance in any manner that results in the generation of a vapor, mist, dust, or aerosol;
- Use of personal protective equipment where there is a potential for dermal exposure; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of metabolism or pharmacokinetics, skin irritation, eye irritation/corrosion, specific target organ toxicity, pulmonary effects, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–21–202 (40 CFR 721.11969)

Chemical Name: Sulfonium, carbomonocycle bis((trihaloalkyl)carbomonocycle), substituted carbomonocyclic ester (generic).

CASRN: Not available.

Effective Date of TSCA Order: December 21, 2022.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use of the PMN substance will be as an ingredient used in the manufacture of photoresist. Based on the physical/chemical properties of the PMN substance (as described in the New Chemical Program’s PBT category at 64 FR 60194; November 1999) and test data on structurally similar substances, the PMN substance is a potentially persistent, bioaccumulative, and toxic (PBT) chemical. EPA estimates that the PMN substance’s cation photolysis

product will persist in the environment for more than six months and estimates a bioaccumulation factor of greater than or equal to 1,000. EPA also estimates that the PMN substance’s cation will persist in the environment for more than six months and estimates an unknown bioaccumulation potential based on uncertainty about bioaccumulation.

Based on the photoreactivity of the PMN substance, EPA has identified concerns for photosensitization for the cation of the PMN substance. Based on comparison to chemical substances analogous to the sulfonium cation of the PMN substance and supported by information provided in the SDS, EPA has also identified concerns for acute toxicity, irritation to the skin, eyes, and respiratory tract, eye corrosion, ocular lethality, neurological effects, and systemic effects for the cation. Based on information provided in the SDS, EPA has also identified concerns for irritation to the skin, eyes, and respiratory tract and neurotoxicity. Based on comparison to analogous chemical substances, EPA has also identified concerns for mutagenicity for the cation. Based on a potential incineration by-product, EPA has also identified concerns for both local and systemic effects via inhalation exposure. Based on test data for salicylic acid and sodium salicylate, EPA has also identified concerns for acute toxicity (mortality), eye irritation, neurotoxicity, and reproductive and developmental effects for the anion. Based on potential for chelation and irritation based on acid groups, EPA has also identified concerns for developmental effects for the anion. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health or the environment. To protect against these risks, the Order requires:

- No manufacture of the PMN substance beyond the time limits specified in the Order without submittal to EPA the results of certain testing described in the Testing section of the Order;
- Use of personal protective equipment where there is a potential for dermal exposure;
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS;
- No modification of the processing or use of the PMN substance in any way that generates a vapor, dust, mist, or aerosol in a non-enclosed process;

- Use of the PMN substance only for the confidential use listed in the Order;
- No domestic manufacture of the PMN substance (*i.e.*, import only);
- Import of the PMN substance only in solution, or in any form in sealed containers weighing 5 kilograms or less; and
- No exceedance of the confidential annual importation volume listed the Order.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information about the physical/chemical properties, fate, bioaccumulation, environmental hazard, and human health effects of the PMN substance may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. The submitter has agreed not to exceed the time limits specified in the Order without performing the required Tier I and Tier II testing outlined in the Testing section of the Order.

PMN Numbers (Proposed CFR Citations): P–21–208 (40 CFR 721.11970), P–21–209 (40 CFR 721.11971), and P–21–210 (40 CFR 721.11972)

Chemical Names: Aromatic diacids, polymer with alkyldiacids, alkyldiols, benzofurandione, caprolactone and 1,1'-methylenebis[4-isocyanatobenzene] (generic) (P–21–208), Aromatic diacid, polymer with alkyldiacid, alkyldiols, polypropylene glycol, benzofurandione, caprolactone and 1,1'-methylenebis[4-isocyanatobenzene] (generic) (P–21–209), and Aromatic diacids, polymer with alkyldiacids, alkyldiols, benzofurandione, polypropylene, alkylhydroxyacid glycolester, caprolactone and 1,1'-methylenebis[4-isocyanatobenzene] (generic) (P–21–210).

CASRN: Not available.

Effective Date of TSCA Order: May 26, 2023.

Basis for TSCA Order: The PMNs state that the generic (non-confidential) uses will be as adhesives for profile wrapping. Based on the structure of the PMN substances, EPA has identified concerns for skin sensitization, respiratory sensitization, and genotoxicity. Based on test data for a feedstock residual, EPA has also identified concerns for acute toxicity, acute neurotoxicity, irritation to the skin, eyes, and respiratory tracts, skin sensitization, respiratory sensitization,

genotoxicity, carcinogenicity, and portal-of-entry systemic, reproductive, and developmental effects. Based on information provided in the SDSs for the feedstock residual, EPA also identified acute toxicity (inhalation), skin sensitization, respiratory sensitization, skin irritation, respiratory irritation, and eye corrosion. Based on Organisation for Economic Co-operation and Development (OECD Toolbox results for the feedstock residual, EPA also identified skin sensitization and respiratory sensitization. Based on test data for a hydrolysis product of feedstock residual, EPA also identified acute toxicity, genotoxicity, carcinogenicity, eye irritation, skin irritation, skin sensitization, and systemic and reproductive effects. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substances may present an unreasonable risk of injury to human health. To protect against these risks, the Order requires:

- No manufacture, processing, or use of the PMN substances in any manner that results in inhalation exposure;
- No release of the PMN substances, or any waste stream containing the PMN substances, into waters of the United States;
- No processing for use or use of the PMN substances in consumer products;
- Use of personal protective equipment where there is a potential for dermal exposure; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of acute toxicity, carcinogenicity, developmental toxicity, serious eye damage, genetic toxicity, reproductive toxicity, skin irritation, skin sensitization, pulmonary effects, and specific target organ toxicity testing may be potentially useful to characterize the health effects of the PMN substances. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–21–212 (40 CFR 721.11973)

Chemical Name: Diketone compound metal complex (generic).

CASRN: Not available.

Effective Date of TSCA Order: August 2, 2023.

Basis for TSCA Order: The PMN states that the use will be as a luminescent material for security ink. Based on submitted test data, EPA has identified concerns for acute toxicity and neurotoxicity. Based on the structure as a europium complex, EPA has also identified concerns for chelation to nutrient metals. Based on test data for analogues of the cation, EPA has also identified concerns for eye irritation, irritation/hypersensitivity reactions, and systemic effects. Based on test data for analogues of the anion, EPA has also identified concerns for acute toxicity, neurotoxicity, and systemic and developmental effects. Based on test data for an incineration product, EPA has also identified concerns for neurotoxicity, portal-of-entry, and systemic effects. Based on comparison to analogous lanthanides or rare earth metals, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 13 ppb. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health and the environment. To protect against these risks, the Order requires:

- No manufacture of the PMN substance in exceedance of an annual volume of 1,000 kg/yr;
- No processing for use or use of the PMN substance in a consumer product;
- No release of the PMN substance, or any waste stream containing the PMN substance, in surface water concentrations that exceed 13 ppb;
- The PMN substance, or waste streams containing the PMN substance, must be disposed of by hazardous waste incineration;
- Use of personal protective equipment where there is a potential for dermal exposure;
- Use of a NIOSH-certified respirator with an APF of at least 10 where there is a potential for inhalation exposure; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of skin sensitization, skin irritation/corrosion, eye irritation, specific target organ toxicity, pulmonary effects, developmental toxicity, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–21–214 (40 CFR 721.11974)

Chemical Name: Poly(oxy-1,2-ethanedlyl), .alpha.,.alpha.,.alpha.”-(trialkylamino)tris[omega-hydroxy-, alkyl (ester) (generic).

CASRN: Not available.

Effective Date of TSCA Order: June 29, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use will be as a textile finishing agent. Based on the structure and intended use as an emulsifier, EPA has identified concerns for lung toxicity (surfactant effects), and skin, eye, and respiratory tract irritation. Based on test data for alcohol ethoxylates, EPA has also identified concerns for developmental and systemic effects. Based on comparison to analogous aliphatic amines and polycationic polymers, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 4 ppb. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health and the environment. To protect against these risks, the Order requires:

- No processing for use or use of the PMN substance in a consumer product;
- No manufacture, processing, or use of the PMN substance in any manner that results in inhalation exposure;
- Use of personal protective equipment where there is a potential for dermal exposure;
- No release of the PMN substance, or any waste stream containing the PMN substance, in surface water concentrations that exceed 4 ppb; and

- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of developmental toxicity, skin irritation, eye irritation, specific target organ toxicity, pulmonary effects, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–22–18 (40 CFR 721.11975)

Chemical Name: Substituted polyalkylenepoly, reaction products with substituted heteromonocycle substituted heteromonocycle polyalkylene derivs. (generic).

CASRN: Not available.

Effective Date of TSCA Order: June 23, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use will be as a component of a lubricant. Based on the structure of the PMN substance, EPA has identified concerns for lung toxicity via cationic binding. Based on the use of the PMN substance, EPA has also identified concerns for surfactant effects on the lungs. Based on comparison to analogous chemical substances, EPA has also identified concerns for irritation. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health. To protect against these risks, the Order requires:

- No processing for use or use of the PMN substance in consumer products at a concentration greater than 3%;
- No manufacture, processing, or use of the PMN substance in any manner that generates a dust, mist, or aerosol;
- Use of personal protective equipment where there is a potential for dermal exposure;

- No use of the PMN substance other than for the confidential use listed in the Order; and

- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of skin irritation and pulmonary effects testing may be potentially useful to characterize the health effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–22–21 (40 CFR 721.11976)

Chemical Name: Alkylphosphonic acid, calcium salt (generic).

CASRN: Not available.

Effective Date of TSCA Order: June 14, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use will be as a nucleating agent for polyolefins. Based on comparison to analogous chemical substances, EPA has identified concerns for systemic (decreased body weight and blood effects) and reproductive (male) effects. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health and the environment. To protect against these risks, the Order requires:

- No use of the PMN substance in consumer products other than in plastic articles and other plastic parts;
- Use of personal protective equipment where there is a potential for dermal exposure;
- Use of a NIOSH-certified respirator with an APF of at least 10 where there is a potential for inhalation exposure; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of specific target organ toxicity testing may be potentially useful to characterize the health effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–22–32 (40 CFR 721.11977)

Chemical Name: Isocyanic acid, polymethylenepolyphenylene ester, polymer with .alpha.-hydro.-omega.-hydroxypoly[oxy(alkanediyl)], 1,1'-methylenebis[4-isocyanatobenzene] and .alpha.-alkane[.omega.-hydroxypoly[oxy(alkanediyl)]] (generic).

CASRN: Not available.

Effective Date of TSCA Order: October 5, 2023.

Basis for TSCA Order: The PMN states that the use will be as a reactive polymer for use in adhesives and sealants. Based on the weight of scientific evidence, EPA has identified concerns for skin and respiratory sensitization and lung toxicity for the PMN substance and the low molecular weight fraction. Based on test data for residuals and analogues of the residuals of the PMN substance, EPA has also identified concerns for acute toxicity, irritation to the skin, eyes, and respiratory tract, skin sensitization, respiratory sensitization, lung effects, systemic effects, reproductive and developmental effects, genetic toxicity, and carcinogenicity. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health. To protect against these risks, the Order requires:

- No manufacture, processing, or use of the PMN substance in any manner that generates vapor, mist, aerosol, or dust;
- No processing for use or use of the PMN substance in a consumer product;
- No release of the PMN substance, or any waste stream containing the PMN

substance, into waters of the United States;

- Use of personal protective equipment where there is a potential for dermal exposure; and

- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of pulmonary effects and skin sensitization testing may be potentially useful to characterize the health effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–22–33 (40 CFR 721.11978)

Chemical Name: Alkylamine, alkoxysilyl-, hydrolyzed (generic).

CASRN: Not available.

Effective Date of TSCA Order: October 5, 2023.

Basis for TSCA Order: The PMN states that the use will be as an adhesion promoter for use in industrial manufacturing operations. Based on the amine content, EPA has identified concerns for irritation to the skin, eye, and respiratory tract. Based on potential for cationic binding to lung membranes, waterproofing, and comparison to analogous alkoxysilanes, EPA has also identified concerns for lung effects. Based on the expected release of a hydrolysis product, EPA has also identified concerns for neurotoxicity and developmental effects. Based on comparison to analogous polycationic polymers, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 1 ppb. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health and the environment. To protect against these risks, the Order requires:

- No manufacture, processing, or use of the PMN substance in any manner

that generates vapor, mist, aerosol, or dust;

- No processing for use or use of the PMN substance in a consumer product;

- No release of the PMN substance, or any waste stream containing the PMN substance, into waters of the United States;

- Use of personal protective equipment where there is a potential for dermal exposure; and

- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of specific target organ toxicity, pulmonary effects, skin irritation/corrosion, eye irritation/corrosion, reproductive/developmental toxicity, neurotoxicity, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–22–34 (40 CFR 721.11979)

Chemical Name: Alkylphosphonic acid, disodium salt (generic).

CASRN: Not available.

Effective Date of TSCA Order: June 14, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use will be as a precursor to a nucleating agent for polyolefins. Based on comparison to analogous chemical substances, EPA has identified concerns for systemic effects. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health and the environment. To protect against these risks, the Order requires:

- No use of the PMN substance in a consumer product;
- No manufacture, processing, or use of the PMN substance in any manner that results in inhalation exposure;

- Use of personal protective equipment where there is a potential for dermal exposure; and

- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of specific target organ toxicity testing may be potentially useful to characterize the health effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–22–35 (40 CFR 721.11980)

Chemical Name: Alkenoic acid, alkanediyl ester, polymer with bis(substituted alkyl)-alkanediol polymer with alkylene oxides alkenoate, and alkanamine (generic).

CASRN: Not available.

Effective Date of TSCA Order: June 1, 2023.

Basis for TSCA Order: The PMN states that the use will be as a component of flexographic ink formulations to improve reactivity when cured under LED UV light. Based on comparison to analogous acrylates/methacrylates and cross-linking potential, EPA has identified concerns for irritation to the skin, eyes and respiratory tract, and skin and respiratory sensitization. Based on the structure of the PMN substance, EPA has also identified concerns for lung effects (cationic binding). Based on comparison to analogues of both the low molecular weight fraction and the residual, EPA also identified concerns for acute toxicity, skin irritation/corrosion, eye irritation/corrosion, respiratory tract irritation/corrosion, skin sensitization, neurotoxicity, and systemic and reproductive (male) effects. Based on comparison to analogous polycationic polymers, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 3 ppb. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the

substance may present an unreasonable risk of injury to human health and the environment. To protect against these risks, the Order requires:

- No use of the PMN substance in consumer products;
- No release of the PMN substance, or any waste stream containing the PMN substance, in surface water concentrations that exceed 3 ppb;
- Use of a NIOSH-certified particulate respirator with an APF of at least 1000 where there is a potential for inhalation exposure;
- Use of personal protective equipment where there is a potential for dermal exposure; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of aquatic toxicity, specific target organ toxicity, pulmonary effects, reproductive/developmental toxicity, skin sensitization, skin irritation/corrosion, eye irritation/corrosion, acute toxicity, and neurotoxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–22–38 (40 CFR 721.11981)

Chemical Name: Siloxanes and silicones, di-Me, mixed (polyhydro-substituted heterocyclic) alkyl group and [(polyalkylsilyl)substituted]-terminated (generic).

CASRN: Not available.

Effective Date of TSCA Order: September 29, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use will be as an additive. Based on comparison to analogous chemical substances, EPA has identified lung, reproductive, and systemic effects. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may

present an unreasonable risk of injury to human health. To protect against these risks, the Order requires:

- No processing for use or use of the PMN substance in a consumer product;
- No manufacture, processing, or use of the PMN substance in any manner that results in inhalation exposure;
- No release of the PMN substance, or any waste stream containing the PMN substance, into waters of the United States;
- Use of personal protective equipment where there is a potential for dermal exposure; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of pulmonary effects, specific target organ toxicity, and reproductive toxicity testing may be potentially useful to characterize the health effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P–22–94 (40 CFR 721.11982)

Chemical Name: Cadmium tin oxide (Cd₂SnO₄).

CASRN: 12185–56–7.

Effective Date of TSCA Order: October 25, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use will be for a contained use as a sputtering material. Based on comparison to analogous respirable, poorly soluble particulates, EPA has identified concerns for lung effects (lung overload and subsequent carcinogenicity). Based on test data for components and information provided in the SDS, EPA has also identified concerns for acute toxicity, irritation to the skin, eyes, and respiratory tract, systemic effects, reproductive and developmental effects, genotoxicity, and carcinogenicity. Based on comparison to analogous chemical substances, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 0.2 ppb. The Order was issued under

TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health and the environment. To protect against these risks, the Order requires:

- No domestic manufacture of the PMN substance (*i.e.*, import only);
- No processing or use of the PMN substance in any manner that results in inhalation exposure;
- Use of personal protective equipment where there is a potential for dermal exposure;
- No use of the PMN substance other than for the confidential use listed in the Order;
- No release of the PMN substance, or any waste stream containing the PMN substance, into waters of the United States; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of aquatic toxicity, sediment toxicity, specific target organ toxicity, acute toxicity, pulmonary effects, reproductive toxicity, developmental toxicity, skin irritation, eye damage, carcinogenicity, and genetic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Numbers (Proposed CFR Citations): P–22–119 (40 CFR 721.11983) and P–22–120 (40 CFR 721.11984)

Chemical Names:

Polyhydroxyalkanoate (generic).

CASRN: Not applicable.

Effective Date of TSCA Order: September 29, 2023.

Basis for TSCA Order: The PMNs state that the generic (non-confidential) uses will be as resins for packaging materials and for use as binders. Based on comparison to analogous chemical substances, EPA has identified concerns

for skin, eye, and respiratory tract irritation. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substances may present an unreasonable risk of injury to human health. To protect against these risks, the Order requires:

Use of a NIOSH-certified particulate respirator with an APF of at least 10 where there is a potential for inhalation exposure;

- Use of personal protective equipment where there is a potential for dermal exposure; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of eye irritation, pulmonary effects, and skin irritation testing may be potentially useful to characterize the health effects of the PMN substances. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P-22-151 (40 CFR 721.11985)

Chemical Name: Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates (generic).

CASRN: Not available.

Effective Date of TSCA Order: August 29, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use will be as a surfactant for commercial applications. Based on the intended use of the new chemical substance as well as submitted surface tension data, EPA has identified concerns for lung effects (surfactancy). Based on test data for components and information provided in the SDS, EPA has identified concerns for eye and respiratory tract irritation and systemic effects. Based on comparison to analogous aliphatic amines, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 550 ppb. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I),

based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health and the environment. To protect against these risks, the Order requires:

- No processing for use or use of the PMN substance in a consumer product;
- No manufacture, processing, or use of the PMN substance in any manner that results in inhalation exposure;
- No release of the PMN substance, or any waste stream containing the PMN substance, in surface water concentrations that exceed 550 ppb;
- Use of personal protective equipment where there is a potential for dermal exposure; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of pulmonary effects, toxicokinetics, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P-22-178 (40 CFR 721.11986)

Chemical Name: Aromatic diacid, polymer with alkyldiols, hexanedioic acid, benzofurandione, and 1,1'-methylenebis[4-isocyanatobenzene] (generic).

CASRN: Not available.

Effective Date of TSCA Order: November 3, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use will be as an adhesive for lamination. Based on comparison to analogous diisocyanates, EPA has identified concerns for skin sensitization, respiratory sensitization, and pulmonary toxicity. Based on test data for the feedstock residual, EPA has also identified concerns for acute toxicity, skin and respiratory sensitization, irritation to the skin, eyes, and respiratory tract, and systemic,

pulmonary, and developmental effects. Based on test data for a hydrolysis product of a residual, EPA has also identified concerns for genetic toxicity, carcinogenicity, and portal-of-entry, systemic, and reproductive effects. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health. To protect against these risks, the Order requires:

- No manufacture, processing, or use of the PMN substance in any manner that results in inhalation exposure;
- No manufacture, processing, or use of the PMN substance with residual MDI greater than 5% by weight;
- No processing for use or use of the PMN substance in consumer products;
- Use of personal protective equipment where there is a potential for dermal exposure;
- No release of the PMN substance, or any waste stream containing the PMN substance, into waters of the United States; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of

pulmonary effects and skin sensitization testing may be potentially useful to characterize the health effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Number (Proposed CFR Citation): P-23-13 (40 CFR 721.11987)

Chemical Name: Phenol, polymer with 4,4'-bis(chloromethyl)-1,1'-biphenyl.

CASRN: 208254-04-0.

Effective Date of TSCA Order: November 2, 2023.

Basis for TSCA Order: The PMN states that the use will be as an epoxy molding compound for electronic devices. Based on comparison to analogous chemical substances, EPA has identified concerns for portal-of-entry effects (GI effects).

The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health. To protect against these risks, the Order requires:

- Manufacture of the PMN substance other than by import into the United States (*i.e.*, no domestic manufacture) at concentrations equal to or less than the confidential concentration percentage listed in the Order;
- No release of the PMN substance, or any waste stream containing the PMN substance, in surface water concentrations that exceed 260 ppb; and
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of specific target organ toxicity testing may be potentially useful to characterize the health effects of the PMN substance. Although the Order does not require these tests, the Order’s restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

PMN Numbers (Proposed CFR Citations): P–23–49 (40 CFR 721.11988) and P–23–124 (40 CFR 721.11989)

Chemical Names: Sulfonium, tricarboxylic-, 2-aryl-polyfluoropolyhydro-alkano-heteropolycycle-alkanesulfonate (1:1), polymer with heteroatom substituted aryl and carbomonocyclic 2-alkyl-2-alkanoate, di-Me 2,2-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated (generic) (P–23–49) and Sulfonium, tricarboxylic-, 2-heteroatom-substituted-(halocarboxylic)carboxylate (1:1) (generic) (P–23–124).

CASRN: Not available.

Effective Date of TSCA Order: September 25, 2023.

Basis for TSCA Order: The PMNs state that the generic (non-confidential) use of the PMN substances will be for photolithography. Based on the physical/chemical properties of the PMN substances (as described in the

New Chemical Program’s PBT category at 64 FR 60194; November 1999) and test data on structurally similar substances, the PMN substance are potentially persistent, bioaccumulative, and toxic (PBT) chemicals. EPA estimates that the PMN substances will persist in the environment for more than six months and estimates a bioaccumulation factor of greater than or equal to 1,000. Based on the presence of sulfonium compounds, EPA has identified concerns for acute toxicity, irritation to the skin and respiratory tract, eye corrosion, neurological effects, and systemic effects for the sulfonium cation of the PMN substances. Based on comparison to analogous chemical substances, EPA has also identified concerns for genetic toxicity for the cation of the PMN substances. Based on the photoreactivity of the PMN substances, EPA has also identified concerns for photosensitization for the cation of the PMN substances. Based on a structural alert and OECD QSAR (Quantitative Structure-Activity Relationship) Toolbox results, EPA has also identified concerns for skin sensitization for the anion of P–23–124. Based on a potential incineration product, EPA has also identified concerns for local and systemic effects for the incineration product. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substances may present an unreasonable risk of injury to human health or the environment. To protect against these risks, the Order requires:

- No manufacture of the PMN substances beyond the time limits specified in the Order without submittal to EPA the results of certain testing described in the Testing section of the Order;
- Use of personal protective equipment where there is a potential for dermal exposure;
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS;
- No modification of the processing of the PMN substances in any way that generates a vapor, dust, mist, or aerosol in a non-enclosed process;
- Use of the PMN substances only for the confidential uses listed in the Order;
- No domestic manufacture of the PMN substances (*i.e.*, import only);
- Import of the PMN substances only in solution, or in sealed containers weighing 5 kilograms or less; and

- No exceedance of the confidential annual importation volumes listed the Order.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information about the physical/chemical properties, fate, bioaccumulation, environmental hazard, and human health effects of the PMN substances may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. The submitter has agreed not to exceed the time limits specified in the Order without performing the required Tier I and Tier II testing outlined in the Testing section of the Order.

PMN Number (Proposed CFR Citation): P–23–50 (40 CFR 721.11990)

Chemical Name: Substituted heterocyclic onium compound, salt with heteropolysubstitutedalkyl substituted tricycloalkancarboxylate (1:1), polymer with 3-ethenylphenol and heterosubstitutedaromaticalkyl 2-methyl-2-propenoate, di-Me 2,2’-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated (generic).

CASRN: Not available.

Effective Date of TSCA Order: September 20, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use of the PMN substance will be for contained use for microlithography for electronic device manufacturing. Based on the physical/chemical properties of the PMN substance (as described in the New Chemical Program’s PBT category at 64 FR 60194; November 1999) and test data on structurally similar substances, the PMN substance is a potentially persistent, bioaccumulative, and toxic (PBT) chemical. EPA estimates that the PMN substance will persist in the environment for more than six months and estimates a bioaccumulation factor of greater than or equal to 1,000. Based on comparison to chemical substances analogous to the cation compounds of the PMN substance and supported by information provided in the SDS, EPA has identified concerns for acute toxicity, irritation to the skin and respiratory tract, eye corrosion, neurological effects, and systemic effects for the cation of the PMN substance. Based on comparison to analogous chemical substances, EPA has also identified concerns for genetic toxicity for the cation of the PMN substance. Based on the photoreactivity

of the PMN substance, EPA has also identified concerns for photosensitization for the cation of the PMN substance. Based on a potential incineration product, EPA has also identified concerns for local and systemic effects for the incineration product. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health or the environment. To protect against these risks, the Order requires:

- No manufacture of the PMN substance beyond the time limits specified in the Order without submittal to EPA the results of certain testing described in the Testing section of the Order;
- Use of personal protective equipment where there is a potential for dermal exposure;
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS;
- No modification of the processing or use of the PMN substance in any way that generates a vapor, dust, mist, or aerosol in a non-enclosed process;
- Use of the PMN substance only for the confidential use listed in the Order;
- No domestic manufacture of the PMN substance (*i.e.*, import only);
- Import of the PMN substance only in solution or in sealed containers weighing 5 kilograms or less; and
- No exceedance of the confidential annual importation volume listed the Order.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information about the physical/chemical properties, fate, bioaccumulation, environmental hazard, and human health effects of the PMN substance may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. The submitter has agreed not to exceed the time limits specified in the Order without performing the required Tier I and Tier II testing outlined in the Testing section of the Order.

PMN Numbers (Proposed CFR Citations): P–23–83 (40 CFR 721.11991), P–23–125 (40 CFR 721.11992), and P–23–147 (40 CFR 721.11993)

Chemical Names: Sulfonium, tricarboxylic-, [polyhydro-alkyl-(polyfluoro-2-heteroatom substituted)-alkano-heteromonocyclic] alkyl ester (1:1) (generic) (P–23–83), Sulfonium, tricarboxylic-, polyfluoropolyhydro-heteroatom substituted carbomonocyclic-2-heteroatom substituted carbomonocyclic heteropolycycle-5-alkanesulfonate (1:1) (generic) (P–23–125), and Sulfonium, tris(heteroatom-substituted carbomonocyclic), salt with polyhydro-polyfluoro-heteroatom-substituted alkyl heteropolycyclic-heteroatom-substituted aryl heteroatom-substituted benzoate (1:1) (generic) (P–23–147).

CASRN: Not available.

Effective Date of TSCA Order: October 27, 2023.

Basis for TSCA Order: The PMNs state that the generic (non-confidential) use of the PMN substances will be for photolithography. Based on the physical/chemical properties of the PMN substances (as described in the New Chemical Program’s PBT category at 64 FR 60194; November 1999) and test data on structurally similar substances, the PMN substances are potentially persistent, bioaccumulative, and toxic (PBT) chemicals. EPA estimates that the PMN substances will persist in the environment for more than six months and estimates a bioaccumulation factor of greater than or equal to 1,000. Based on the presence of sulfonium compounds, EPA has identified concerns for acute toxicity, irritation to the skin and respiratory tract, eye corrosion, neurological effects, and systemic effects for the sulfonium cation of the PMN substances. Based on comparison to analogous chemical substances, EPA has also identified concerns for genetic toxicity for the sulfonium cation of the PMN substances. Based on the photoreactivity of the PMN substances, EPA has also identified concerns for photosensitization for the sulfonium cation of the PMN substances. Based on comparison to analogous chemical substances, EPA has also identified concerns for systemic and developmental effects for the anion component of the PMN substances. Based on a potential incineration product, EPA has also identified concerns for local and systemic effects via inhalation exposure for the incineration product of the PMN substances. Based on OECD Toolbox results, EPA also identified concerns for

skin sensitization for the anion component of P–23–147. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substances may present an unreasonable risk of injury to human health or the environment. To protect against these risks, the Order requires:

- No manufacture of the PMN substances beyond the time limits specified in the Order without submittal to EPA the results of certain testing described in the Testing section of the Order;
- Use of personal protective equipment where there is a potential for dermal exposure;
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS;
- No modification of the processing of the PMN substances in any way that generates a vapor, dust, mist, or aerosol in a non-enclosed process;
- Use of the PMN substances only for the confidential uses listed in the Order;
- No domestic manufacture of the PMN substances (*i.e.*, import only);
- Import of the PMN substances only in solution, or in sealed containers weighing 5 kilograms or less; and
- No exceedance of the confidential annual importation volumes listed the Order.

The proposed SNUR would designate as a “significant new use” the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information about the physical/chemical properties, fate, bioaccumulation, environmental hazard, and human health effects of the PMN substances may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. The submitter has agreed not to exceed the time limits specified in the Order without performing the required Tier I and Tier II testing outlined in the Testing section of the Order.

PMN Number (Proposed CFR Citation): P–23–104 (40 CFR 721.11994)

Chemical Name: Sulfonium, carbomonocycle bis[(trihaloalkyl)carbomonocycle], disubstituted carbomonocyclic ester (generic).

CASRN: Not available.

Effective Date of TSCA Order: September 29, 2023.

Basis for TSCA Order: The PMN states that the generic (non-confidential) use of the PMN substance will be an ingredient used in the manufacture of photoresist. Based on the physical/chemical properties of the PMN substance (as described in the New Chemical Program's PBT category at 64 FR 60194; November 1999) and test data on structurally similar substances, the PMN substance is a potentially persistent, bioaccumulative, and toxic (PBT) chemical. EPA estimates that the PMN substance will persist in the environment for more than six months and estimates a bioaccumulation factor of greater than or equal to 1,000. Based on the presence of sulfonium compounds, EPA has identified concerns for acute toxicity, irritation to the skin and respiratory tract, eye corrosion, neurological effects, and systemic effects for the cation of the PMN substance. Based on comparison to analogous chemical substances, EPA has also identified concerns for genetic toxicity for the cation of the PMN substance. Based on the photoreactivity of the PMN substance, EPA has also identified concerns for photosensitization for the cation of the PMN substance. Based on a potential incineration product, EPA has also identified concerns for local and systemic effects for the incineration product. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health or the environment. To protect against these risks, the Order requires:

- No manufacture of the PMN substance beyond the time limits specified in the Order without submittal to EPA the results of certain testing described in the Testing section of the Order;
- Use of personal protective equipment where there is a potential for dermal exposure;
- Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS;
- No processing of the PMN substance in any way that generates a vapor, dust, mist, or aerosol in a non-enclosed process;
- Use of the PMN substance only for the confidential use listed in the Order;
- No domestic manufacture of the PMN substance (*i.e.*, import only);
- Import of the PMN substance only in solution, or in sealed containers weighing 5 kilograms or less; and

- No exceedance of the confidential annual importation volume listed the Order.

The proposed SNUR would designate as a "significant new use" the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information about the physical/chemical properties, fate, bioaccumulation, environmental hazard, and human health effects of the PMN substance may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. The submitter has agreed not to exceed the time limits specified in the Order without performing the required Tier I and Tier II testing outlined in the Testing section of the Order.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at <https://www.epa.gov/laws-regulations-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action proposes to establish SNURs for new chemical substances that were the subject of PMNs. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866 (58 FR 51735, October 4, 1993), as amended by Executive Order 14094 (88 FR 21879, April 11, 2023).

B. Paperwork Reduction Act (PRA)

According to the PRA (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable.

The information collection requirements related to SNURs have already been approved by OMB pursuant to PRA under OMB control number 2070-0038 (EPA ICR No. 1188). This action does not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated

to average between 30 and 170 hours per submission. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

EPA always welcomes your feedback on the burden estimates. Send any comments about the accuracy of the burden estimate, and any suggested methods for improving the collection instruments or instruction or minimizing respondent burden, including through the use of automated collection techniques.

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 (5 U.S.C. 601 *et seq.*). The requirement to submit a SNUN applies to any person (including small or large entities) who intends to engage in any activity described in the final rule as a "significant new use." Because these uses are "new," based on all information currently available to EPA, EPA has concluded that no small or large entities presently engage in such activities.

A SNUR requires that any person who intends to engage in such activity in the future must first notify EPA by submitting a SNUN. Although some small entities may decide to pursue a significant new use in the future, EPA cannot presently determine how many, if any, there may be. However, EPA's experience to date is that, in response to the promulgation of SNURs covering over 1,000 chemicals, the Agency receives only a small number of notices per year. For example, the number of SNUNs received was 16 in Federal fiscal year (FY) FY2018, five in FY2019, seven in FY2020, 13 in FY2021, 11 in FY2022, and 15 in FY2023, and only a fraction of these submissions were from small businesses.

In addition, the Agency currently offers relief to qualifying small businesses by reducing the SNUN submission fee from \$37,000 to \$6,480. This lower fee reduces the total reporting and recordkeeping cost of submitting a SNUN to about \$14,500 per SNUN submission for qualifying small firms. Therefore, the potential economic impacts of complying with these proposed SNURs are not expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published in the **Federal Register** of June 2, 1997 (62 FR 29684) (FRL-5597-1), the Agency presented its general determination that SNURs are not expected to have a significant

economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more (in 1995 dollars) in any one year as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by SNURs, and EPA does not have any reasons to believe that any State, local, or Tribal government will be impacted by these SNURs. In addition, the estimated costs of this action to the private sector do not exceed \$183 million or more in any one year (the 1995 dollars are adjusted to 2023 dollars for inflation using the GDP implicit price deflator). The estimated costs for this action are discussed in Unit I.D.

E. Executive Order 13132: Federalism

This action will not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it is not expected to have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the requirements of Executive Order 13132 do not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action will not have Tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000), because it is not expected to have substantial direct effects on Indian Tribes, significantly or uniquely affect the communities of Indian Tribal governments and does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175 do not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it does not concern an environmental health or safety risk. Since this action does not concern a human health risk, EPA's 2021 Policy

on Children's Health also does not apply. Although the establishment of these SNURs do not address an existing children's environmental health concern because the chemical uses involved are not ongoing uses, SNURs require that persons notify EPA at least 90 days before commencing manufacture (defined by statute to include import) or processing of any of these chemical substances for an activity that is designated as a significant new use by this rulemaking. This notification allows EPA to assess the intended uses to identify potential risks and take appropriate actions before the activities commence.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act (NTTAA)

This action does not involve any technical standards subject to NTTAA section 12(d) (15 U.S.C. 272 note).

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

EPA believes that this type of action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on communities with environmental justice concerns in accordance with Executive Orders 12898 (59 FR 7629, February 16, 1994) and 14096 (88 FR 25251, April 26, 2023). Although this action does not concern human health or environmental conditions, the premanufacture notifications required by these SNURs will allow EPA to assess the intended uses to identify potential disproportionate risks and take appropriate actions before the activities commence.

List of Subjects in 40 CFR part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: November 22, 2024.

Mary Elissa Reaves,

Director, Office of Pollution Prevention and Toxics.

Therefore, for the reasons stated in the preamble, EPA proposes to amend 40 CFR chapter I as follows:

PART 721—SIGNIFICANT NEW USES OF CHEMICAL SUBSTANCES

■ 1. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

■ 2. Add §§ 721.11960 through 721.11994 to Subpart E to read as follows:

Subpart E—Significant New Uses for Specific Chemical Substances

Sec.

*	*	*	*	*
721.11960	Polyester polyol (generic).			
721.11961	Polyester polyol (generic).			
721.11962	2,4,8,10-Tetraoxa-3,9-diphosphaspiro[5.5]undecane, 3,9-bis-[2-(1-methyl-1-phenylethyl)-4-(1,1,3,3-tetramethylbutyl)phenoxy]-.			
721.11963	1-Propanamine, 3-methoxy-N,N-dimethyl-.			
721.11964	Soybean oil, mixed esters with diethylene glycol, phthalic acid and terephthalic acid.			
721.11965	Soybean oil, epoxidized, polymer with bisphenol A, alkyl glycidyl ether, epichlorohydrin, polyethylene glycol and trihydroxyalkane (generic).			
721.11966	Metal, [heteropolycyclic]-, [[[(hydroxyalkyl)amino] sulfonyl] alkyl]sulfonyl[sulfoalkyl]sulfonyl derivs., ammonium sodium salts (generic).			
721.11967	Siloxanes and silicones polyether, polymer with aliphatic isocyanate, 2-dimethylaminoethanol and polyglycol ether (generic).			
721.11968	Siloxanes and Silicones, di-Me, [gluconoylamino]alkyl[dialkylammonio]-hydroxyalkoxy[alkyl group-terminated, (salts) (generic).			
721.11969	Sulfonium, carbomonocycle bis((trihaloalkyl)carbomonocycle), substituted carbomonocyclic ester (generic).			
721.11970	Aromatic diacids, polymer with alkyl diacids, alkyl diols, benzofurandione, caprolactone and 1,1'-methylenebis[4-isocyanatobenzene] (generic).			
721.11971	Aromatic diacid, polymer with alkyl diacid, alkyl diols, polypropylene glycol, benzofurandione, caprolactone and 1,1'-methylenebis[4-isocyanatobenzene] (generic).			
721.11972	Aromatic diacids, polymer with alkyl diacids, alkyl diols, benzofurandione, polypropylene, alkylhydroxyacid glycolester, caprolactone and 1,1'-methylenebis[4-isocyanatobenzene] (generic).			
721.11973	Diketone compound metal complex (generic).			

- 721.11974 Poly(oxy-1,2-ethanedyl), alpha, alpha", alpha"- (trialkylamino) tris[omega-hydroxy-, alkyl (ester) (generic).
- 721.11975 Substituted polyalkylenepoly, reaction products with substituted heteromonocycle substituted heteromonocycle polyalkylene derivs (generic).
- 721.11976 Alkylphosphonic acid, calcium salt (generic).
- 721.11977 Isocyanic acid, polymethylene polyphenylene ester, polymer with .alpha.-hydro-.omega.w-hydroxypoly[oxy(alkanediyl)], 1,1'-methylenebis[4-isocyanatobenzene] and .alpha.-alkane[.omega.w-hydroxypoly[oxy(alkanediyl)]] (generic).
- 721.11978 Alkylamine, alkoxysilyl-, hydrolyzed (generic).
- 721.11979 Alkylphosphonic acid, disodium salt (generic).
- 721.11980 Alkenoic acid, alkanediyl ester, polymer with bis(substituted alkyl)-alkanediol polymer with alkylene oxides alkenoate, and alkanamine (generic).
- 721.11981 Siloxanes and silicones, di-Me, mixed (polyhydro-substituted heterocyclic) alkyl group and [(polyalkylsilyl)substituted]-terminated (generic).
- 721.11982 Cadmium tin oxide (Cd2SnO4).
- 721.11983 Polyhydroxyalkanoate (generic).
- 721.11984 Polyhydroxyalkanoate (generic).
- 721.11985 Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates (generic).
- 721.11986 Aromatic diacid, polymer with alkyldiols, hexanedioic acid, benzofurandione, and 1,1'-methylenebis[4-isocyanatobenzene] (generic).
- 721.11987 Phenol, polymer with 4,4'-bis(chloromethyl)-1,1'-biphenyl.
- 721.11988 Sulfonium, tricarboxylic-, 2-aryl- polyfluoropolyhydro-alkano-heteropolycycle-alkanesulfonate (1:1), polymer with heteroatom substituted aryl and carbomonocyclic 2-alkyl-2-alkanoate, di-Me 2,2-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated (generic).
- 721.11989 Sulfonium, tricarboxylic-, 2-heteroatom-substituted-(halocarboxylic)carboxylate (1:1) (generic).
- 721.11990 Substitutedheterocyclic onium compound, salt with heteropolysubstitutedalkyl substitutedtricycloalkanecarboxylate (1:1), polymer with 3-ethenylphenol and heterosubstitutedaromaticalkyl 2-methyl-2-propenoate, di-Me 2,2'-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated (generic).
- 721.11991 Sulfonium, tricarboxylic-, 2-aryl- polyfluoropolyhydro-alkano-heteropolycycle-alkanesulfonate (1:1), polymer with heteroatom substituted aryl and carbomonocyclic 2-alkyl-2-alkanoate, di-Me 2,2-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated (generic).
- 721.11992 Sulfonium, tricarboxylic-, polyfluoropolyhydro-heteroatom substituted carbomonocyclic-2-

heteroatom substituted carbomonocyclic heteropolycycle-5-alkanesulfonate (1:1) (generic).

- 721.11993 Sulfonium, tris(heteroatom-substituted carbomonocyclic), salt with polyhydro-polyfluoro-heteroatom-substituted alkyl heteropolycyclic-heteroatom-substituted aryl heteroatom-substituted benzoate (1:1) (generic).
- 721.11994 Sulfonium, carbomonocycle bis[(trihaloalkyl)carbomonocycle], disubstituted carbomonocyclic ester (generic).

* * * * *

§ 721.11960 Polyester polyol (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as polyester polyol (PMN P-16-377) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1) and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer use.* It is a significant new use to manufacture, process, or use the substance in any manner that would result in respirable particle sizes below 10 microns.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), and (f) through (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11961 Polyester polyol (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as polyester polyol (PMN P-16-378) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.*

Requirements as specified in § 721.72(a)

through (f), and (g)(1) and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer use.* It is a significant new use to manufacture, process, or use the substance in any manner that would result in respirable particle sizes below 10 microns.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), and (f) through (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11962 2,4,8,10-Tetraoxa-3,9-diphosphaspiro[5.5]undecane, 3,9-bis-[2-(1-methyl-1-phenylethyl)-4-(1,1,3,3-tetramethylbutyl)phenoxy]-.

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified as 2,4,8,10-tetraoxa-3,9-diphosphaspiro[5.5]undecane, 3,9-bis-[2-(1-methyl-1-phenylethyl)-4-(1,1,3,3-tetramethylbutyl)phenoxy]- (PMN P-18-346; CASRN 1507339-21-0) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1), (3) through (5), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1) and (4), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(a)(5), respirators must provide a National Institute for Occupational Safety and Health (NIOSH) assigned protection factor (APF) of at least 50.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (d), (f), and (g)(1), (3), and (5). For purposes of § 721.72(g)(1), this

substance may cause: skin sensitization, eye irritation, reproductive toxicity, and specific target organ toxicity. For purposes of § 721.72(g)(3), this substance may be: toxic to aquatic life. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=18.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (h), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11963 1-Propanamine, 3-methoxy-N,N-dimethyl-

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified as 1-propanamine, 3-methoxy-N,N-dimethyl- (PMN P-20-44; CASRN 20650-07-1) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1), (3) through (5), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1) and (4), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(a)(5), respirators must provide a National Institute for Occupational Safety and Health (NIOSH) assigned protection factor (APF) of at least 1000. For purposes of § 721.63(b), the concentration is set at 1.0%.

(A) As an alternative to the respirator requirements in paragraph (a)(2)(i) of this section, a manufacturer or processor may choose to follow the new chemical exposure limit (NCEL) provision listed in the TSCA section 5(e) Order for this substance. The NCEL is 1.1388mg/m³ as an 8-hour time weighted average. Persons who wish to pursue NCELs as an alternative to § 721.63 respirator

requirements may request to do so under § 721.30. Persons who § 721.30 requests to use the NCELs approach are approved by EPA will be required to follow NCELs provisions comparable to those contained in the corresponding TSCA section 5(e) Order.

(B) [Reserved]

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1) and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: skin irritation, serious eye damage, reproductive toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o).

(iv) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=1000.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11964 Soybean oil, mixed esters with diethylene glycol, phthalic acid and terephthalic acid.

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified as soybean oil, mixed esters with diethylene glycol, phthalic acid and terephthalic acid (PMN P-21-21) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or destroyed.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1) and (3), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace

policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(b), the concentration is set at 1.0%.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1) and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: skin irritation, eye irritation, reproductive toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture,

process, or use the substance in any manner that results in inhalation exposure.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=3000.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11965 Soybean oil, epoxidized, polymer with bisphenol A, alkyl glycidyl ether, epichlorohydrin, polyethylene glycol and trihydroxyalkane (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as soybean oil, epoxidized, polymer with bisphenol A, alkyl glycidyl ether, epichlorohydrin, polyethylene glycol and trihydroxyalkane (PMN P-21-151) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance when completely reacted or cured.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1) and (3) through (5), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1) and (4), engineering control measures (e.g.,

enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(a)(5), respirators must provide a National Institute for Occupational Safety and Health (NIOSH) assigned protection factor (APF) of at least 1,000.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (d), (f), and (g)(1) through (3), and (5). For purposes of § 721.72(g)(1), this substance may cause: respiratory sensitization, skin sensitization, and specific target organ toxicity. For purposes of § 721.72(g)(2), do not spray apply. For purposes of § 721.72(g)(3), this substance may be: toxic to aquatic life. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o). It is a significant new use to process or use the substance in a spray application.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=140.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11966 Metal, [heteropolycyclic]-, [((hydroxyalkyl)amino)sulfonyl]alkyl[sulfonyl(sulfoalkyl)sulfonyl]derivs., ammonium sodium salts (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as metal, [heteropolycyclic]-, [((hydroxyalkyl)amino)sulfonyl]alkyl[sulfonyl(sulfoalkyl)sulfonyl]derivs., ammonium sodium salts (PMN P-21-168) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(3) and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For

purposes of § 721.72(g)(3), this substance may be: toxic to aquatic life. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=178.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (f) through (h), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11967 Siloxanes and silicones polyether, polymer with aliphatic isocyanate, 2-dimethylaminoethanol and polyglycol ether (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as siloxanes and silicones polyether, polymer with aliphatic isocyanate, 2-dimethylaminoethanol and polyglycol ether (PMN P-21-173) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been embedded into a textile fiber matrix.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1) and (3), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(b), the concentration is set at 1.0%.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1), (3), and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: reproductive toxicity and specific target organ toxicity. For purposes of § 721.72(g)(3), this substance may be: toxic to aquatic

life. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=1.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11968 Siloxanes and Silicones, di-Me, [gluconoylamino]alkyl[dialkylammonio]-hydroxyalkoxy]alkyl group-terminated, (salts) (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as siloxanes and silicones, di-Me, [gluconoylamino]alkyl[dialkylammonio]-hydroxyalkoxy]alkyl group-terminated, (salts) (PMN P-21-194) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance when incorporated into a textile.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1) and (3), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(b), the concentration is set at 1.0%.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1), (3), and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this

substance may cause: skin irritation, eye irritation, and specific target organ toxicity. For purposes of § 721.72(g)(3), this substance may be: toxic to aquatic life. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the substance in any manner that results in the generation of a vapor, mist, dust, or aerosol.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=210.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11969 Sulfonium, carbomonocycle bis((trihaloalkyl)carbomonocycle), substituted carbomonocyclic ester (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as sulfonium, carbomonocycle bis((trihaloalkyl)carbomonocycle), substituted carbomonocyclic ester (PMN P-21-202) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or adhered (during photolithographic processes) onto a semiconductor wafer surface or similar manufactured article used in the production of semiconductor technologies.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1), (2)(i) and (iii), (3), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be

considered and implemented to prevent exposure, where feasible.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (d), (f), and (g)(1), (2)(i) through (iii), (v), (3)(i) and (ii), and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin irritation, serious eye damage, skin sensitization, genetic toxicity, reproductive toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f), (k), and (t). It is a significant new use to import the substance other than in solution, unless in sealed containers weighing 5 kilograms or less. It is a significant new use to process the substance in any way that generates dust, mist, or aerosol in a non-enclosed process. It is a significant new use to manufacture the substance longer than 9 months.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11970 Aromatic diacids, polymer with alkyl diacids, alkyl diols, benzofurandione, caprolactone and 1,1'-methylenebis[4-isocyanatobenzene] (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as aromatic diacids, polymer with alkyl diacids, alkyl diols, benzofurandione, caprolactone and 1,1'-methylenebis[4-isocyanatobenzene] (PMN P-21-208) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or cured.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1) and (3), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or

confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (d), (f), and (g)(1) and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin irritation, serious eye damage, eye irritation, respiratory sensitization, skin sensitization, genetic toxicity, carcinogenicity, reproductive toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11971 Aromatic diacid, polymer with alkyl diacid, alkyl diols, polypropylene glycol, benzofurandione, caprolactone and 1,1'-methylenebis[4-isocyanatobenzene] (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as aromatic diacid, polymer with alkyl diacid, alkyl diols, polypropylene glycol, benzofurandione, caprolactone and 1,1'-methylenebis[4-isocyanatobenzene] (PMN P-21-209) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or cured.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1) and (3), and (c). When

determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(ii) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (f), and (g)(1) and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin irritation, serious eye damage, eye irritation, respiratory sensitization, skin sensitization, genetic toxicity, carcinogenicity, reproductive toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11972 Aromatic diacids, polymer with alkyldiacids, alkyldiols, benzofurandione, polypropylene, alkylhydroxyacid glycolester, caprolactone and 1,1'-methylenebis[4-isocyanatobenzene] (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as aromatic diacids, polymer with alkyldiacids, alkyldiols, benzofurandione, polypropylene, alkylhydroxyacid glycolester, caprolactone and 1,1'-methylenebis[4-isocyanatobenzene] (PMN P-21-210) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after

they have been completely reacted or cured.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1) and (3), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (d), and (f), and (g)(1) and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin irritation, serious eye damage, eye irritation, respiratory sensitization, skin sensitization, genetic toxicity, carcinogenicity, reproductive toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11973 Diketone compound metal complex (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as diketone compound metal complex (PMN P-21-212) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance when completely entrained in dried/cured ink.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1), (3) through (5), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1) and (4), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(a)(5), respirators must provide a National Institute for Occupational Safety and Health (NIOSH) assigned protection factor (APF) of at least 10.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (d), (f), and (g)(1), (3), and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin corrosion, serious eye damage, skin irritation, eye irritation, skin sensitization, reproductive toxicity, and specific target organ toxicity. For purposes of § 721.72(g)(3), this substance may be: toxic to aquatic life. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o) and (t). It is a significant new use to manufacture the substance in excess of an annual volume of 1,000 kg/yr.

(iv) *Disposal.* It is a significant new use to dispose of the substance or waste streams containing the substance other than by hazardous waste incineration.

(v) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=13.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11974 Poly(oxy-1,2-ethanedilyl), alpha,alpha',alpha''-(trialkylamino)tris[omega-hydroxy-, alkyl (ester) (generic)].

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified

generically as poly(oxy-1,2-ethanedyl), alpha,alpha',alpha"- (trialkylamino)tris[omega-hydroxy-, alkyl (ester) (PMN P-21-214) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been embedded into a textile fiber matrix.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1) and (3), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(b), the concentration is set at 1.0%.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1), (3), and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: skin irritation, eye irritation, reproductive toxicity, and specific target organ toxicity. For purposes of § 721.72(g)(3), this substance may be: toxic to aquatic life. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=4.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11975 Substituted polyalkylenepoly, reaction products with substituted heteromonocycle substituted heteromonocycle polyalkylene derivs (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as substituted polyalkylenepoly, reaction products with substituted heteromonocycle substituted heteromonocycle polyalkylene derivs. (PMN P-22-18) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1) and (3), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(b), the concentration is set at 1.0%.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1) and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: skin irritation and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(k). It is a significant new use to process for use or use the substance in consumer products at a concentration greater than 3%. It is a significant new use to manufacture, process, or use the substance in any manner that results in a dust, mist, or aerosol.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11976 Alkylphosphonic acid, calcium salt (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as alkylphosphonic acid, calcium salt (PMN P-22-21) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been fully reacted, cured, destroyed, or entrained in a polymer matrix.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1), (3) through (5), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1) and (4), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(a)(5), respirators must provide a National Institute for Occupational Safety and Health (NIOSH) assigned protection factor (APF) of at least 10. For purposes of § 721.63(b), the concentration is set at 1.0%.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1) and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* It is a significant new use to use the substance in consumer products other than in plastic articles and other plastic parts.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11977 Isocyanic acid, polymethylenepolyphenylene ester, polymer with .alpha.-hydro-.omega.-hydroxypoly[oxy(alkanediyl)], 1,1'-methylenebis[4-isocyanatobenzene] and .alpha.-alkane[.omega.-hydroxypoly[oxy(alkanediyl)]] (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as isocyanic acid, polymethylenepolyphenylene ester, polymer with .alpha.-hydro-.omega.-hydroxypoly[oxy(alkanediyl)], 1,1'-methylenebis[4-isocyanatobenzene] and .alpha.-alkane[.omega.-hydroxypoly[oxy(alkanediyl)]] (PMN P-22-32) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or cured.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1) and (3), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(ii) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (f), and (g)(1) and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity (residual), skin irritation (residual), eye irritation (residual), skin sensitization, respiratory sensitization, genetic toxicity (residual), carcinogenicity (residual), reproductive toxicity (residual), specific target organ toxicity (residual), specific target organ toxicity (residual), Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the substance in any manner that results in a vapor, mist, aerosol, or dust.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11978 Alkylamine, alkoxysilyl-, hydrolyzed (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as alkylamine, alkoxysilyl-, hydrolyzed (PMN P-22-33) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or cured.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1) and (3), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(b), the concentration is set at 1.0%.

(ii) *Hazard communication.* Requirements as specified in § 721.72(a) through (f), and (g)(1), (3) and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: skin irritation, eye irritation, specific target organ toxicity, and reproductive toxicity. For purposes of § 721.72(g)(3), this substance may be: toxic to aquatic life. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the substance in any manner that results in a vapor, mist, aerosol, or dust.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11979 Alkylphosphonic acid, disodium salt (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as alkylphosphonic acid, disodium salt (PMN P-22-34) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been fully reacted, cured, destroyed, or entrained in a polymer matrix.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1) and (3), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(b), the concentration is set at 1.0%.

(ii) *Hazard communication.* Requirements as specified in § 721.72(a) through (f), and (g)(1) and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11980 Alkenoic acid, alkanediyl ester, polymer with bis(substituted alkyl)-alkanediol polymer with alkylene oxides alkenoate, and alkanamine (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as alkenoic acid, alkanediyl ester, polymer with bis(substituted alkyl)-alkanediol polymer with alkylene oxides alkenoate, and alkanamine (PMN P-22-35) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or cured.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1), (3) through (5), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1) and (4), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(a)(5), respirators must provide a National Institute for Occupational Safety and Health (NIOSH) assigned protection factor (APF) of at least 1000.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (d), (f), and (g)(1), (3), and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin irritation, eye irritation, skin corrosion, serious eye damage, respiratory sensitization, skin sensitization, reproductive toxicity, and specific target organ toxicity. For purposes of § 721.72(g)(3), this substance may be: toxic to aquatic life. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o).

(iv) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=3.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11981 Siloxanes and silicones, di-Me, mixed (polyhydro-substituted heterocyclic) alkyl group- and [(polyalkylsilyl)substituted]-terminated (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as siloxanes and silicones, di-Me, mixed (polyhydro-substituted heterocyclic) alkyl group- and [(polyalkylsilyl)substituted]-terminated (PMN P-22-38) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or cured.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1) and (3), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(b), the concentration is set at 1.0%.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1) and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: reproductive toxicity and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of Subpart A of this part

apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11982 Cadmium tin oxide (Cd₂SnO₄).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified as cadmium tin oxide (Cd₂SnO₄) (PMN P-22-94; CASRN 12185-56-7) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1) and (3), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(b), the concentration is set at 0.1%.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1), (3), and (5). For purposes of § 721.72(e), the concentration is set at 0.1%. For purposes of § 721.72(g)(1), this substance may cause: skin irritation, eye irritation, genetic toxicity, specific target organ toxicity, acute toxicity, reproductive toxicity, and carcinogenicity. For purposes of § 721.72(g)(3), this substance may be: toxicity to aquatic life. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(f) and (k). It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of Subpart A of this part

apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11983 Polyhydroxyalkanoate (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as polyhydroxyalkanoate (PMN P-22-119) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been entrained in plastic or when completely reacted or cured or when incorporated into an article.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1), (3) through (5), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1) and (4), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(a)(5), respirators must provide a National Institute for Occupational Safety and Health (NIOSH) assigned protection factor (APF) of at least 10. For purposes of § 721.63(b), the concentration is set at 1.0%.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1) and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: skin irritation, eye irritation, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (h) are applicable

to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11984 Polyhydroxyalkanoate (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as polyhydroxyalkanoate (PMN P-22-120) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been entrained in plastic or when completely reacted or cured or when incorporated into an article.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1), (3) through (5), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1) and (4), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(a)(5), respirators must provide a National Institute for Occupational Safety and Health (NIOSH) assigned protection factor (APF) of at least 10. For purposes of § 721.63(b), the concentration is set at 1.0%.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1) and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: skin irritation, eye irritation, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (h) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11985 Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates (PMN P-22-151) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1) and (3), (b), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible. For purposes of § 721.63(b), the concentration is set at 1.0%.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1), (3), and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: eye irritation and specific target organ toxicity. % For purposes of § 721.72(g)(3), this substance may be: toxic to aquatic life. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.*

Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=550.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11986 Aromatic diacid, polymer with alkyldiols, hexanedioic acid, benzofurandione, and 1,1'-methylenebis[4-isocyanatobenzene] (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as aromatic diacid, polymer with alkyldiols, hexanedioic acid, benzofurandione, and 1,1'-methylenebis[4-isocyanatobenzene] (PMN P-22-178) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or cured.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1) and (3), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (d), (f), and (g)(1) and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin irritation, eye irritation, respiratory sensitization, skin sensitization, genetic toxicity, carcinogenicity, reproductive toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer use.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure. It is a significant new use to manufacture, process, or use the substance with residual MDI greater than 5% by weight.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11987 Phenol, polymer with 4,4'-bis(chloromethyl)-1,1'-biphenyl.

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified as phenol, polymer with 4,4'-bis(chloromethyl)-1,1'-biphenyl (PMN P-23-13; CASRN 208254-04-0) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or cured.

(2) The significant new uses are:

(i) *Hazard communication.*

Requirements as specified in § 721.72(a) through (f), and (g)(1) and (5). For purposes of § 721.72(e), the concentration is set at 1.0%. For purposes of § 721.72(g)(1), this substance may cause: specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer use.* It is a significant new use to manufacture the substance other than by import into the United States (i.e., no domestic manufacture) at concentrations equal to or greater than the confidential concentration percentage listed in the Order.

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=260.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (f) through (i), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11988 Sulfonium, tricarbo-cyclic-, 2-aryl- polyfluoropolyhydro-alkano-heteropolycycle-alkanesulfonate (1:1), polymer with heteroatom substituted aryl and carbomonocyclic 2-alkyl-2-alkanoate, di-Me 2,2-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as sulfonium,

tricarbo-cyclic-, 2-aryl-polyfluoropolyhydro-alkano-heteropolycycle-alkanesulfonate (1:1), polymer with heteroatom substituted aryl and carbomonocyclic 2-alkyl-2-alkanoate, di-Me 2,2-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated (PMN P-23-49) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or adhered (during photolithographic processes) onto a semiconductor wafer surface or similar manufactured article used in the production of semiconductor technologies.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1), (2)(i) and (iii), (3), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (d), (f), (g)(1), (2)(i) through (iii), (v), (3)(i) and (ii), and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin irritation, serious eye damage, skin sensitization, genetic toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f), (k), and (t). It is a significant new use to import the substance other than in solution, or in sealed containers weighing 5 kilograms or less. It is a significant new use to modify the processing of the substance in any way that generates dust, mist, or aerosol in a non-enclosed process. It is a significant new use to manufacture the substance longer than 18 months.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The

provisions of § 721.185 apply to this section.

§ 721.11989 Sulfonium, tricarboxylic-, 2-heteroatom-substituted-(halocarboxylic)carboxylate (1:1) (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as sulfonium, tricarboxylic-, 2-heteroatom-substituted-(halocarboxylic)carboxylate (1:1) (generic) (PMN P-23-124) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or adhered (during photolithographic processes) onto a semiconductor wafer surface or similar manufactured article used in the production of semiconductor technologies.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (2)(i) and (iii), (3), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(ii) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (f), and (g)(1), (2)(i) through (iii), (v), (3)(i) and (ii), and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin irritation, serious eye damage, skin sensitization, genetic toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f), (k), and (t). It is a significant new use to import the substance other than in solution, or in sealed containers weighing 5 kilograms or less. It is a significant new use to modify the processing of the substance in any way that generates dust, mist, or aerosol in a non-enclosed process. It is a significant new use to manufacture the substance longer than 18 months.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11990 Substitutedheterocyclic onium compound, salt with heteropolysubstitutedalkyl substitutedtricycloalkanecarboxylate (1:1), polymer with 3-ethenylphenol and heterosubstitutedaromaticalkyl 2-methyl-2-propenoate, di-Me 2,2'-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as substitutedheterocyclic onium compound, salt with heteropolysubstitutedalkyl substitutedtricycloalkanecarboxylate (1:1), polymer with 3-ethenylphenol and heterosubstitutedaromaticalkyl 2-methyl-2-propenoate, di-Me 2,2'-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated (PMN P-23-50) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or adhered (during photolithographic processes) onto a semiconductor wafer surface or similar manufactured article used in the production of semiconductor technologies.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (2)(i) and (iii), (3), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(ii) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (f), and (g)(1), (2)(i) through (iii), (v), (3)(i) and (ii), and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin irritation, serious eye damage, skin sensitization, genetic toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f), (k), and (t). It is a significant new use to import the substance other than in solution, or in sealed containers weighing 5 kilograms or less. It is a significant new use to modify the processing or use the substance in any way that generates dust, mist, or aerosol in a non-enclosed process. It is a significant new use to manufacture the substance longer than 18 months.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11991 Sulfonium, tricarboxylic-, 2-aryl- polyfluoropolyhydro-alkano-heteropolycycle-alkanesulfonate (1:1), polymer with heteroatom substituted aryl and carbomonocyclic 2-alkyl-2-alkanoate, di-Me 2,2'-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as sulfonium, tricarboxylic-, 2-aryl- polyfluoropolyhydro-alkano-heteropolycycle-alkanesulfonate (1:1), polymer with heteroatom substituted aryl and carbomonocyclic 2-alkyl-2-alkanoate, di-Me 2,2'-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated (PMN P-23-83) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or adhered (during photolithographic processes) onto a semiconductor wafer surface or similar manufactured article used in the production of semiconductor technologies.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (2)(i) and (iii), (3), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be

considered and implemented to prevent exposure, where feasible.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (d), (f), and (g)(1), (2)(i) through (iii), (v), (3)(i) and (ii), and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin irritation, serious eye damage, skin sensitization, genetic toxicity, reproductive toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f), (k), and (t). It is a significant new use to import the substance other than in solution, or in sealed containers weighing 5 kilograms or less. It is a significant new use to modify the processing of the substance in any way that generates dust, mist, or aerosol in a non-enclosed process. It is a significant new use to manufacture the substance longer than 18 months.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11992 Sulfonium, tricarboxylic-, polyfluoropolyhydro-heteroatom substituted carbomonocyclic-2-heteroatom substituted carbomonocyclic heteropolycycle-5-alkanesulfonate (1:1) (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as sulfonium, tricarboxylic-, polyfluoropolyhydro-heteroatom substituted carbomonocyclic-2-heteroatom substituted carbomonocyclic heteropolycycle-5-alkanesulfonate (1:1) (PMN P-23-125) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or adhered (during photolithographic processes) onto a semiconductor wafer surface or similar manufactured article used in the production of semiconductor technologies.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1), (2)(i) and (iii), (3), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (d), (f), and (g)(1), (2)(i) through (iii), (v), (3)(i) and (ii), and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin irritation, serious eye damage, skin sensitization, genetic toxicity, reproductive toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f), (k), and (t). It is a significant new use to import the substance other than in solution, or in sealed containers weighing 5 kilograms or less. It is a significant new use to modify the processing of the substance in any way that generates dust, mist, or aerosol in a non-enclosed process. It is a significant new use to manufacture the substance longer than 18 months.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11993 Sulfonium, tris(heteroatom-substituted carbomonocyclic), salt with polyhydro-polyfluoro-heteroatom-substituted alkyl heteropolycyclic-heteroatom-substituted aryl heteroatom-substituted benzoate (1:1) (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as sulfonium, tris(heteroatom-substituted carbomonocyclic), salt with polyhydro-polyfluoro-heteroatom-substituted alkyl heteropolycyclic-heteroatom-substituted aryl heteroatom-substituted benzoate

(1:1) (PMN P-23-147) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or adhered (during photolithographic processes) onto a semiconductor wafer surface or similar manufactured article used in the production of semiconductor technologies.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1), (2)(i) and (iii), (3), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (d), (f), and (g)(1), (2)(i) through (iii), (v), (3)(i) and (ii), and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin irritation, serious eye damage, skin sensitization, genetic toxicity, reproductive toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f), (k), and (t). It is a significant new use to import the substance other than in solution, or in sealed containers weighing 5 kilograms or less. It is a significant new use to modify the processing of the substance in any way that generates dust, mist, or aerosol in a non-enclosed process. It is a significant new use to manufacture the substance longer than 18 months.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11994 Sulfonium, carbomonocycle bis[(trihaloalkyl)carbomonocycle], disubstituted carbomonocyclic ester (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as sulfonium, carbomonocycle bis[(trihaloalkyl)carbomonocycle], disubstituted carbomonocyclic ester (PMN P-23-104) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the substance after they have been completely reacted or adhered (during photolithographic processes) onto a semiconductor wafer surface or similar manufactured article used in the production of semiconductor technologies.

(2) The significant new uses are:

(i) *Protection in the workplace.*

Requirements as specified in § 721.63(a)(1), (2)(i) and (iii), (3), and (c).

When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(ii) *Hazard communication.*

Requirements as specified in § 721.72(a) through (d), (f), and (g)(1), (2)(i) through (iii), (v), (3)(i) and (ii), and (5). For purposes of § 721.72(g)(1), this substance may cause: acute toxicity, skin irritation, serious eye damage, skin sensitization, genetic toxicity, and specific target organ toxicity. Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer activities.* Requirements as

specified in § 721.80(f), (k), and (t). It is a significant new use to import the substance other than in solution, or in sealed containers weighing 5 kilograms or less. It is a significant new use to process the substance in any way that generates dust, mist, or aerosol in a non-enclosed process. It is a significant new use to manufacture the substance longer than 9 months.

(b) *Specific requirements.* The provisions of Subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

[FR Doc. 2024-27912 Filed 11-29-24; 8:45 am]

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